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CALIFORNIA REPORTER

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SECOND SERIES

107 P.2d – 108 P.2d

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Judges

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Reporter

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[1] Became Presiding Judge Nov. 18, 1940.
[2] Term expired Nov. 18, 1940.
[3] Appointed, took office Nov. 18, 1940.
[4] Appointed Feb. 14, 1940.

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CALIFORNIA REPORTER

IN VOLUME

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SECOND SERIES

16 Cal.2d 593

BROWNE v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

S. F. 16352.

Supreme Court of California.

Nov. 12, 1940.

1. Prohibition 🔑10(2)

The Supreme Court has power to grant writ of prohibition restraining superior court from issuing a writ of habeas corpus if superior court acts in excess of its jurisdiction.

2. Courts 🔑475(1)
Prohibition 🔑10(1)

Where several courts have concurrent jurisdiction over a certain type of proceeding, the first one to assume and exercise such jurisdiction in a particular case acquires an exclusive jurisdiction and thereafter another court is wholly without power to interfere, and may be restrained by prohibition.

3. Courts 🔑475(1)

The rule that where several courts have concurrent jurisdiction, the first one to assume and exercise such jurisdiction in a particular case acquires an exclusive jurisdiction, has no application when judgment has become final and jurisdiction has been exhausted.

4. Guardian and ward 🔑2, 8, 144

The jurisdiction of court appointing a guardian is a continuing one in respect to supervision of act of guardian, consideration of his accounting, giving instructions and removing or discharging guardian.

5. Habeas corpus 🔑92(1)

Ordinarily, court in habeas corpus proceeding can determine only whether applicant is being unlawfully deprived of liberty.

6. Prohibition 🔑5(3)

Where Santa Barbara superior court had appointed guardian and had instructed guardian that ward should remain in San Francisco at a nursing home, San Francisco superior court would be prohibited from entertaining habeas corpus proceeding which had been instituted for purpose of determining whether ward should be permitted to return to Santa Barbara and method of treatment of ward. Probate Code, § 1500.

7. Guardian and ward 🔑29

A guardian has the custody and care of his ward, and guardian may limit ward's activities in a reasonable manner for ward's own benefit, but cannot without good reason deny ward such freedom as is essential to her welfare.

8. Habeas corpus 🔑3

Writ of habeas corpus was not proper remedy where attorney claimed that he had been denied right to consult ward, in view of fact that no attempt had been made to secure relief from court appointing guardian.

SHENK, J., and MARKS, Justice pro tem., dissenting.

◆

In Bank.

Prohibition proceeding by Belmore Browne, as guardian of the person and estate of Ella H. Browne, an incompetent person, against the Superior Court of the state of California, in and for the City and County of San Francisco, and A. J. Fritz, Judge of the Superior Court, to restrain respondent court from hearing and deciding an application for writ of habeas corpus.

Peremptory writ of prohibition issued.

Prior opinion, 95 P.2d 178.

Freitas, Duffy & Keating, of San Rafael, for petitioner.

Harold V. Daley, of Beverley Hills, and Abbott, Appel & Dains, of San Francisco, for respondents.

GIBSON, Chief Justice.

This is a petition for a writ of prohibition, to restrain respondent superior court from hearing and deciding an application for writ of habeas corpus sought on behalf of an incompetent person.

The petition shows that Mrs. Ella H. Browne, an elderly lady nearly ninety years of age, was adjudged incompetent in a proceeding in the Superior Court of Santa Barbara County. On April 23, 1934, her son, Belmore Browne, petitioner herein, was appointed guardian of her person and estate. He qualified as such and entered upon his duties.

Mrs. Browne remained in Santa Barbara until October, 1936. At that time, upon the advice of physicians, including psychiatrists, she was sent to San Francisco and placed in the Greer Home, an institution offering satisfactory care and attention. Thereafter J. W. Browne, another son, in various communications to his mother and to the guardian, urged that she come back to Santa Barbara. Her attending physician opposed the move as dangerous. On November 22, 1937, the guardian filed a petition in the Santa Barbara superior court seeking instructions, in which all of the foregoing facts were set forth. The court held a hearing at which J. W. Browne failed to appear, and entered its order instructing the guardian that the ward should remain in San Francisco at the nursing home, and that her attending physician should examine and if necessary censor her incoming mail for the purpose of avoiding undue excitement.

J. W. Browne then moved to reopen the case, and the court did so. At this hearing the parties, including J. W. Browne, stipulated that the matter be submitted upon the testimony of a psychiatrist appointed by the court. This psychiatrist testified that Mrs. Browne was sane, but mentally childish and incapable of making practical judgments alone; that her age, and her physical and mental condition made it dangerous to move her to Santa Barbara, for the reason that the excitement incident thereto might bring on a fatal heart attack; that the Greer Home furnished good service and environment well adapted to her needs, and that there was no nursing home in Santa Barbara comparable in service and price; that her desire to return to Santa Barbara was merely a normal result of her age and condition, but that it was not safe for her to do so. On the basis of this evidence the court reaffirmed its original order instructing the guardian to keep Mrs. Browne in San Francisco. No appeal was taken from either order.

On April 7, 1939, Harold V. Daley, the attorney who had represented J. W. Browne in the earlier proceedings, made an application in the San Francisco superior court for a writ of habeas corpus on behalf of Mrs. Browne. The application alleged that he was her attorney and was requested by her to institute the proceeding to release her from restraint; that she was being unlawfully confined in the Greer Home by her guardian and the superintendent and doctor; that her confinement was unlawful for the reason that she was not insane or mentally unsound; that conditions and associations in Santa Barbara were more conducive to her happiness; that her entreaties to her guardian to be returned there had been disregarded, leaving her homesick and unhappy; that her estate was sufficient to provide such institutional care as might be proper upon her return to Santa Barbara; and (on information and belief) that she could make the journey without danger. It was further alleged that because of the censorship of her mail and visitors, her attorney was unable to discuss her case freely and for this reason presented the application on her behalf without verification by her. The prayer was "that said Ella H. Browne be relieved of and from such detention, confinement and restraint and for such other and further relief as she ought to have".

The writ issued, and a demurrer and answer were filed, denying most of the material allegations and raising mainly the issues of jurisdiction and res judicata. The demurrer was overruled and the court set the proceeding in habeas corpus for trial. Thereupon petitioner sought a writ of prohibition in this court, and an alternative writ issued.

[1] A preliminary objection made by respondents is that prohibition can only issue to an inferior tribunal, and that in its jurisdiction to issue habeas corpus the superior court is on the same plane as an appellate court. This argument is answered by cases recognizing the power to restrain unauthorized issuance of habeas corpus. France v. Superior Court, 201 Cal. 122, 255 P. 815, 52 A.L.R. 869; Bartlett v. Superior Court, 108 Cal.App. 755, 292 P. 545; 29 Cor.Jur. 116; 12 R.C.L.

1218. Under these authorities there can be no doubt of our power and duty to grant the writ of prohibition herein if the respondent superior court is acting in excess of its jurisdiction.

[2, 3] The chief contention of petitioner is that the Santa Barbara court has exclusive jurisdiction over the custody of the incompetent, and that the San Francisco court has no power to interfere with it. This is the familiar proposition that where several courts have concurrent jurisdiction over a certain type of proceeding, the first one to assume and exercise such jurisdiction in a particular case acquires an exclusive jurisdiction. Thereafter another court, though it might originally have taken jurisdiction, is wholly without power to interfere, and may be restrained by prohibition. See Gorman v. Superior Court, 23 Cal.App.2d 173, 72 P.2d 774. The rule is generally invoked where a proceeding is still pending; when it is completed and judgment has become final, jurisdiction has been exhausted and the rule has no application.

In applying this doctrine to a guardianship proceeding, we must keep in mind at least two distinct stages in the court proceedings. First there is the petition brought to establish the incompetency of the ward and to obtain the appointment of a guardian. When this matter is concluded, the second stage is reached, wherein the guardian undertakes the duties of providing for the ward and administering his affairs. As to the first stage, the determination of incompetency and resulting appointment of a guardian, the issues are no longer pending. A final adjudication has been made. In the present case the jurisdiction of the Santa Barbara court over this subject matter has been fully exercised, and for all normal purposes this adjudication is conclusive. If the question of incompetency may properly be raised again, there is no longer any objection that the matter is pending within the jurisdiction of the Santa Barbara court.

[4, 5] As to the second stage, however, the matter is not concluded until the discharge of the guardian. In carrying out his duties of administration he acts under the authority and supervision of the court which appointed him, must render accountings, may petition for instructions, and is subject to liability or removal for misconduct. The jurisdiction of the court in this respect is a continuing one, and though no motion, petition or other such incidental proceeding may be pending at any particular time, the court still has jurisdiction over the guardianship. No other court, we believe, has power to interfere with that continuing control over the guardian; no other court could receive and approve his accounting, or instruct him as to his duties. The San Francisco superior court cannot, in this habeas corpus proceeding, enter into any consideration of the propriety of the medical or other care of Mrs. Browne, her residence, the extent of supervision over her visitors, mail or other personal activities, or any other matters connected with her guardianship. The allegation that she desires to return to Santa Barbara has no legal significance under the facts recited; no more significance, indeed, than her personal preference as to doctors, drugs or treatment. Under the law her guardian must choose her place of residence (Prob.Code, sec. 1500), and the Santa Barbara court has fully considered all matters pertaining thereto. These are all wholly within the jurisdiction of the Santa Barbara court, and are beyond the scope of any proceeding in habeas corpus. Ordinarily, the court in a habeas corpus proceeding of this kind can have but one issue to determine: Whether the applicant is being unlawfully deprived of liberty. If she is competent, she should be freed from all custody and may choose her own residence and mode of life. If she is incompetent, she is properly in the custody of her guardian and is not entitled to a discharge.

It remains now to test the present proceeding by these principles. The application for the writ of habeas corpus contains allegations of illegal restraint of a competent person, which, standing alone, would doubtless give jurisdiction to the court to determine her competency and right to release from restraint. But there are statements in the pleadings and briefs which throw an entirely different light upon the proceeding. The petition for prohibition alleges that by the application for habeas corpus "it is sought to free said ward from the custody of her guardian". In the answer to the petition, filed by the attorneys who obtained the writ of habeas corpus, they "Deny that by the application of Ella H. Browne for writ of habeas corpus it is sought to free said Ella H. Browne from the custody of her guardian." And in one of their briefs, said counsel state: "Her petition for habeas corpus in the

San Francisco Superior Court seeks her removal to Santa Barbara."

[6] Because of this confusion, counsel at the oral argument were questioned as to the real object of the application. At that time counsel for the applicant denied any intention of seeking the release of the ward from custody or having the guardian removed, and stated that the purpose was, first, "to enable this ward to have a certain measure of freedom, using that term in the sense of a desire on her part to be permitted to return to Santa Barbara"; second, "to remedy unreasonable restraint upon her personal liberties with respect to the improper, as we contend, censorship of her mail and also the denial to her of the right to have visitors come to her at the Greer Home, where she was in effect kept incommunicado by her guardian". These statements constitute an abandonment of the only proper ground upon which the writ could issue. The action of the respondent court in issuing its writ of habeas corpus was undoubtedly based upon a misconception of the object of counsel who applied for it. The subsequent disclosures show that the matters sought to be determined, namely, the residence method of treatment of the ward, are exclusively within the jurisdiction of the Santa Barbara court, and outside the scope of the writ of habeas corpus. If these facts had been brought to its attention, the lower court might properly have dismissed the proceeding. It is equally proper for this court to grant prohibition to restrain it.

Counsel for the applicant, it is true, makes some attempt to justify the use of the writ of habeas corpus to remedy what he describes as the "unreasonable restraint upon her personal liberties", consisting of the designation of San Francisco as her residence, and the limitations placed upon her right to receive mail and visitors. He has furnished us with no case in point, but relies on a few general statements to the effect that unreasonable interference with the personal liberty or welfare of a person may be inquired into on habeas corpus, notwithstanding the fact that the person is in the custody of a guardian. The case of State ex rel. Raymond v. Lawrence, 86 Minn. 310, 90 N.W. 769, 770, 58 L.R.A. 931, offers a typical illustration of the meaning of these statements. The court there declared that "The welfare of the ward is the chief matter to be considered, —not the wishes of the relatives, nor the convenience of the guardian. * * * The guardian does not have unlimited power over the ward, and cannot change its temporary or permanent residence to its detriment * * *." Further on, the court said: "Where an attempt is made by a guardian or anybody else to exercise any restraint over the person of any one within this state, the writ of habeas corpus, or any other appropriate remedy, will always be effectual to inquire into the propriety of any such attempted restraint, and upon such inquiry the proper court can make such an order or judgment as the particular case may require." However, a study of the opinion reveals that the guardians were actuated by personal hostility to the relator, daughter of the ward, and gave "scant consideration" to the welfare of the ward. Notwithstanding this misconduct, the court held that, until removed by the probate court, the guardians could care for and control the ward in any reasonable manner. "They may designate the persons in whose immediate charge she shall be,—such as the attending physician and nurses, —and may insist upon the observance of reasonable rules and regulations conducive to her health and comfort." Accordingly, the court declined to approve an attempt by the lower court commissioner to make a change in her custody and control, but reaffirmed the rule that these matters were within the sound discretion of the guardians.

[7] Such decisions are entirely reasonable when considered in connection with their particular facts. We may assume that if the guardian of the incompetent herein, without instruction or authorization from the court, took the ward away from her home to an unsatisfactory place of residence, or unjustifiably confined or imprisoned her so as to deny her the pleasures of visiting her family or friends, or deprived her of the opportunity to receive medical care by preventing her from seeing a physician, these restraints might, in the absence of another adequate remedy, be the subject of inquiry on habeas corpus. The guardian has the custody and care of the ward, but the ward is not his prisoner. He may limit her activities in a reasonable manner, for her own benefit, but cannot, without good reason, deny her such freedom as is essential to her welfare.

All this, however, has no bearing on the instant case. The guardian is not arbitrarily confining or limiting the freedom of the ward upon his own initiative. He is acting under the instructions of the court having jurisdiction of the guardianship, and the court gave those instructions after the fullest possible hearing, and upon ample and practically conclusive testimony that the particular course of conduct prescribed was for the best interests of the ward. The court may have been wrong then, and it may be wrong now. For the error it may have committed then, appellate review was possible. For the error it may be committing now, an application to that court, which has continuing jurisdiction of the guardianship, is still possible. Evidence as to the condition, the needs and the desires of the ward may be presented to that court on her behalf, and the fairness of the hearing or the correctness of the decision may be reviewed on appeal. But in the present circumstances there is no possible ground for habeas corpus. There is no illegal restraint whatever. Everything has been done in accordance with the lawful orders of a court with jurisdiction to make them, upon evidence which fully supports the orders. If the guardian were to permit what the application demands, he would be acting in violation of the orders of the Santa Barbara court, and would be answerable to that court for his misconduct.

[8] The only other contention that requires consideration is that the writ may issue to permit the incompetent to consult with her attorney, a right now alleged to be denied her. There are, of course, authorities which hold that the right of an accused or a prisoner to consult his counsel may be enforced on habeas corpus (see In re Rider, 50 Cal.App. 797, 195 P. 965), but we are unable to see any revelancy in those decisions. The present application for habeas corpus was filed by Harold V. Daley, who was attorney for the brother of the guardian, but who never, as far as the record shows, represented the ward. However, even granting his authority, his right to do so has never been denied. The Santa Barbara court, which, as we have seen, is the only court having jurisdiction to consider the matters raised in the present proceeding, has never refused to hear an application on behalf of the ward, by Mr. Daley or any other attorney. The proper place to enforce his alleged right to consult the ward is, in the first instance, the Santa Barbara court. But the record fails to show any attempt to seek relief there. On the contrary, it was expressly admitted at the oral argument that this was not done. We cannot assume that the Santa Barbara court will deny a request which has never been made.

Let a peremptory writ of prohibition issue restraining respondent superior court from trial or determination of the issues raised by the application for habeas corpus.

We concur: CURTIS, J; EDMONDS, J.; MOORE, Justice pro tem.

CARTER, Justice (concurring).

I concur in the conclusion reached in the opinion prepared by the Chief Justice. In my opinion the Superior Court of Santa Barbara County had exclusive jurisdiction over all matters pertaining to the person and estate of the alleged incompetent person and was pursuing its jurisdiction in directing her guardian as to where and in what manner his ward should be maintained. The Superior Court of Santa Barbara County is open to the ward or anyone interested in her personal or financial welfare to seek a modification of the restrictions imposed upon the guardian for her maintenance, and anyone applying for a modification of said order has the right of appeal from any further or additional orders made by said Superior Court.

While it is true that the Superior Court of the City and County of San Francisco has jurisdiction to issue a writ of habeas corpus to anyone unlawfully detained within the city and county of San Francisco, such jurisdiction cannot be exercised to nullify an executory order made by the Superior Court of Santa Barbara County in a proceeding clearly within the jurisdiction of the latter court.

It is obvious that the granting of the writ of habeas corpus prayed for in the case at bar would result in an absurdity; that is, assuming that the Superior Court of the City and County of San Francisco granted the writ of habeas corpus prayed for, which would have the effect of releasing the incompetent person from the control of her guardian in San Francisco so that she could return to Santa Barbara county; such return would be in violation of the order made by the Superior Court of Santa Barbara County, and the latter court would undoubtedly order the guardian to return the ward to the Greer Home in San Francisco; this would be in violation of the writ of habeas corpus issued out of the Superior Court of the City and County of San Francisco. The effect of each of these courts persisting in having their respective orders and writs executed would result in making a shuttlecock out of the ward without either party being able to obtain relief by appeal, since the order instructing the guardian with respect to the maintenance of the ward has become final, and the order granting the writ of habeas corpus is not appealable.

To my mind the same rule should be applied here as was applied in the case of Gorman v. Superior Court, 23 Cal.App.2d 173, 72 P.2d 774, where it was held that the court first obtaining jurisdiction over the subject matter of an action and the parties thereto, had exclusive jurisdiction to proceed with the disposition of the action, and that a court of concurrent jurisdiction in which the same action was subsequently commenced should be restrained by a writ of prohibition from proceeding with the disposition of the case until the first Superior Court had exhausted its jurisdiction.

The instant case is not one where the Superior Court of Santa Barbara County has made a final determination of the subject matter of the proceeding before it, and thereby exhausted its jurisdiction, as said court still retains jurisdiction of said proceeding to enforce its order relating to the maintenance of the ward; such order is subject to modification from time to time by the Superior Court of Santa Barbara County, and there appears to be no question but that the interests of the ward will be amply safeguarded by permitting the Superior Court of Santa Barbara County to exercise exclusive jurisdiction in determining the place where and the manner in which said ward shall be maintained by her guardian.

I think it is obvious that a writ of prohibition should be granted restraining the Superior Court of the City and County of San Francisco from proceeding further with the habeas corpus proceeding therein.

SHENK, Justice (dissenting).

I dissent. It should be borne in mind that this is not a proceeding to restrain the superior court from passing upon the application for a writ of habeas corpus. That application had in fact been passed upon and the writ had issued before the present proceeding was commenced. The main opinion states that the writ had issued, but much of it proceeds on the theory that it had not, and consequently that the respondents in that proceeding need not be put to their proof in justification of the alleged unlawful restraint. The concurring opinion definitely proceeds on the mistaken assumption of fact that the writ had not been issued. That the petition for the writ of habeas corpus stated a prima facie case when it was presented to the respondent court cannot be denied. That it did not purport to demand a release of the ward from the custody of the guardian was fairly disclosed on the face of the petition and was also freely conceded by counsel for the petitioner on oral argument herein. The obvious purpose of the habeas corpus proceeding was and is to have the respondent court define the rights of the ward under the facts to be disclosed at the hearing on the return to the writ. How the concession of counsel for the petitioner as to the limited purpose of his application would constitute "an abandonment of the only proper ground upon which the writ could issue" is beyond my comprehension. To so declare is to deny the right to resort to habeas corpus to define rights and obtain relief less than complete discharge.

The matter before the respondent court which has been stopped by this court was a hearing on the issues framed by the allegations of the petition for the writ of habeas corpus and the return thereto. The majority has proceeded to decide the merits of that controversy in a proceeding in prohibition. It cannot be assumed, as the majority seem to do, that the respondent court will disregard the showing on the return to the writ of habeas corpus and arbitrarily decide the matter before it contrary to the law and the facts there presented. It is certain that issues of both law and fact would be presented to that court on the hearing. Those issues were raised by the petition for the writ of habeas corpus wherein it was alleged that on or about the 23rd of April, 1934, the Superior Court of the State of California, in and for the County of Santa Barbara, made and entered an order appointing Belmore Browne as guardian of the person and estate of the petitioner, an alleged incompetent person; and that Belmore Browne has since been and still is acting as such guardian; that the applicant Ella H. Browne is now and for several years last past has been unlawfully and improperly restrained of her liberty and confined and detained at the Greer

Home, located at No. 6000 Fulton street, in San Francisco, by said guardian and certain named persons acting in concert with and at the direction of said guardian; that the restraint of applicant's liberty and the confinement and detention of her person by said persons are unlawful, and in that respect alleges as follows: (1) That while of advanced years, she is not and never has been insane or mentally unsound, is a person of high cultural background, refinement and education, and possesses mental capacity to fully comprehend and distinguish her environment and residences which she has voluntarily chosen and which afford her happiness and contentment; (2) that for more than twenty years before the appointment of said guardian the applicant maintained her home in Santa Barbara, where she now owns a residential dwelling, where she has friends of long standing whose company and association she enjoys and desires; (3) that since his appointment as guardian, said Belmore Browne, on or about October 18, 1936, removed her from Santa Barbara to San Francisco and placed her in said Greer Home, where she has since been continuously confined, detained and restrained of her liberty, against her wishes and without her consent and in utter disregard of her entreaties to be returned to Santa Barbara; that by reason of her guardian's disregard of her wishes to be so returned, she continues to remain homesick, unhappy, discontented and distressed; (4) that the estate of the applicant is amply sufficient to meet all expenses incident to her return to Santa Barbara and her proper care and maintenance in that city during the remainder of her life; (5) that reputable physicians and psychiatrists have examined the applicant and have advised that she can make the journey to Santa Barbara without danger or harm to her health or physical well being and that the change will be of extreme benefit to her; (6) that in refusing to effect applicant's return to Santa Barbara and in causing her to be detained, confined and restrained of her liberty at the Greer Home in San Francisco, her guardian is acting arbitrarily, improperly, unreasonably and unlawfully and in abuse of the spirit and intent of the powers conferred upon him as such guardian, and without any respect, regard or consideration for the welfare, comfort and happiness of the applicant; (7) that without just cause the guardian and those acting in concert with him have accomplished strict and complete censorship of all the correspondence to and from the applicant, including her letters to her son John W. Browne and his letters to her, and do likewise interfere with and violate confidential and personal communications passing between applicant and her attorney herein; (8) that her guardian, with the aid and assistance of those acting in concert with him, and without just cause, has refused to allow applicant to be visited by her friends of long standing, notwithstanding the fact that such visits would have brought much happiness to the applicant and could in no wise be detrimental to her health and well being, and has refused to allow petitioner, her attorney, to visit with her and discuss with her matters concerning her personal affairs, her confinement and restraint of her liberty.

The petitioner prayed that the court issue the writ of habeas corpus directing the persons named, having her in custody, "to have the body of said Ella H. Browne thus confined and detained and restrained of her liberty, as aforesaid, before said court, at a certain time and place therein to be specified, to do and receive what shall then and there be considered concerning said Ella H. Browne together with the time and cause of her detention and restraint, and said writ; and that said Ella H. Browne be relieved of and from such detention, confinement and restraint and for such other and further relief as she ought to have".

Upon the filing of the aforesaid petition the respondent court issued a writ of habeas corpus returnable at a specified time and place. As a return to the writ the respondents in said proceeding filed a demurrer to the petition and also an answer, in which it was denied that the applicant was unlawfully restrained of her liberty and in which it was alleged that the matters sought to be adjudicated in the habeas corpus proceeding in the superior court in and for the city and county of San Francisco had been presented to the superior court in Santa Barbara county and had "been adjudicated by said superior court, as more fully appears from the record of proceedings on file with said court", which proceedings are described and referred to in said answer with certain exhibits attached.

When the matter came on for hearing before the respondent court on the return to the writ, the guardian interposed an objection to the court's proceeding further to hear and determine the matter on the ground that said court was without jurisdiction in the premises for the reason that the superior court in and for the county of Santa Barbara "has acquired and is exercising jurisdiction in all things and matters pertaining to the guardianship of the person and estate of Ella H. Browne, an incompetent person", and that all such matters should be addressed to the court in Santa Barbara county.

The respondent court overruled the objection and the present proceeding was brought to prohibit that court from further hearing or making any determination in the habeas corpus proceeding.

The conceded purpose of the habeas corpus proceeding is (1) to test the right of the guardian to confine the ward in the Greer Home in San Francisco under the circumstances alleged; (2) to test the right of those having custody of the ward to censor her mail and deprive her of the privilege of having her friends visit her; and (3) to test the right of the guardian and those acting for him to prevent the ward from consulting with her attorney.

As to the liberties enumerated and sought to be protected, it must be said that the petition states a prima facie case in favor of the issuance of the writ. "The office of the writ is to afford the citizen a speedy and effective method of securing the removal of any unlawful restraint upon his liberty; and the statute which confers the right has always been construed in favor of the liberty of the citizen." In re Rider, 50 Cal.App. 797, 195 P. 965, 966. The guardian does not have unlimited power over the ward, even though the ward be an incompetent person. State ex rel. Raymond v. Lawrence, 86 Minn. 310, 90 N.W. 769, 770, 58 L.R.A. 931. It was held in that case that where an attempt is made by a guardian of an incompetent to exercise any restraint over the person of the ward, "the writ of habeas corpus * * * will always be effectual to inquire into the propriety of any such attempted restraint". On the same subject and commenting on that case and authorities to like effect, the author of the article on Habeas Corpus in 25 American Jurisprudence, at page 209, says: "An attempt made by the guardian of the person of an incompetent to exercise any unauthorized restraint over such person can be frustrated by a writ of habeas corpus, but the relief which may be granted under such a writ does not include an order removing the guardian and depriving him of all authority over the person of the incompetent; such an order can be made only in the guardianship proceeding."

It needs no citation of authority to support the assertion that the right of the ward to dispatch and receive her mail is prima facie one of the liberties which may be protected from unlawful interference. Her right to consult with an attorney concerning her alleged unlawful restraint would likewise appear prima facie to be subject to such protection. There is nothing on the face of the petition which would deprive the applicant of the right to apply for the writ and the prima facie showing therein made was sufficient to warrant the issuance thereof.

It may well be that upon a hearing on the return to the writ full and complete justification for the alleged unlawful restraint would be established by the records of the proceedings in the Santa Barbara court. The record of those proceedings, brought before the court as a part of the return to the writ of habeas corpus, is defensive in character and might well operate in justification of the alleged unlawful restraint. Matters of justification do not go to the jurisdiction of the respondent court to consider the issues presented by the return to the writ.

The respondent court should be permitted to hear and determine the habeas corpus proceeding: First, because the right to resort to habeas corpus as against unlawful restraint of personal liberty or freedom of action is firmly grounded in the law, both constitutional and statutory. The essential object and purpose of the writ are to inquire into all manner of involuntary restraints. This writ has long been regarded as the greatest remedy known to the law whereby one unlawfully restrained of his liberty may secure release or have his civil rights defined. Its origin is obscured in antiquity. It antedated Magna Charter, and the right to resort to it is universally recognized in English and American law. The Constitution of the United States (art. I, sec. 9) provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Article I, section 5, of our State Constitution, makes the same provision. Although these constitutional mandates are generally directed to the legislature or executive departments, or both (25 Am.Jur. p. 149) the protection of the fundamental right there declared has been enjoined on the court. In this state, section 1473 of the Penal Code provides: "Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint." Under that and the succeeding sections of the same Code, any person deeming himself unlawfully restrained of his liberty has the right to apply to a court of competent jurisdiction for the issuance of the writ and to have a ruling thereon. The ruling may be in the form of an order denying the writ for failure to state facts justifying its issuance. Having issued it, as here, the question then is whether the return thereto shows lawful justification for the restraint, and the petitioner is just as much entitled to have the court rule upon the sufficiency or insufficiency of the return as he is to have a ruling on his application for the issuance of the writ.

Secondly, the superior court has constitutional jurisdiction to issue the writ of habeas corpus. Art. VI, sec. 5. The consideration of and ruling on the petition for the writ is ordinarily ex parte. "After a return to a writ, the court or judge to whom the return is made must pass upon all questions of both law and fact and determine the ultimate questions whether the prisoner is wrongfully restrained of his liberty. It is necessary for the court to determine the weight and credibility of the evidence where the testimony is conflicting." 25 Am.Jur. p. 245, and authorities there cited. When the applicant is rightfully in custody the hearing on the return may disclose a partial unlawful restraint, or no unlawful restraint at all. In the pending habeas corpus proceeding the respondent court may conclude that the alleged illegal restraints are justified by reason of prior adjudications in Santa Barbara county, or are justified by reason of the present mental and physical condition of the applicant. These questions should be determined by the respondent court in its consideration of the issues raised on the return to the writ, and its constitutional and statutory power so to do should not be interfered with in the present proceeding.

I concur: MARKS, Justice pro tem.

George H. SHIELDS et al., Plaintiffs and Appellants, v. Geraldine D. JAY and Cassius M. Jay, Defendants and Respondents.
L. A. 17709.

Supreme Court of California.
Nov. 12, 1940.

In Bank.

Action by George H. Shields and others against Geraldine D. Jay and another. From the judgment, plaintiffs appeal.

On motion to dismiss appeal.

Motion granted upon the ground the appeal appears to have been abandoned.

John L. Schaefer, of Los Angeles, for appellants.

Bradner & Weil and Gertrude R. Chamberlin, all of Los Angeles, for respondents.

CARTER, Justice.

I dissent from the order granting respondents' motion to dismiss the appeal in this case, as there is absolutely no basis for the granting of such motion.

The record shows that notice of the order denying the motion for a new trial was served on December 19, 1939, and notice of appeal and notice to prepare transcript, pursuant to the provisions of section 953a, Code of Civil Procedure, were filed on January 17, 1940. Thereafter the clerk's transcript was prepared and filed on February 13, 1940. No reporter's transcript has yet been filed, and no proceedings have been instituted for termination of proceedings for the preparation of a record in the trial court. The foregoing facts appear from a certificate of the clerk of the trial court presented to this court as the basis for this motion.

In view of the foregoing facts, the order granting respondents' motion to dismiss the appeal is in direct violation of rule I of the rules of this court. Under this rule it has been repeatedly held that a motion to dismiss an appeal for failure to file a transcript on appeal to be prepared pursuant to the provisions of section 953a, Code of Civil Procedure, will not be entertained unless and until an order has been granted by the trial court terminating the proceedings instituted to obtain such transcript.

The fact that the notice to prepare transcript was filed more than ten days after notice of the order denying the motion for a new trial does not change the situation, as the filing of a notice to prepare transcript pursuant to the provisions of section 953a, Code of Civil Procedure, is directory only, and if such transcript is thereafter prepared, approved by the trial judge and filed, the failure to file such notice within the time specified in said section will be disregarded. Weaver v. Shell Oil Company, 124 Cal.App. 233, 12 P.2d 167; Title Guarantee & Trust Company v. Lester, 216 Cal. 372, 14 P.2d 297; Rubin v. Platt Music Company, 79 Cal.App. 756, 251 P. 243; Vicino v. Amador, 71 Cal.App. 604, 236 P. 369; Tobin Grocery Co. v. Spry, 201 Cal. 152, 255 P. 791; Stenzel v. Kronick, 201 Cal. 26, 255 P. 199.

The motion to dismiss the appeal in this case should therefore be denied.

16 Cal.2d 550

TRUSTY v. STATE BAR OF CALIFORNIA.

S. F. 16386.

Supreme Court of California.

Nov. 12, 1940.

Rehearing Denied Dec. 12, 1940.

1. Attorney and client 🔑57

Upon adoption of local committee's findings, board of governors is not without power to recommend a more severe discipline than that recommended by the local body since procedure contemplated by State Bar Act provides for examination and review by board of governors of all disciplinary proceedings heard before local committees and confers powers upon board to make recommendations to the Supreme Court as to discipline to be imposed upon members of the bar against whom such proceedings are instituted. St.1939, pp. 351, 354, 355, 357, §§ 6043, 6067, 6068, 6078, 6103, 6106.

2. Attorney and client 🔑57

Under State Bar Act, while a local committee may make findings and recommendations in disciplinary proceedings, board of Governors is not bound thereby and may entirely disregard such findings and make such findings and recommendations as record before it might justify. St.1939, pp. 351, 355, §§ 6043, 6078.

3. Attorney and client 🔑58

An attorney who was employed in 1933 to prosecute a divorce action on behalf of a woman client and was paid a fee therefor and who after a minute order was entered granting the client an interlocutory decree of divorce, failed to prepare such decree and did nothing until the latter part of 1939 following institution of disciplinary proceedings when he had both the interlocutory and final decrees entered pursuant to statute, was suspended from practice for 30 days as against contention that attorney's offense was one of mere negligence. St.1939, pp. 354, 355, 357, §§ 6067, 6068, 6103, 6106; Civ. Code § 131.5, as added by St.1939, p. 1672.

CARTER, J., dissenting in part.

In Bank.

Disciplinary proceeding by the State Bar of California against Joseph M. Trusty for violation of his oath and duties as an attorney at law, wherein the attorney sought to review the action of the Board of Governors.

Suspension of practice ordered in accordance with opinion.

Rehearing denied; CARTER, J., dissenting.

J. B. Zimdars and H. J. Kleefisch, both of San Francisco, for petitioner.

Claude Minard, of San Francisco, for respondent State Bar of California.

PER CURIAM.

Petitioner seeks herein to review the action of the board of governors of the State Bar in a disciplinary proceeding instituted against him before local administrative committee No. 5 for the City and County of San Francisco. In the order to show cause issued and served upon him petitioner was charged with the violation of his oath and duties as an attorney at law within the meaning of section 6103 of the State Bar act (Ch. 4, Business and Professions Code, St. 1939, p. 357), as the same are prescribed by sections 6067 and 6068 of that act, and the commission of acts involving moral turpitude and dishonesty within the meaning of section 6106 of the same act.

Petitioner was employed in 1933 to institute and prosecute a divorce action on behalf of a woman client. He was paid a fee therefor. The action was commenced and after hearing, a minute order was entered granting petitioner's client an interlocutory decree of divorce. However, petitioner failed to prepare an interlocutory decree and to submit the same to the trial judge for his signature. In fact, nothing further was done by petitioner until the latter part of 1939, following the institution of this disciplinary proceeding, when he had both the interlocutory and final decrees entered pursuant to section 131.5 of the Civil Code which then had been recently enacted by the legislature, St. 1939, p. 1672.

It is apparent from the transcript of evidence taken before the local committee that the client on numerous occasions had requested petitioner to secure a final decree for her, but that he had failed and neglected to do so, and that she finally ascertained that for some unknown reason petitioner had failed and neglected to have the interlocutory decree of divorce entered. In explanation of his conduct, petitioner testified in substance that he had learned that the parties were living under the same roof and assumed that they had become reconciled. Such assumption immediately upon entry of the minute order granting an interlocutory decree finds little basis in reason. Thereafter, even the most cursory inquiry by petitioner would have confirmed his client's unaltered desire in the premises and would have served to disabuse his mind of such unfounded assumption.

After finding the facts, the local committee properly found that petitioner was not justified in assuming a reconciliation and that he was neglectful in not having the interlocutory decree promptly entered. Because no great damage ultimately was visited upon the client, the local committee recommended a private reproval. The board of governors adopted the findings of the committee and based also upon a prior private reproval of petitioner in 1930 has recommended that he be suspended from the practice for thirty days.

[1, 2] We find no merit in petitioner's contention that upon adoption of the local committee's findings the board of governors is without power to recommend a more severe discipline than that recommended by the local body. The procedure contemplated by the State Bar Act clearly provides for an examination and review by the board of governors of all disciplinary proceedings heard before local committees and confers power upon the board to make recommendations to this court as to the discipline to be imposed upon members of the bar against whom such proceedings are instituted. We need only refer to sections 6043 and 6078 of the State Bar Act which definitely indicate that while a local committee may make findings and recommendations in disciplinary proceedings, the board of governors is not bound thereby and may entirely disregard the same and make such findings and recommendations as the record before it might justify. This court repeatedly has approved such procedure. Recht v. State Bar, 218 Cal. 352, 23 P.2d 273; Nolan v. State Bar, 219 Cal. 759, 28 P.2d 1050; Sawyer v. State Bar, 220 Cal. 702, 32 P.2d 369; Oster v. State Bar, 2 Cal.2d 625, 42 P.2d 627; Townsend v. State Bar, 4 Cal.2d 619, 51 P.2d 879; Wood v. State Bar, 6 Cal.2d 533, 58 P.2d 1280; Price v. State Bar, 8 Cal.2d 201, 64 P.2d 727.

Nor do we find any merit in petitioner's contention that his offense, if any, was one of "mere negligence" which assertedly is not designated in the pertinent sections of the State Bar Act as one of the grounds warranting disciplinary proceedings against an attorney. Prior decisions of this court have resolved the issue against petitioner. In Marsh v. State Bar, 210 Cal. 303, 291 P. 583, 585, the attorney complained against had accepted a fee to institute a divorce action, which he subsequently failed to do. Just prior to a hearing in the disciplinary proceeding based thereon, he repaid the fee. Upon such hearing he introduced in evidence a copy of a divorce complaint and testified that his secretary inadvertently had failed to file the same. He was recommended for suspension for one year. Before this court he contended that the evidence was insufficient, that his conduct amounted to mere negligence and, as here, that he could not be suspended on grounds other than those specified in the statute and rules of professional conduct. While in the early part of the decision this court intimated that the attorney's conduct bordered on "moral turpitude" within the meaning of subdivision 5 of section 287 of the Code of Civil Procedure, and that the recommendation of suspension implied a finding of such "moral turpitude", the decision further declares that "It also appears that said acts and conduct of petitioner were of a character to warrant his suspension under the provisions of subdivision 2 of said section 287 [now section 6103, State Bar act], to the effect that an attorney may be suspended for 'any violation of the oath taken by him, or of his duties as such attorney and counselor.' The oath referred to, required upon admission of a person to practice law, contains a pledge 'to faithfully discharge the duties of an attorney * * * to the best of his knowledge and ability'. Section 278, Code Civ.Proc. [now section 6067, State Bar act]. Obviously, this petitioner * * * failed to discharge faithfully * * * his duties as an attorney in the instances under review".

Some four years later Marsh, the attorney involved in the foregoing case, was again cited for discipline upon his later acceptance of a fee from another client for the prosecution of an annulment proceeding, which he likewise failed to commence. He returned the fee after disciplinary proceedings were commenced. Again he advanced the defense of "negligence", urging that suspension therefor was not warranted under the statute. This court, among other things, declared that the "defense is without merit", adding a quotation from its prior decision to the effect that Marsh was "at least a careless and 'sloppy' practitioner, and that his negligence borders very closely upon moral turpitude. This type is not safe to represent clients in the practice of the law, particularly implicated, as he seems to be, in constant trouble with his clients over money matters, delays and actual misrepresentation". Marsh v. State Bar, 2 Cal. 2d 75, 79, 39 P.2d 403, 404.

In Waterman v. State Bar, 8 Cal.2d 17, 63 P.2d 1133, the petitioner therein was employed in March, 1935, to prosecute a divorce action and was paid a portion of his fee in advance. He thereafter told his client that he had filed and served a complaint when, in fact, and by mistake, he failed to file the original, though he served a copy together with a copy of summons the original of which never had been issued. He discovered his mistake in August, 1935, but did nothing until November when he had his client sign the complaint whereupon he filed it and again served the defendant. The local committee found that these acts involved dishonesty and moral turpitude "but were brought about by carelessness and negligence." It was recommended by the board of governors that the petitioner therein be suspended for six months. Before this court he urged that "he had no intention to deceive or defraud but was guilty merely of carelessness and neglect which does not involve moral turpitude of warrant the six months' suspension recommended by the board of governors". Among other things, this court declared that "Gross carelessness and negligence constitute a violation of the oath of an attorney to 'faithfully discharge the duties of an attorney and counselor at law to the best of his knowledge and ability' (Code Civ.Proc. § 278) and involve moral turpitude in that they are a breach of the fiduciary relation which binds 'him to the most conscientious fidelity.' Marsh v. State Bar, 210 Cal. 303, 291 P. 583. * * *"

In 69 A.L.R. 705, 707, are collected, among others, cases in which "inattention to duty which has been wilful or accompanied by an element of deceit or imposition has been held ground for disbarment or suspension".

[3] It is evident from the record herein that throughout the period of several years in which petitioner neglected and failed to have either the interlocutory or final decree entered that his conduct was not only of negligent inactivity but of active misrepresentation to his client who stated, before the local committee, among other things, that petitioner "says he does this and that and he doesn't do anything at all". It was only by reason of the saving grace of a recently enacted statute that the client was not made to feel the full burdensome effect of petitioner's protracted negligent inactivity and misrepresentation. Under the circumstances disclosed by the record we are satisfied that petitioner is without a meritorious defense both under the facts and the law.

It is, therefore, ordered that petitioner be and he is hereby suspended from the practice of the law in this state for a period of thirty days, effective upon finality of this decision.

CARTER, Justice.

I dissent.

I agree with that portion of the majority opinion which holds that the board of governors of the State Bar of California has the power to adopt the findings of fact of a local administrative committee in a disciplinary proceeding, and make a recommendation to this court that the discipline to be inflicted upon the member of the bar be greater or less than that recommended by said committee, providing the evidence is sufficient to support such findings and recommendation, but I dissent from the portion of the majority opinion which holds that a member of the bar may be disciplined for negligent conduct in the handling of a legal matter entrusted to him where there is no showing of bad faith, misrepresentation or any form of moral delinquency accompanying the negligent conduct of such member.

The record before this court in the above-entitled cause discloses that this proceeding was instituted before local administrative committee No. 5 of the State Bar of California for the city and county of San Francisco. Petitioner was charged with the violation of his oath and duties as an attorney and counselor at law within the meaning of section 6103 of article 6 of the Business and Professions Code of the State of California, as the same are prescribed by sections 6067 and 6068 of article 4 of said code, and the commission of acts involving moral turpitude and dishonesty within the meaning of section 6106 of article 6 of said code.

The evidence produced at the hearing before said committee disclosed that some time prior to June 22, 1933, Mrs. Jeanette Schlessinger employed petitioner to represent her in an action for divorce in the superior court of San Mateo county. Petitioner agreed to handle Mrs. Schlessinger's case for the sum of $50, which amount was to cover attorney's fees and costs. This sum was thereupon paid petitioner. He thereafter commenced an action for divorce on her behalf, and the case was heard on June 22, 1933. At the conclusion of such hearing, the court made a minute order granting Mrs. Schlessinger an interlocutory decree of divorce. Petitioner failed to prepare a formal interlocutory decree and submit the same to the trial judge for his signature and nothing further was done by him in connection with said action until the latter part of 1939 when he had both the interlocutory and final decrees of divorce entered pursuant to section 131.5 of the Civil Code.

Mrs. Schlessinger testified before the local administrative committee that on numerous occasions she had requested petitioner to secure a final decree for her, but that he had failed and neglected to do so, and that she finally learned that for some reason, unknown to her, petitioner had failed and neglected to have the interlocutory decree of divorce entered. She also stated that she had not been in a hurry to secure the final decree, but that she was more or less disturbed over the procrastination of petitioner. Petitioner testified in substance that he had learned that the parties had become reconciled and were again living together under the same roof, and for that reason failed to enter the interlocutory decree.

After finding the foregoing facts, the local administrative committee concluded:

"The Committee feels in this case that Mr. Trusty was not justified in assuming that the parties had become reconciled and that he was neglectful in not having the interlocutory decree of divorce entered.

"Outside of the anxiety which was caused his client, we do not feel that she was damaged materially in the delay, inasmuch as section 131.5 of the Civil Code came to her relief. However, we do feel the respondent should be reproved privately for his neglect which might have presented a serious problem."

The recommendation of the local administrative committee was that petitioner be privately reproved.

A record of the proceedings before the local administrative committee together with the findings and recommendation of said committee were transmitted to the board of governors of the State Bar of California, and without receiving any additional evidence, said board adopted the findings of fact of said committee but recommended to this court that petitioner be suspended from the practice of the law in the state of California for a period of thirty days.

It is, of course, elementary that in order to justify the recommendation that a member of the bar be disciplined, the record before the board of governors must be sufficient to support some charge of unprofessional conduct against such member denounced by the State Bar Act or the rules of professional conduct promulgated by the board of governors and approved by this court.

Turning to the record in the proceeding now before us, I find nothing therein which can be said to give support to a charge against petitioner involving moral turpitude, dishonesty or corruption, or a violation of any of the rules of professional conduct of the State Bar of California. The most that can be said regarding petitioner's conduct as disclosed by the record in this proceeding is, that he was negligent in not having the formal interlocutory decree of divorce entered forthwith after the hearing of the action for divorce, or that he did not procure the entry of the final decree of divorce on behalf of Mrs. Schlessinger immediately upon her request after the expiration of one year from the entry of the interlocutory decree.

After a careful reading of the record in this case, I can find nothing in the conduct of petitioner in the handling of Mrs. Schlessinger's case or in his relationship with her as attorney and client which can be characterized as unprofessional conduct as defined in the State Bar Act or in the rules of professional conduct of the State Bar of California.

While I do not wish to be understood as sanctioning or condoning negligent conduct on the part of a member of the bar in the handling of matters entrusted to him in his professional capacity, I am of the opinion that mere acts of negligence which do not involve any element of moral turpitude, dishonesty or corruption are insufficient to constitute a ground upon which a disciplinary proceeding against a member of the bar can be instituted.

The term negligence is defined in California Jurisprudence as follows:

"Negligence is not an act itself, but a fact which defines the character of an act and makes it a legal wrong. It has been variously defined as the absence of care, the want of such care as a person of ordinary prudence would exercise under the circumstances of the case, the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do, and as 'the failure to observe, for the protection of the interest of another person, that degree of care, protection and vigilance which the circumstances justly demand, whereby such other person suffers injury'. Negligence may be active or passive in character and may consist in heedlessly doing an improper thing or in heedlessly refraining from doing a proper thing. One who does not do what he should do is chargeable with negligence equally with him who does that which he should not.

"Although no difficulty attends an attempt to define negligence in the abstract, the application of definitions to concrete facts gives rise to serious controversy. Negligence is a comparative and not a positive term, whether applied to the acts of a plaintiff or of a defendant. It is determined in all cases by reference to the situation and knowledge of the parties and to all the attendant circumstances. What would be extreme care under one condition of knowledge and one set of circumstances might be gross negligence with different knowledge and changed circumstances. Of necessity the question is nearly always one of fact for the jury." 19 Cal.Jur. sec. 4, pp. 547–550.

While the above-quoted definition of negligence is somewhat all-inclusive, it will be observed therefrom that a person may be guilty of negligent conduct without having any intention whatever to injure another and without being motivated by bad faith or dishonesty or guilty of the violation of any recognized moral code.

It cannot be gainsaid that a disciplinary proceeding against a member of the bar is quasi criminal in nature and carries with it the odium of such a proceeding. Technically speaking, crimes are divided into two groups; that is, those acts which are classified as bad in themselves or malum in se, and those acts which do not constitute a violation of any recognized moral code but are prohibited by statutory law and are classified as malum prohibitum, or bad because they are prohibited by law. Negligence must necessarily fall in the latter class. Therefore, unless it can be said that the State Bar Act denounces mere acts of negligence on the part of an attorney in the handling of his client's legal matters as unprofessional conduct, and authorizes the infliction of discipline upon members of the bar who may be found guilty of negligent conduct, there is no basis in the law of this state for a charge of unprofessional conduct against a member of the bar arising out of negligent conduct alone. 9 Cal.Jur. 10 Yr.Supp. sec. 43, p. 392; In re Collins, 147 Cal. 8, 81 P. 220; Lantz v. State Bar, 212 Cal. 213, 298 P. 497; Howe v. State Bar, 212 Cal. 222, 298 P. 25.

An examination of the State Bar act fails to disclose any provision therein denouncing acts of negligence on the part of a member of the bar as unprofessional conduct warranting the infliction of discipline, and I am therefore of the opinion that such acts do not constitute a basis for a disciplinary proceeding against a member of the bar of this state.

The foregoing proposition is supported by the following quotation from California Jurisprudence Supplement:

"Carelessness or negligence in the conduct of a client's business is not among the grounds for removal or suspension which are enumerated by statute. Such conduct is ground for discipline, however, if it is of such a character as to come within the statutory provision that an attorney may be removed or suspended 'for the commission of any act involving moral turpitude, dishonesty or corruption'.

"It seems to be the prevailing view in other jurisdictions that inattention to duty constitutes ground for disciplinary action only when it is accompanied by some form of moral delinquency." 9 Cal.Jur. 10 Yr. Supp. sec. 62, pp. 410, 411.

My attention has not been called to any case in this or other jurisdictions where discipline was inflicted upon a member of the bar for conduct consisting of mere acts of negligence alone where there was no showing of bad faith, misrepresentation or some form of moral delinquency accompanying the negligent conduct of the attorney.

The majority opinion cites and relies upon the cases of Marsh v. State Bar, 210 Cal. 303, 291 P. 583, and Marsh v. State Bar, 2 Cal.2d 75, 39 P.2d 403, in support of its holding that mere negligent conduct of an attorney is sufficient to justify the infliction of discipline under the provisions of the State Bar act. These cases do not support the position of the majority of this court in the conclusion reached by it in this case, as a reading of these cases discloses that the conduct of petitioner, which was the subject of the disciplinary proceeding reviewed therein, involved dishonesty and misrepresentation which amounted to moral turpitude and both the local administrative committee and the board of governors and this court found that his conduct was not merely negligent but that he was guilty of intentional wrongdoing amounting to moral turpitude. In the first Marsh case reported in 210 Cal. at page 307, 291 P. at page 584, this court said:

"But petitioner argues, conceding that he was guilty of such carelessness and negligence, these elements are not grounds for suspension. In other words, section 287 of the Code of Civil Procedure, which states the grounds upon which an attorney may be removed or suspended by this court, makes no mention of carelessness and negligence. Subdivision 5 of said section, however, provides that an attorney may be removed or suspended 'For the commission of any act involving moral turpitude, dishonesty or corruption, * * *' and if the conduct of petitioner and his gross negligence and carelessness come within this definition such conduct and acts constitute sufficient grounds for his suspension. The recommendation of the Board of Governors itself implies a finding that the acts committed by him involved moral turpitude, dishonesty or corruption. But aside from this fact, how petitioner's misrepresentations to the complainants, after his acceptance of a fee from them, can be classed as other than outright dishonesty, is hard to understand. Neither can it be denied that the breach by petitioner of the confidential relation—a fiduciary relation of the very highest character, binding him to the most conscientious fidelity—between himself and his said clients involved moral turpitude. The definition of 'turpitude' as anything done 'contrary to justice, honesty, modesty, or good morals' has long been approved by this court. In re O'Connell, 184 Cal. 584, 587, 194 P. 1010, 1012; Matter of Coffey, 123 Cal. 522, 56 P. 448. See, also, Matter of Humphrey, 174 Cal. 290, 295, 163 P. 60, 62, wherein it is said: 'Moral turpitude is misconduct by an attorney in reference to his duties and obligations as such attorney —conduct, in fact, which is contrary to justice, honesty, modesty, or good morals.'

"It also appears that said acts and conduct of petitioner were of a character to warrant his suspension under the provisions of subdivision 2 of said section 287, to the effect that an attorney may be suspended for 'any violation of the oath taken by him, or of his duties as such attorney and counselor.' The oath referred to, required upon admission of a person to practice law, contains a pledge 'to faithfully discharge the duties of an attorney * * * to the best of his knowledge and ability.' Section 278, Code Civ.Proc. Obviously, this petitioner not only failed to discharge faithfully, but failed to discharge in any way whatsoever his duties as an attorney in the instances under review. See In re Morganstern, 61 Cal.App. 702, 708, 215 P. 721, holding that where the alleged acts of an attorney are such that they show moral turpitude, dishonesty, or corruption in violation of his duties as an attorney and committed in the course of the practice of his profession, he may be proceeded against under either subdivision 2 or subdivision 5 of said section 287 of the Code of Civil Procedure, and under subdivision 2 there is no limitation upon the power of the court to entertain a motion for his removal or suspension."

In the second Marsh case reported in 2 Cal.2d at pages 77 and 78, 39 P.2d at page 404, this court said:

"From these facts the local administrative committee concluded that petitioner was guilty of acts involving moral turpitude, dishonesty, and corruption (subdivision 5, § 287, Code Civ.Proc.), and of violation of his oath and duties as an attorney (subdivision 2, § 287, Code Civ.Proc.). It further found that on September 24, 1930, in another disciplinary proceeding where the facts were similar to those here shown, this court ordered petitioner's suspension from practice for one year (Marsh v. State Bar, 210 Cal. 303, 291 P. 583), and that petitioner there presented the same defense of 'negligence' as pleaded here, which defense is without merit. The committee quoted from said reported case the following remarks of one of the members of the board of governors of the State Bar: 'A review of the facts of these three cases under consolidation would indicate that the respondent is at least a careless and "sloppy" practitioner, and that his negligence borders very closely upon moral turpitude. This type is not safe to represent clients in the practice of the law, particularly implicated, as he seems to be, in constant trouble with his clients over money matters, delays and actual misrepresentation.' Marsh v. State Bar, supra, 210 Cal. page 306, 291 P. 583, 584.

"The committee further found that the above comments were as applicable to the present proceeding as to the former 'except as to the discipline recommended, which, in view of respondent's former record, should be greater.' It therefore recommended petitioner's suspension for a period of three years, as aforesaid.

"Petitioner contends that the present record, considered without reference to his prior wrongdoing, falls far short of showing facts sufficient to justify his suspension, and certainly not a three-year period of suspension. He asserts that he has already suffered full punishment for the former wrongdoing and should not now be punished a second time for it, as contemplated by the recommendation made. The State Bar replies that the court must consider its opinion in the earlier proceeding, which characterizes petitioner's misrepresentations to his clients as 'outright dishonesty,' and therefore the proposed penalty is just."

It must be remembered that the local administrative committee in the case at bar found that petitioner was "neglectful" only. This finding was adopted by the board of governors, and there is nothing in the record to justify any other finding or conclusion. In view of this state of the record, there is no basis whatever for holding that petitioner was guilty of any act involving moral turpitude, dishonesty, corruption, bad faith, misrepresentation or any form of moral delinquency accompanying his negligent conduct in the action which was the subject matter of the disciplinary proceeding against him. It is obvious, therefore, that the two Marsh cases cited above cannot be relied upon as authority to support the recommendation made by the board of governors that petitioner be disciplined by suspension from the practice of law for the period of thirty days for his conduct in said action.

The same situation as that disclosed by the above quotations from the two Marsh cases existed in the case of Waterman v. State Bar, 8 Cal.2d 17, 63 P.2d 1133, also cited in the majority opinion. In that case the local administrative committee found that petitioner was guilty of acts involving dishonesty and moral turpitude. The board of governors adopted this finding and this court sustained the recommendation for discipline upon the ground that the acts of petitioner involved moral turpitude in that they constituted a breach of the fiduciary relationship with his client. As pointed out hereinabove, there is no such finding by either the local administrative committee or the board of governors in the case at bar and the record before us is insufficient to support such a finding or any other finding than that petitioner's conduct was "neglectful" only.

The majority opinion ignores the findings of the local administrative committee when it states:

"It is evident from the record herein that throughout the period of several years in which petitioner neglected and failed to have either the interlocutory or final decree entered that his conduct was not only of negligent inactivity but of active misrepresentation to his client * * *"

I do not understand it to be the function of this court to change the findings of fact made by a local administrative committee in a disciplinary proceeding and approved by the board of governors, especially when those findings are in accordance with the record.

The majority opinion is confusing in that it is impossible to determine therefrom whether the majority of the court are of the opinion that mere negligent conduct of an attorney which does not involve any element of bad faith, misrepresentation, dishonesty or some form of moral delinquency accompanying the negligent conduct can be made the subject of a disciplinary proceeding under the State Bar Act or the rules of professional conduct of the State Bar of California. Some of the language of the majority opinion is susceptible of the interpretation that such conduct may justify discipline, but the court appears to rest its conclusion that discipline is justified in this case because of certain alleged misrepresentations made by petitioner to his client. As stated before, the record does not support such conclusion, and it is not clear what the conclusion of the majority of the court would have been if its opinion had been confined exclusively to the record.

In view of what I have said in the foregoing opinion, the proceeding against the petitioner herein should be dismissed.

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16 Cal.2d 535

In re GUMP'S ESTATE.

S. F. 16028.

Supreme Court of California.

Nov. 12, 1940.

Rehearing Denied Dec. 12, 1940.

1. Perpetuities 🔑4(15), 6(2)

Under trust agreement conveying realty to bank as security, the provision that trustee might hold title even after expiration of 20-year term of trust until indebtedness was fully repaid, as a security protection, was not contrary to rules against "perpetuities" and restraints on alienation. Civ.Code, §§ 715, 716; Const. art. 20, § 9.

See Words and Phrases, Permanent Edition, for all other definitions of "Perpetuities".

2. Perpetuities 🔑4(15), 6(2)

On issue whether inter vivos trust for term of 20 years conveying realty to bank as security violated rules against perpetuities and restraints on alienation on theory that trust contemplated a possible continuance for indefinite period beyond 20-year term because of failure to clear property of debts, the power of trustee to make repairs and improvements does not vest in such trustee power to make extravagant expenditures. Civ.Code, §§ 715, 716, 857; Const.art. 20, § 9.

3. Trusts 🔑184

If power to "improve" given to trustee under inter vivos trust was meant to be more than power of reasonable and careful management by trustee, such purpose was not a lawful trust purpose, and such provision was void from its inception. Civ.Code, § 857.

See Words and Phrases, Permanent Edition, for all other definitions of "Improve".

4. Perpetuities 🔑4(15), 6(2)

In testing a trust agreement for violation of rules against perpetuities and restraints on alienation, its validity is to be judged as of date of its inception and not by subsequent happenings. Civ.Code, §§ 715, 716; Const. art. 20, § 9.

5. Trusts 🔑52

Illegal portions of a trust will be severed from otherwise valid portions of the trust when to do so will be in accordance with trustor's intent.

6. Trusts 🔑52

Generally, trust provisions for a valid term are separable from those for an invalid period where trust instrument shows trustor would have preferred separation to total invalidation, or where invalid provisions only incidentally affect main scheme.

7. Trusts 🔑52

In determining whether a case is a proper one for application of rule which permits a severance of invalid trust provisions in order to sustain those which are valid, it is not only permissible but proper to examine and evaluate actual occurrences.

8. Trusts ⚿112

In construing trust instruments, as in construction and interpretation of all documents, duty of court is to first ascertain and then, if possible, give effect to intent of the maker.

9. Trusts ⚿52

An inter vivos trust which conveyed realty to bank as security and which provided that after 20 years trustee should convey realty to trustor's children or to children's children per stirpes with a life estate to trustor did not violate rules against "perpetuities" and restraints on alienation because of alleged invalidity of provision which authorized trustee to hold title even after expiration of 20 years until indebtedness was fully repaid, where such provision could be severed from other valid portions of trust in accordance with trustor's intent. Civ. Code, §§ 715, 716; Const. art. 20, § 9.

10. Executors and administrators ⚿504(6)

The question of validity of sale of personalty of testatrix at public auction after petition by executors for its sale, proper notice given, and confirmation of sale by probate court, could not be reopened on hearing of objections to final account, since order for confirmation of sale is an "appealable order," and no appeal having been taken, probate court could not re-examine question upon hearing of final account. Probate Code, § 1240.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Proceeding in the matter of the estate of Mabel B. Gump, also known as Mabel L. Gump, also known as Mabel Latham Gump, and also known as Mabel Beatrice Lichtenstein Gump, deceased, between Bertha L. Cohen and Abraham L. Gump and others, executors of the last will and testament of Mabel B. Gump, deceased. From an order settling the first and final account and report of the executors and ordering final distribution, Bertha L. Cohen appeals.

Affirmed.

Prior opinion, 97 P.2d 301.

Rehearing denied; CARTER and TRAYNOR, JJ., dissenting.

Treadwell & Laughlin, of San Francisco (Russell E. Barnes, of San Francisco, of counsel), for appellant.

Charles A. Christin and Rowland R. King, both of San Francisco, for respondents.

Heller, Ehrman, White & McAuliffe and Lawrence C. Baker, all of San Francisco, amici curiæ.

CURTIS, Justice.

This is an appeal from an order settling the first and final account of the executors of the estate of Mabel B. Gump, deceased, and ordering final distribution in the matter of said estate.

The main objection of appellant to said order is the alleged failure of the trial court to compel the executors to inventory certain real property, the subject of an inter vivos trust, as an asset of the estate, upon the theory that said trust was void as violating the rule against perpetuities and the statutory rule against restraints of alienation. A further objection was made that the executors should have been charged with secret profits which had been made and which might be made by them as shareholders and officers of S. & G. Gump Company on the resale of personal property purchased from the estate.

The appellant, Bertha L. Cohen as a lifelong friend of testatrix, was named a legatee in the sum of $5,000 in the will of Mabel B. Gump, deceased. In said will, the testatrix after leaving certain legacies to friends, relatives and charities, devised and bequeathed the residue to her three children, Marcella Gump, Robert Livingston Gump and Richard Benjamin Gump, and nominated Abraham L. Gump, Robert Livingston Gump and Richard Benjamin Gump as executors of her last will and testament.

Subsequent to the date of her will, on the 14th day of February 1928, Mabel B. Gump conveyed her interest in certain real property to the Wells Fargo Bank & Union Trust Company by deed. On the same date an agreement was entered into between Mabel B. Gump, as trustor, and Wells Fargo Bank & Union Trust Company, as trustee, setting forth the terms upon which the Wells Fargo Bank & Union Trust Company was to hold the property.

Mabel B. Gump died on December 3, 1934, and proper steps were taken by her executors to administer her estate. The executors did not include in the inventory filed by them, the property included and described in the trust agreement executed by the testatrix on February 14, 1928. During the course of the administration of her estate, after petition duly filed and notice of hearing given appellant, the personal property of the testatrix, consisting mainly of rare and beautiful objects of art, was sold at public auction. No objection to the petition or return of sale was made. Thereafter the first and final account of the executors was filed. Prior to the filing of any objections to said account, the executors sought and secured confirmation of the sale of the personal property of testatrix at public auction. No appeal was taken from this order. When it appeared that the assets of the estate would be insufficient to permit payment of the $5,000 legacy to said Bertha L. Cohen unless said assets could be augmented by having the trust property returned as part of the estate, Bertha L. Cohen filed her objections and exceptions to said final order settling the estate and sought to have the trust declared null and void.

She also sought to compel the executors to account for profits made by S. & G. Gump Company in which corporation the executors were beneficially interested as shareholders and officers, upon a resale of certain of the personal property of the testatrix bought by said corporation at the public auction.

The probate court sustained the trust, overruled the objections with reference to the sale at public auction of the personal property of the testatrix, and made its order settling the account and decreeing distribution of the estate. It is from this order that the appeal is here taken.

In order that there may not be any possible misstatement of the provisions of said trust instrument, we shall set it forth in full. It is as follows:

"This agreement, made and entered into this 14th day of February, 1928, by and between Mabel L. Gump, of the City and County of San Francisco, State of California, party of the first part, and Wells Fargo Bank & Union Trust Co., a corporation, party of the second part; Witnesseth:

"Whereas, the party of the first part has by deed of grant, bargain and sale bearing even date herewith, sold and conveyed unto the said party of the second part, its successors and assigns, all of the following real property situate, lying and being in the City and County of San Francisco, State of California, and particularly described as follows, to-wit: (Description of property.)

"Now, therefore, it is understood and agreed by said parties hereto that said conveyance was made, executed and delivered by said party of the first part to said party of the second part for the following uses and purposes, and subject to the following conditions:

"(1) To hold the same for the term of twenty years from the date hereof, as security for the payment to said party of the second part of the sum of seventy-five thousand dollars ($75,000.00), with interest thereon at the rate of six per cent per annum, until paid; and as security for the payment to said party of the second part for all taxes, assessments, liens and encumbrances, repairs, improvements, and insurance premiums which may, during the term of this agreement, be laid or imposed upon the said premises; and, if, during the term of this agreement, the said party of the second part shall deem it necessary or proper to pay any other expenses or moneys in connection with said property herein conveyed, or under this agreement, the amounts so expended by said party of the second part shall be deemed to be a debt due from said party of the first part to said party of the second part, and be secured with interest thereon at the rate of six per cent per annum from the date of such expenditure, until paid, by the property hereinabove described.

"(2) To manage and lease said properties, and to ask, demand, sue for, recover, and receive, any and all sums of money arising, or which may arise from the said properties hereinabove described, from rents, income, or otherwise, during the term of this agreement; and to pay, or cause to be paid, from the rents and income arising, or which may arise from the said properties, all taxes, assessments, liens or encumbrances which may be laid or imposed upon the said properties, and all repairs, improvements and insurance premiums in and upon the said properties, and all expenses incurred by the said party of the second part in connection with this trust, including all reasonable fees and charges which may be paid or incurred for advice given or for legal services rendered to said party of the second part in connection therewith, and for all compensation to which the said party of the second part may be entitled for services in connection with this trust; and said party of the second part is hereby given full power and authority, without notice to the party of the first part, to incur any indebtedness which it may deem necessary or proper for the protection of the said properties hereinabove described, and to carry out the intent, purposes and terms of this agreement.

"(3) To repay to the said party of the second part the said sum of $75,000.00, and interest thereon at the rate of six per cent per annum until paid, and all other sums of money which may be expended, or debts incurred, in the manner following: The sum of seven hundred and fifty dollars ($750.00) per month, commencing with the 15th day of March, 1928, and continuing thereafter until the entire amount of $75,000.00, and such other amounts as shall have been advanced by said party of the second part to said party of the first part, or for her use and benefit, in connection with this trust, together with interest thereon, shall have been fully paid; the said payments to be made out of the rentals and income arising or which may arise from the properties hereinbefore described; and, after deducting from said rentals and income the said monthly payment to said party of the second part, as set forth herein, and of any and all expenditures made by said party of the second part in connection with the said properties and in connection with this agreement, as set forth in paragraph 2 hereof, the said party of the second part shall, each month, pay over to said party of the first part the remainder of the said rentals and income.

"(4) If all of said indebtedness of $75,000.00 and all moneys advanced or which may be advanced by said party of the second part for the purposes of this agreement, and interest thereon, and all moneys due to said party of the second part, and all sums hereby secured, shall be well and truly paid by said party of the first part, and all covenants and obligations by her to be kept and discharged shall be duly observed during the term of this agreement, and then, at the expiration of the term of this agreement the said party of the second part shall make, execute and deliver, by proper deed or deeds of conveyance, all of the property hereinabove described and conveyed by said party of the first part to said party of the second part on this date, to the following named persons, to wit: Marcella Gump, Robert Livingston Gump and Richard Benjamin Gump, the children of said party of the first part; reserving, however, to said party of the first part herein a life estate in said properties, together with the entire net rents and income arising therefrom.

"In the event, however, that at the expiration of the term of this agreement all of the said sums of money herein specified and referred to, and interest thereon, shall not have been fully paid by said party of the first part to said party of the second part, and all covenants and obligations by her to be kept and discharged shall not have been fully observed by her, then and in that event this trust shall continue and the title to said properties hereinabove described shall remain in said party of the second part, until all sums of money which may then be due and owing to said party of the second part by said party of the first part shall be fully paid, and all covenants and obligations upon her part to be discharged hereunder shall be fully observed, and the said properties shall then be conveyed to the said parties hereinabove named, to wit: Marcella Gump, Robert Livingston Gump and Richard Benjamin Gump.

"If, however, before the expiration of the term of this agreement, all of the said sums of money herein specified and referred to, and interest thereon, shall be fully paid by said party of the first part to said party of the second part, and all covenants and obligations upon her part hereunder shall be fully kept and observed, then the said party of the second part shall pay over to said party of the first part each month during the remaining term of this agreement, the entire rentals and income arising from the said properties hereinabove described, after deducting from said rentals and income the amount of any expenditures which may be necessary and proper to make in connection with this trust, and all necessary expenses in connection with the said properties, as set forth and referred to in paragraph 2 of this agreement, and for the protection and care of the said properties.

"(5) In the event of the death of said party of the first part during the term of this agreement, then the said party of the second part shall convey the said properties conveyed to it by said party of the first part, to the following named persons, to wit: Marcella Gump, Robert Livingston Gump and Richard Benjamin

Gump; upon the condition, however, that simultaneously with the making, execution and delivery by said party of the second part of said deed or deeds of conveyance to said Marcella Gump, Robert Livingston Gump and Richard Benjamin Gump, the said Marcella Gump, Robert Livingston Gump and Richard Benjamin Gump shall make, execute and deliver to said party of the second part herein a promissory note, secured by a deed of trust covering the said properties hereinabove described, which said deed of trust shall constitute a first lien on said properties, to secure the payment to said party of the second part of any and all sums of money or indebtedness which may then be due to said party of the second part hereunder; said note and deed of trust to contain such terms and provisions as may be suggested by said party of the second part.

"In the event that the said party of the first part shall die prior to twenty years from the date hereof, and shall be predeceased by either Marcella Gump, Robert Livingston Gump or Richard Benjamin Gump, or, in the event that either of said last named persons shall fail from any cause to make, execute and deliver to the party of the second part, upon the death of the said party of the first part, such note and deed of trust, then said party of the second part shall, at the death of the party of the first part, continue to hold title to said properties hereinabove described, and shall make conveyance thereof only if and when said indebtedness shall be fully paid, to such of the aforesaid three children of the party of the first part as shall then be alive, and to the issue per stirpes of any of said three children who may then be dead, or failing such issue, to the survivors or survivor of said children.

"In the event that one or more of the said children of said party of the first part shall predecease said party of the first part, or die before the expiration of the term of this agreement, and leave issue him or her surviving, then and in that event such issue of such deceased child or children shall be named as a grantee or grantees in said deeds of conveyance of said properties by said party of the second part herein, in the place and stead of such child or children. In the event, however, that one or more of the said children of said party of the first part shall predecease the said party of the first part, or shall die before the expiration of the term of this agreement, and leave no issue him or her surviving, then and in that event such child or children of the party of the first part herein shall survive said party of the first part, or shall be living at the expiration of the term of this agreement, shall be named as the grantee or grantees in the said deed or deeds of conveyance of said properties by said party of the second part.

"(6) Said party of the second part shall have the right to sell and dispose of the said properties conveyed to it by said party of the first part, at public auction, or at private sale, and on such terms and conditions as to the said party of the second part may seem meet and proper. In the event of such sale the party of the second part shall apply such portion of the proceeds thereof as may be necessary to pay all indebtedness due and owing to the said party of the second part by said party of the first part hereunder, at the time of such sale, together with interest thereon, and all costs of sale and expenses connected therewith which may be required to be paid by said party of the second part; and the party of the second part may invest and reinvest the balance of the proceeds of such sale in such manner as in its judgment, may be for the best interests of the party of the first part herein, and to pay over to said party of the first part the entire rentals or income which may arise from such investment after deducting therefrom all necessary and proper expenses connected therewith and with this trust; and further carrying out all of the other terms and conditions of this trust herein contained.

"(7) In the event of the death of the party of the first part prior to the expiration of the term of this agreement, and in the event that at the time of the death of said party of the first part all of the said sums of money herein specified and referred to, and interest thereon, shall be fully paid, and all covenants and obligations upon the part of said party of the first part hereunder shall be fully kept and observed, then the said party of the second part shall, during the remainder of the term of this agreement, pay over the entire net rentals and income arising from the said properties hereinabove described, to the said children of the party of the first part who shall survive her and to the issue per stirpes of any deceased child or children, or if there be no such issue, then to the survivor or survivors of said children of said party of the first part.

"(8) The party of the first part hereby constitutes the party of the second part her true and lawful attorney, irrevocable, authorizing said party of the second part, in the name of the party of the first part, or otherwise, as the case may require, to do any and all acts and things which may be necessary and proper to carry into effect the proper intent and meaning of these presents."

We shall briefly analyze the trust agreement as there are certain features of the agreement to which attention should be specifically directed. It is at once apparent that the trust deed has a dual or double aspect in that it has mortgage, deed of trust, or security attributes, included to protect the rights of the creditor-trustee, and it also has provisions which create, or attempt to create, an inter vivos or living trust. It is also apparent from the face of the instrument that the primary object of said trust agreement was the security of the Wells Fargo Bank & Union Trust Company, and of next importance was a final distribution to the trustor for life and upon her death to her three children. Provision is naturally made therein that if any of her children shall be deceased prior to the termination of the trust, the issue of said child shall take the share of said deceased child, or if there be no issue of said deceased child, then said property shall go to the survivor or survivors of the three children of the trustor. There is nothing in the trust agreement to indicate that the trustor was particularly interested in the grandchildren as such, or interested in their receiving any part of the estate, other than in carrying out logically her scheme of distribution whereby her three children would share equally, share and share alike. Clearly of secondary importance are these provisions for the issue of any deceased child. A definite term of twenty years is specified as the duration of the trust and most of the provisions are phrased upon the assumption that the trust will continue only for the definite period of twenty years, or sooner in the event of the death of the trustor prior to that time. A definite provision is also included whereby in the normal course of events the entire sum of $75,000 will be repaid with interest at the rate of $750 per month before the expiration of the definite period of twenty years. In this regard it should perhaps be pointed out that the expenses incidental to the management of the property and the trust are to be paid out of the monthly income and rentals in addition to the regular $750 per month payment. To fully protect the security of the bank, the creditor-trustee is given full management and control of the real property described therein; is given the privilege of retaining title thereto until the indebtedness has been paid in full; and is further vested with the absolute and unlimited power of sale.

Three contingencies are specifically provided for: (1) If the trustor is living at the end of the twenty-year period, and at the termination of said period the indebtedness shall be fully paid, the trustee is to convey the property to the three named children of the trustor, reserving a life estate to the trustor; (2) if the trustor die during the duration of the twenty-year period, the trustee is to convey the property to the three children upon their simultaneously executing a promissory note and trust deed to the bank for the balance due; and (3) if the bank, in the exercise of its privilege and power of sale, shall sell the trust property then after paying the amount of indebtedness due, together with the expenses of sale, etc., the trustee shall invest and reinvest the balance of the proceeds, and pay the income therefrom to the trustor until the expiration of the twenty-year period.

It may be noted that the second contingency provided for has in fact occurred. The death of the trustor taking place on December 3, 1934, prior to the termination of the twenty-year period, the trustee and beneficiaries named therein, being the three children of the trustor, in April, 1935, carried out the terms of said trust agreement by a conveyance of the trust property by the bank to the beneficiaries, and the simultaneous execution by them of a promissory note and trust deed as security for the $33,000 balance of indebtedness due at that time.

[1] The sole provision which endangers the whole trust scheme is the security provision contained in paragraph 4 of said instrument stating that the trustee may hold title, even after the expiration of twenty years, until the indebtedness be fully repaid. As a security protection, such

provision under the doctrine of Sacramento Bank v. Alcorn, 121 Cal. 379, 53 P. 813, is not contrary to the rule against perpetuities and the rule against restraints on alienation. However, it is argued that this same provision when considered in reference to the inter vivos trust aspect of the trust agreement violates both the constitutional prohibition against perpetuities (art. XX, sec. 9, California Constitution) and the statutory prohibition on restraints on alienation. (Secs. 715 and 716, Civ. Code). It is with this phase only that we are here concerned.

[2, 3] As before noted, the provision of the trust against which the attack is launched and which it is claimed invalidates the entire trust, is that one which contemplates a possible continuance of the trust for an indefinite period beyond the twenty-year term because of a failure to clear the property of debt. Theoretically, the trustee might under its plenary power of management continue to encumber the property—perhaps to such an extent that the children of the trustor, or their issue, would never be willing to meet the condition of executing a promissory note and trust deed to secure payment of any remaining balance of the debt upon conveyance to them of the real property by the trustee. Practically, such a situation is most improbable. In the first place, the power of the trustee to make repairs and improvements does not vest in such trustee the power to make extravagant expenditures. The suggestion that the trustee might "improve" the property by the construction of a twenty-story building at a cost of five to ten million dollars is patently unreasonable. At the time the trust was created, section 857 of the Civil Code limited trusts in real property to trusts for certain purposes and a trust to "improve" property and expend any money which the trustee deemed proper in connection with the property was in no way authorized by law. And if the power "to improve" be claimed to be more than the power of reasonable and careful management by the trustee, such purpose was not a lawful trust purpose and such provision was void from its inception. In re Estate of Fair, 132 Cal. 523, 60 P. 442, 64 P. 1000, 84 Am.St.Rep. 70. It is to be noted, as before pointed out, that paragraph 3 of the trust instrument which provides for the repayment of the principal and interest of the debt at the rate of $750 per month or $9,000 each year, also provides that the payment for the other expenses of management and upkeep are to be paid monthly from the income and rentals of the trust property and it is only after the payment and deduction from the total income of such expenses and the $750 per month that the remainder of the income is to be paid over to the trustor. It is mathematically demonstrable that if these incidental expenses are paid each month from the income and $750 per month is paid on the principal and interest that the entire amount will be paid within twelve years. The fact that $42,000 of the principal debt had already been paid off between the date of the execution of the trust agreement, February 14, 1928, and the date, April, 1935, when the three children of the trustor joined in executing a promissory note and trust deed for the balance then due of $33,000, a period of a little more than seven years, clearly demonstrates the improbability of the contingency suggested by the appellant actually materializing.

[4] However, we have in mind the fact that in testing a trust agreement for violation of the rule against perpetuities or restraints on alienation, its validity, is to be judged as of the date of its inception. In re Estate of Troy, 214 Cal. 53, 3 P.2d 930. That is to say, it is not permitted to wait to see what happens in order to determine the validity or invalidity of the trust. We shall, therefore, concede the possibility of the situation suggested by appellant arising—despite the fact that the trust agreement has already been fully executed and terminated by the conveyance of the trust property therein described by the trustee to the three children of the trustor, and the simultaneous execution by them of a promissory note and trust deed for the balance due—and shall proceed, upon the premise that this particular provision would be repugnant to the constitutional and statutory prohibitions against perpetuities and restraints on alienation, to a discussion of the question of whether the inclusion of such invalid provision in the trust instrument necessarily invalidates the entire trust agreement.

The inclusion of such provision does not invalidate the trust agreement for the reason that the valid portions of the trust with reference to the vesting of the estate in certain beneficiaries can be severed from the invalid provisions and allowed to stand in order to effectuate the trustor's intent, irrespective of any invalid provision.

[5-9] The rule that illegal portions of a trust will be severed from otherwise valid portions of the trust when to do so will be in accordance with the trustor's intent is well settled in California. In this regard, it is the general rule that trust provisions for a valid term are separable from those for an invalid period where the trust instrument shows the trustor would have preferred separation to total invalidation, or where the invalid provisions only incidentally affect the main scheme. The cases of Nellis v. Rickard, 133 Cal. 617, 66 P. 32, 85 Am.St.Rep. 227; In re Estate of Pichoir, 139 Cal. 682, 73 P. 606; Sacramento Bank v. Montgomery, 146 Cal. 745, 81 P. 138; In re Estate of Van Yyck, 185 Cal. 49, 196 P. 50, and In re Estate of Troy, supra, are all authority for this salutary rule. See, also, In re Wanamaker's Estate, 335 Pa. 241, 6 A.2d 852, and In re Lilley's Estate, 272 Pa. 143, 116 A. 392, 28 A.L.R. 375 and Millikin Nat. Bank v. Wilson, 343 Ill. 55, 174 N.E. 857, 75 A.L.R. 124. It has also been held that in determining whether a case is a proper one for the application of the rule which permits a severance of invalid trust provisions in order to sustain those which are valid, it is not only permissible but proper to examine and evaluate actual occurrences. In re Estate of Troy, supra. This being so, we are convinced that the instant case clearly belongs in the category of cases where that which is valid in the trust may be separated from that which is invalid, for we are satisfied that the main scheme of the trustor for the distribution of the trust property is completely achieved and realized by the elimination of the invalid provision. That the estate of the trustor's three children may be readily separated from the possible estate to any grandchildren is completely demonstrated by the fact that it has already been accomplished. There can be no stronger proof. In construing trust instruments, as in the construction and interpretation of all documents, the duty of the court is to first ascertain and then, if possible, give effect to the intent of the maker. Would it not be sacrificing the substance to the mere letter of the law to hold that there can be no possible severance of estates because such severance would be contrary to the scheme of distribution in the mind of the trustor at the time of the execution of the trust instrument, after the intent of the trustor has, in fact, been completely accomplished by the conveyance of the trust property to the three children by the trustee upon the execution by them of a promissory note and trust deed for the balance due upon the indebtedness, in strict accordance with the exact provisions of the trust agreement? Such a severance is not only possible, but if the intent of the trustor is to be effected, it is imperative. To refuse to make such severance results in a nullification of the entire trust instrument in so far as its inter vivos trust provisions are concerned and thereby utterly defeats the trustor's plan of distribution of her estate as clearly expressed in said instrument.

Doubtless it was the intention and hope of the testatrix at the time of the execution of her will that the specific legacies therein provided for should be paid to the named legatees, but this intention was necessarily modified when she subsequently executed the trust instrument containing the provisions making the specific disposition of the trust property therein described. Her intention thereafter must have been that such legacies should be paid out of her estate only if there were sufficient assets in her estate after the withdrawing of said trust property from the total amount of her assets.

We are satisfied that the trust agreement herein was not invalid, and that the finding of the probate court to the effect that the executors have not failed to include in their inventory property belonging to the estate of the decedent is correct.

[10] We are likewise satisfied that the question of the validity of the sale of the personal property of the testatrix at public auction, after petition by the executors for its sale, proper notice given, and the confirmation of the sale by the probate court, cannot be reopened on the hearing of objections to the final account. The order for confirmation of sale is an appealable order. Sec. 1240, Probate Code. The objection that the executors bought property of the estate, either personally or in behalf of S. & G. Gump Company, of which corporation they were officers and in which they owned shares, should have properly been presented at the hearing upon the petition for a confirmation of the sale. No appeal having been taken from said order of confirmation, the probate

court was not at liberty to re-examine the question upon the hearing of the final account.

The order of the probate court settling the first and final account of the executors and decreeing distribution of the said estate is hereby affirmed.

We concur: GIBSON, C. J.; SHENK, J.; EDMONDS, J.; CARTER, J.; YORK, Justice pro tem.; MOORE, Justice pro tem.

WEST KEY NUMBER SYSTEM

16 Cal.2d 573

In re ARNOLD'S ESTATE.

Sac. 5300.

Supreme Court of California.

Nov. 12, 1940.

1. Trial 🔑**142**

A nonsuit or directed verdict may be granted only when, disregarding conflicting evidence and giving plaintiff's evidence proper value, and indulging in every legitimate inference deducible therefrom, evidence is insufficient to support verdict for plaintiff.

2. Wills 🔑**155(1)**

The "undue influence" which will justify setting aside a will must have been such as in effect to destroy the testator's free agency and to substitute another person's will for his own.

See Words and Phrases, Permanent Edition, for all other definitions of "Undue Influence".

3. Wills 🔑**163(1)**

In action to set aside will for undue influence, evidence must be produced that pressure was brought to bear directly on the testamentary act.

4. Wills 🔑**155(1)**

Mere general influence, however strong and controlling, will not authorize setting aside will for "undue influence" if it does not bear on the testamentary act, and the influence must be used directly to procure the will and must amount to coercion destroying testator's free agency.

5. Wills 🔑**155(1)**

Mere opportunity to influence mind of testator, though coupled with an interest or a motive to do so, will not authorize setting aside will for "undue influence."

6. Wills 🔑**163(2)**

In will contest, proof of a confidential relation between testator and residuary legatee would not cast burden on legatee of proving that will was not obtained by her through undue influence.

7. Wills 🔑**163(2)**

A presumption of "undue influence" arises from proof of confidential relation between testator and beneficiary, coupled with activity on part of beneficiary in preparation of the will.

8. Wills 🔑**324(3)**

In will contest, evidence was insufficient for jury on issue of undue influence.

9. Judgment 🔑**199(1)**

The right of the trial court to render a judgment notwithstanding the verdict is the same as its right to grant a nonsuit.

10. Judgment 🔑**199(3)**
Trial 🔑**139(1)**

The trial court may neither grant a motion for nonsuit nor render judgment notwithstanding the verdict if there is any substantial evidence before the court in the first instance in support of plaintiff's case, or in the second instance in support of the verdict rendered by the jury.

11. Wills 🔑**166(8)**

Where doctor testified that testator had no memory and could not remember orders from one day to another, but it appeared from other testimony that doctor must have been referring to occasions when testator was drunk or so far under the influence of liquor as to be unaccountable, the testimony of the doctor did not establish that testator was mentally incompetent to make a will.

12. Wills 🔑**166(8)**

Mere proof of mental derangement of testator or even of insanity in a medical sense will not invalidate a will, but contestant must prove either such complete mental degeneration as denotes utter incapacity to understand those things essential to the making of a will, or existence of a specific insane delusion which affected the making of the will.

13. Evidence ⚿574

Expert opinion that testator was of unsound mind was not conclusive but would be construed in connection with other evidence produced on behalf of contestant showing that testator attended to his ordinary business, made loans, met appointments made previously, and acted as executor of his wife's will.

14. Wills ⚿166(8)

Evidence that as a result of chronic alcoholism testator had sustained loss of memory and impairment of other mental faculties did not establish incapacity to make will.

15. Wills ⚿50

One who has sufficient mental capacity to understand the nature of his acts, the extent and character of his property, and relationship to persons who are the natural objects of his bounty is possessed of sufficient mental capacity to make a will.

16. Wills ⚿166(8)

The fact that holographic will was written in plain legible style, that no nervousness or trembling on part of testator was indicated in body of will, that names of beneficiaries were set forth, with the addresses of most of them given, and that it was prepared in strict accord with the law prescribing the requisites of such a testament, was convincing evidence that testator at the time had mental capacity to execute a will.

17. Wills ⚿341

In will contest, evidence authorized granting of proponents' motion for judgment in their favor notwithstanding verdict of jury in favor of contestant, on ground that no substantial evidence was presented by contestant in support of jury's finding that testator was not of sound and disposing mind on date will was executed.

CARTER, J., dissenting.

◆

In Bank.

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Proceeding in the matter of the estate of Hobart L. Arnold, deceased, between Earl W. Peterson, contestant, and Vera L. Logan and another, executrices of the last will and testament of Hobart L. Arnold, deceased, proponents. From a judgment for proponents notwithstanding a verdict for contestant, contestant appeals.

Affirmed.

Prior opinion, 99 P.2d 376.

Geary & Geary and C. J. Tauzer, of Santa Rosa, for appellant.

Barrett & McConnell, of Santa Rosa (A. Dal Thomson, of San Francisco, of counsel), for respondents.

CURTIS, Justice.

Hobart L. Arnold died on June 3, 1937, leaving what purported to be an holographic will, dated May 6, 1936, which reads as follows:

"May 6th, 1936

"I, Hobart L. Arnold of Santa Rosa Sonoma County California, being of sound and disposing mind and memory, and not acting under undue influence of any person whomsoever, do make, publish and declare this to be my last Will and testament. I am single. I have no children.

"I do give and bequeath my property to the persons named in this will.

"To Earl W. Peterson of Modesto One Thousand Dollars. To Walter Staley of South Laguna Orange County, One Thousand Dollars. To Florence Wells Lancini One Thousand Dollars. To Dresse Wells Five Hundred Dollars. To Lois Hardisty of Santa Rosa Five Hundred Dollars. To Mabel Baudau of Windsor One Thousand Dollars. To Mrs. M. A. Parrish of 641 Sonoma Ave Santa Rosa One Thousand Dollars. To Frances Carrington of Rincon Valley and Vera Logan of 925 Wright st. Santa Rosa I leave the rest of my estate to share alike of what Stocks, Bonds Real estate Personal or whatever I may own at the time of my death. I appoint Frances Carrington and Vera Logan as Executrixs of my Estate without bonds.

"Signed this 6th day of May, 1936.

"Hobart L. Arnold."

The decedent was a widower at the time of his death. He left no children or other descendants, and his nearest relative was the said Earl W. Peterson, a nephew of said deceased, and, as stated above, one of the beneficiaries under said will.

Upon the filing of this instrument for probate as the last will of said deceased by Frances Carrington and Vera Logan, a contest was instituted by the nephew Earl W. Peterson upon the ground of undue influence, and unsoundness of mind of said deceased. At the trial of said contest, the court granted a nonsuit as to the issue of undue influence and denied a motion for nonsuit as to the issue of unsoundness of mind. Evidence was introduced by the respective parties in support of the issue of unsoundness of mind and at the close thereof counsel for proponents, Frances Carrington and Vera Logan, moved the court for a directed verdict in favor of proponents, which motion was denied by the court.

After a verdict of the jury in favor of the contestant finding the deceased not to be of sound and disposing mind, the court granted a motion for judgment in favor of proponents notwithstanding the verdict, and entered an order admitting the purported will to probate as the last will and testament of said deceased, and appointing proponents the executrices of said will. From this judgment the contestant has appealed on the ground that the court erred in granting a nonsuit as to the issue of undue influence and also erred in granting proponents' motion for judgment notwithstanding the verdict of the jury in favor of contestant as to the issue of unsoundness of mind. It is the contention of the contestant that there is sufficient substantial evidence in support of each of these two issues to entitle the contestant to have these two issues passed upon by the jury.

[1] We will first direct our discussion to the order granting proponent's motion for a nonsuit. The rule applicable to motions of this character is well established and was correctly stated in our recent decision in the Estate of Flood, 217 Cal. 763, page 768, 21 P.2d 579, at page 580, where, in an opinion written by Mr. Justice Langdon, it is said: "It has become the established law of this state that the power of the court to direct a verdict is absolutely the same as the power of the court to grant a nonsuit. A nonsuit or a directed verdict may be granted 'only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given.'"

This rule has been approved and followed by this court so often that it seems almost unnecessary to again refer to it. Among the many cases that have expressly sanctioned this rule, the following may be listed: Umsted v. Scofield Eng. Const. Co., 203 Cal. 224, 228, 263 P. 799; Newson v. Hawley, 205 Cal. 188, 270 P. 364; Mitchell Camera Corp. v. Fox Film Corp., 8 Cal.2d 192, 197, 64 P.2d 946.

[2-5] In an action to set aside a will of a deceased person on the ground of undue influence, it is necessary to show that the influence was such as, in effect, to destroy the testator's free agency and substitute for his own another person's will. Estate of Motz, 136 Cal. 558, 563, 69 P. 294. Evidence must be produced that pressure was brought to bear directly upon the testamentary act. In re McDevitt's Estate, 95 Cal. 17, 33, 30 P. 101. Mere general influence, however strong and controlling, not to bear upon the testamentary act, is not enough; it must be influence used directly to procure the will, and must amount to coercion destroying free agency on the part of the testator. Estate of Keegan, 139 Cal. 123, 127, 72 P. 828. It is further held that mere opportunity to influence the mind of the testator, even coupled with an interest or a motive to do so, is not sufficient. Estate of Easton, 140 Cal.App. 367, 371, 35 P.2d 614.

"The unbroken rule in this state is that the courts must refuse to set aside the solemnly executed will of a deceased person upon the ground of undue influence unless there be proof of 'a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made.'" Estate of Gleason, 164 Cal. 756, 765, 130 P. 872, 876.

We will examine the evidence in this case adduced on behalf of this contestant in an effort to ascertain, in the light of the above ruling, whether it was sufficient to require the court to submit to the jury the issue of undue influence.

It is the contention of the contestant that the residuary legatees under said will so unduly and improperly influenced the testator to make said will in their favor as to the residue of this estate as to render the will of no legal effect. The amount of the estate, which the two residuary legatees would receive, is at least $20,000. Neither of these two women was related to the testator either by marriage or consanguinity, while the contestant was his nephew and his only heir at law. Hobart L. Arnold, at the time of his death, was living at the home of the proponent, Vera L. Logan. On that day Mrs. Logan and a man named Wedell had gone to Oakland and when they returned to her home in Santa Rosa, they found Arnold lying on the bed in his bedroom dead. Whether he died as a result of the excessive use of intoxicating liquor or not is an unsolved question in the case. The cause of his death is not, however, of any material consequence. Mr. Wedell searched Arnold's body and took possession of what money he had which was only a few dollars. Mrs. Logan took a billfold from one of Arnold's pockets and took it to an attorney who opened it and found, in an envelope therein, the will which is now the subject of this controversy. The will as noted above bore date of May 6, 1936, over a year prior to the time of Arnold's death.

Respecting the claim of undue influence over the testator by proponent Frances Carrington, there is absolutely no evidence in the record of this case to support such claim. Mr. and Mrs. Carrington were old friends of Mr. and Mrs. Arnold, before the death of Mrs. Arnold. The Arnolds frequently visited the Carrington home and were greatly interested in the Carrington children. This friendship between the Arnolds and the Carringtons continued after the death of Mrs. Arnold and Arnold made frequent visits after his wife's death, to the Carringtons and their children. A short time before Arnold's death, the friendly relations between him and Mr. Carrington were interrupted by some misunderstanding between them respecting a business matter. But this break in their friendship did not extend to Mrs. Carrington, and Arnold continued to pay occasional visits to her and her children, after the misunderstanding with Mr. Carrington, but avoided making these visits when Mr. Carrington was at home. Arnold also took Mrs. Carrington and her children with him on a trip to Eureka. Contestant relies upon these visits of Arnold to the Carrington home and this trip to Eureka as evidence tending to support his contention that Arnold's will was the result of the exercise of undue influence over him by Mrs. Carrington. It is needless to say that this contention cannot be sustained. There is absolutely not one iota of evidence that Mrs. Carrington ever discussed with Arnold the subject of his will, or ever suggested to him that he should include her therein as one of its beneficiaries. There is no evidence that Mrs. Carrington knew of the execution of the will before the death of Arnold and it is equally true that she did not in any way participate in its execution.

As to the contention of contestant that proponent, Vera L. Logan, improperly influenced said testator to make said will in her favor, the facts are much more involved. Arnold first met Mrs. Logan at her home in Santa Rosa one Sunday in March, 1936. He had been invited by Mr. Logan to have dinner with the Logan family, consisting of Mr. and Mrs. Logan and their nine year old daughter. Sometime later, Arnold spoke to Logan and asked if he could not take his meals at the Logan home. Logan replied that it was all right with him if he could make satisfactory arrangements with Mrs. Logan. As a result of this conversation and after seeing Mrs. Logan regarding the matter, Arnold took his meals at the Logan home, paying therefor $50 a month to Mrs. Logan. Later Arnold sold his own home and arrangements were made with the Logans for Arnold to have a room with them. Arnold was a heavy drinker, and was frequently so badly intoxicated that it was necessary to put him to bed in his room at the Logan home. During these times Mrs. Logan cared for him until he recovered, or until it was necessary for him to be sent to a hospital, which was frequently the case as Arnold suffered a number of attacks of delirium tremens after he began taking his meals with the Logans, both before and after he occupied a room in their home. Afterwards Arnold took a room at the Travelers Hotel and later at the Santa Rosa Hotel. At the direction of the doctor, Mrs. Logan took a room adjoining the room at the hotel occupied by Arnold for the purpose of caring for him during the periods when he was suffering from an over-indulgence in intoxicating liquors. It might be well to here state that Mr. and Mrs. Logan had separated sometime after Arnold became a roomer at their home and it appears that they never were legally married.

Mrs. Logan some time before Arnold's death became acquainted with a salesman named Wedell, and shortly after Arnold's death she and Wedell were married. During the later months of Arnold's life he became very lavish in the expenditure of money, especially in behalf of Mrs. Logan. He bought her an automobile and financed the purchase of a saloon for her and Wedell. He signed a power of attorney and delivered it to the Bank of America at Santa Rosa authorizing her to sign and endorse checks, notes and drafts, and conduct other business for him at the bank. Under this authorization she withdrew from the bank various sums of money, a considerable amount of which she evidently appropriated to her own use without any accounting to him.

Contestant claims that the amount of money squandered by Arnold between his wife's death and his own amounted to $24,000, a considerable portion of which went to Mrs. Logan. This amount is arrived at by contestant by taking from the appraised value of Mrs. Arnold's estate the amount of the estate left by Arnold. This appraised value of Mrs. Arnold's estate is taken from the certificate of the inheritance appraiser in Mrs. Arnold's estate which showed the total appraised value of her estate was $53,661.55. Our attention, however, is called to the final account in Mrs. Arnold's estate which shows that there were large claims filed and allowed against her estate, and that the total value of the property distributed to Arnold from his wife's estate was $39,282.58. The appraised value of the Hobart L. Arnold estate was shown to be $33,412.49. It is difficult to see how contestant arrives at the sum of $24,000 as the amount "squandered" by deceased after the death of his wife. The amount of $6,000 would seem to more correctly represent the difference between the value of the wife's estate distributed to Arnold and the value of the estate left by him. Contestant concedes that $2,500 of this amount was invested in a mining venture of uncertain value.

There is a large amount of evidence of the same character of that recited above respecting the association of Arnold and Mrs. Logan. They were together on numerous occasions. He continued his excessive drinking after suffering attacks of delirium tremens through which she sometimes nursed him and at other times he was sent to the hospital. They were often seen together and sometimes she was seen drinking with him and on at least one of these occasions she was intoxicated. There is no evidence they ever discussed the subject of his will, nor did she ever ask, or even suggest that he make his will in her favor.

From the foregoing the contestant contends that a confidential relation existed between Mrs. Logan and Arnold which caused her to assume the burden of proving that the will was not obtained by her through undue influence and that the testator had the benefit of independent advice.

[6, 7] Conceding, simply for the purpose of argument, that a confidential relation was proved to have existed between Mrs. Logan and Arnold, proof of that fact alone did not cast the burden of proof upon her that the will was not obtained by her through undue influence. Estate of Purcell, 164 Cal. 300, 303, 128 P. 932. In that case it was held that proof of a confidential relationship did not bring into play a presumption of undue influence in the absence of evidence that the beneficiary suggested the terms of the will. In the Estate of Baird, 176 Cal. 381, 384, 168 P. 561, 563, we find the applicable rule stated in the following concise language: "As suggested in Estate of Higgins, 156 Cal. [257] 261, 104 P. [6] 8, a 'presumption of undue influence' arises from proof of the exercise of a confidential relation between the testator and such a beneficiary, 'coupled with activity on the part of the latter in the preparation of the will.' The confidential relation alone is not sufficient. There must be activity on the part of the beneficiary in the matter of the preparation of the will."

In an unbroken line of decisions of this court, the above statement of law has been approved. Estate of Anderson, 185 Cal. 700, 716, 198 P. 407; Estate of Ricks, 160 Cal. 450, 461, 117 P. 532; Estate of Relph, 192 Cal. 451, 465, 221 P. 361; Estate of Lances, 216 Cal. 397, 14 P.2d 768; Estate of Lavinburg, 161 Cal. 536, 540, 119 P. 915; Estate of Presho, 196 Cal. 639, 651, 238 P. 944. See, also, 28 R.C.L. 146.

[8] As the evidence of contestant failed to show any activity on the part of Mrs. Logan in the procurement of the will of decedent, it was inadequate to prove undue influence on her part in the execution of said will. The evidence being insufficient to show that the will of said decedent was the result of the undue influence of either of the proponents, the court properly granted the motion of respondents for a non suit.

[9, 10] We will now give our consideration to contestant's further contention that the trial court erred in granting the motion for judgment notwithstanding the

verdict. The right of the trial court to render a judgment notwithstanding the verdict is the same as its right to grant a nonsuit. Card v. Boms, 210 Cal. 200, 202, 291 P. 190. It may neither grant this motion for a nonsuit nor may it render judgment notwithstanding the verdict if there is any substantial evidence before the court in the first instance in support of plaintiff's case, or in the second instance in support of the verdict rendered by the jury. We have, in the preceding portion of this opinion, set forth the correct rule governing the trial court in passing upon a motion for a nonsuit, and as this rule applies with equal force to a motion for the entry of judgment notwithstanding the verdict, it is unnecessary to restate it here.

The motion for judgment notwithstanding the verdict was made and granted on the ground that contestant had produced no evidence tending to support the finding of the jury that Arnold was not of sound and disposing mind on May 6, 1936, the date of the will.

It is the contention of contestant that there was sufficient evidence before the court to submit the question of unsoundness of mind to the jury, and that it was error for the trial court to enter judgment admitting the will to probate notwithstanding the verdict of the jury finding the deceased to be of unsound mind at the date on which the will was executed.

The evidence in support of the claim of contestant that the testator was of unsound mind at the time the will was executed was given by three physicians and a number of intimate acquaintances of the testator.

Practically all the testimony of these witnesses, both medical and lay, was directed to the intemperate habits of the deceased. Dr. Pleth was the family physician of Mr. and Mrs. Arnold from 1929 to the death of Mrs. Arnold in July, 1935. He ceased to be the Arnold's physician a short time prior to Mrs. Arnold's death, although he frequently saw him on the streets of Santa Rosa, and a time or two in the doctor's office. Dr. Thurlow testified that he treated Arnold between September, 1935, and the spring of 1936. Dr. Roy, the third medical witness testifying in behalf of the contestant, never treated the deceased, but testified in answer to a hypothetical question propounded to him that in his opinion Arnold was of unsound mind on May 6, 1936, the date of the purported will of Arnold.

Dr. Pleth's testimony covered a period of time extending over six years, during which he treated Arnold for being drunk around two hundred times, giving him bromides mostly because they quiet the nervous system without laying the patient up. Sometimes he gave Arnold atropin sulphate and also injections of salt water and twenty per cent sugar for the purpose of dehydrating the brain. These were given two or three dozen times at least to reduce certain swelling brought on by alcoholic debauches. He treated him for numerous attacks of delirium tremens which would last sometimes two or three hours, sometimes half a day and sometimes an entire day. He treated Arnold for psychosis which he called alcoholic degeneration or chronic alcoholism. He stated that Arnold at those times was always alcoholic. He was always alcoholic, he was unaccountable. He further testified that Arnold was always drunk and when a man is that way he is called incompetent and unable to observe, to base an opinion, or to handle his estate and possessions. He was a thorough going alcoholic. At one time he had an attack of delirium tremens at his house. He said he was tired of living, and Dr. Pleth found a bottle of strychnine secreted in Arnold's bed. His condition was progressive chronic alcoholism and destructive of the brain cells, and in Mr. Arnold's case it interfered with his power of thinking and that portion of the brain cells where he does his thinking must have been injured, damaged or destroyed. It is the rule that one suffering from chronic alcoholism has an impaired memory. He had a positive Romberg condition, in which he could not balance. The pupils of his eyes were unequal. He had trouble with his liver, cirrhosis of the liver, which brought on dropsy. He had arthritis, lumbago and arteriosclerosis. He had a poor memory; he could not remember from one day to another the orders given and the doctor had to give his orders to other people, the usual orders for sick people as to what they shall eat and drink and the time to go to bed. A poor memory or inability to recollect is of no particular significance in connection with the pathology of the brain. Brain cells that are damaged or destroyed as a result of chronic alcoholism may recover to some extent in very early stages of drunkenness, if drinking is stopped in time, but they never completely recover, and in many later stages these cells can never be repaired or replaced. Dr. Pleth treated Arnold in his office after the death of the latter's wife. He was then drunk. In Dr. Pleth's opinion Arnold was of unsound mind on the 6th day of May, 1936, the day his purported will bears date. Dr. Pleth states that he never attended Arnold at the hospital or at his home after his wife died. He was always drunk and nervous. There was a tremor in his hands. In 1929 he tried to write his name, but it was a shaky hand which increased progressively down until the time of his death. He had a tremor in his hands. It was a wavering handwriting, and in Dr. Pleth's language, "In English I would call it scribbling."

Dr. Thurlow testified that he was called several times to give medical aid to Hobart L. Arnold betweeen September, 1935, and spring of 1936, both at his house on Sonoma avenue and at the home of Mrs. Logan on Wright street, each time for something pertaining to alcoholism and on one or two occasions it was delirium tremens. He hospitalized Arnold for alcoholism or delirium tremens. Delirium tremens deteriorates all the brain structures through a period of years. He last visited Arnold in the spring of 1936, but had no record of "putting down" anything about the case on that occasion, and does not recall whether he was drunk or sober. There can never be a complete restoration of the thinking power of the brain where the injury is due to the excessive use of intoxicating liquor, where it is repeated over a number of years. Dr. Thurlow met Arnold on the street once. He was drunk. During his observation of Arnold and from the history of his case, Dr. Thurlow stated that Arnold was of unsound mind in the medical sense, having reference to the deterioration of the brain cells.

The intimate acquaintances who were called on behalf of contestant testified generally to Arnold's excessive drinking. As a rule they stated that on numerous occasions when they saw him he was drunk. Mrs. Baudau testified that when Arnold was drunk he was irrational. Josephine Gibson, who testified about Arnold from her observation of him, said that he was irrational. Others testified that most of the time Arnold was drunk and that he did not know what he was doing; that he was irrational and was not capable of taking care of his business; and three others testified that he was irrational.

[11] Possibly the strongest testimony in favor of contestant was that given by Dr. Pleth. He testified that Arnold was always drunk. Of course, he could only testify to those occasions when he observed Arnold. He could not testify that Arnold was drunk at times when he did not see him. Thirteen of contestant's witnesses testified to various occasions, during the years 1935, 1936, and 1937, when they met and observed Arnold that he was sober. It is not necessary to set forth their testimony, but we will refer to two of them. Pete Falkins borrowed money of Arnold on two occasions during December, 1936, and January, 1937. On each occasion Falkins met Arnold by previous appointment. W. D. Wright saw Arnold at his home in regard to a money deal in December, 1936, or January, 1937. Arnold promised to meet him at Berger's on the following day and he kept his appointment. Arnold appeared perfectly rational and their conversation was confined to business. There was no indication that Arnold had been drinking on that occasion. The testimony of these witnesses, considered in connection with that of Dr. Pleth, establishes two facts. The first of these is that Arnold was not always drunk, but that there were intervals when he was sober and able to transact business, and the second of these two facts is that Dr. Pleth's testimony relates only to occasions when Arnold was drunk. When, therefore, Dr. Pleth testified that Arnold had no memory and could not remember the orders he gave him from one day to another, and the doctor had to give the orders to other people, he was referring to occasions when Arnold was drunk or so far under the influence of liquor as to be unaccountable. He could not be referring to occasions when Arnold was sober, and transacted business, meeting appointments made on previous dates. This same conclusion must be reached when considering other testimony given by Dr. Pleth. He referred to Arnold drunk and not Arnold sober. This evidence falls far short of that required to prove that Arnold was mentally incompetent to make a valid will. In fact it is no evidence of the unsoundness of mind of a sober individual. Estate of Carithers, 156 Cal. 422, 105 P. 127. The same may be said respecting the testimony of Dr. Thurlow. He saw Arnold only when the latter was drunk.

Both Dr. Pleth and Dr. Thurlow, as well as Dr. Roy, testified Arnold was of unsound mind, and a number of his intimate acquaintances gave as their opinion that he was irrational due to his reported indulgence in intoxicating liquor.

[12] It is well settled that mere proof of mental derangement or even of insanity in a medical sense is not sufficient to invalidate a will, but the contestant is required to go further and prove either such a complete mental degeneration as denotes utter incapacity to know and understand those things which the law prescribes as essential to the making of a will, or the existence of a specific insane delusion which affected the making of the will in question. Estate of Shay, 196 Cal. 355, 359, 237 P. 1079; Estate of Russell, 189 Cal. 759, 769, 210 P. 249.

"In considering the evidence it is important, preliminarily, to observe that it is not every form of insanity, not every mental departure from the normal, which destroys an otherwise valid testamentary act. The rule of law is not that no person who is insane may make a valid will, but that the will of no person who, by reason of insanity, is incapable of making valid testamentary disposition shall be upheld." Estate of Chevallier, 159 Cal. 161, 168, 113 P. 130, 133.

"Ability to transact important business, or even ordinary business, is not the legal standard of testamentary capacity, though it seems to be quite generally but mistakenly supposed, outside the ranks of the legal profession, that a capacity to transact important business is the criterion of fitness to make a valid will. Says the Iowa Supreme Court [Perkins v. Perkins, 116 Iowa 253, 90 N.W. 55]: 'While, as every lawyer knows, a man may be capable of making a good will after he is so far gone into imbecility and mental darkness as to be no longer capable of making a valid deed or of transacting business generally, the very opposite conclusion seems to pervade the lay mind, and the making of a will is, to its apprehension, the one item of business which requires the presence of all one's faculties in their normal strength.'" Estate of Sexton, 199 Cal. 759, 768, 251 P. 778, 782.

Further this was said in the same case, at page 764, of 199 Cal., at page 780 of 251 P.: "A testator is of sound and disposing mind and memory if, at the time of making his will, he has sufficient mental capacity to be able to understand the nature of the act he is doing, to understand and recollect the nature and situation of his property, and to remember and understand his relations to the persons who have claims upon his bounty and whose interests are affected by the provisions of the instrument."

Still further in the same case, the court said, at page 766 of 199 Cal., at page 781 of 251 P.: "Testamentary capacity is always presumed to exist until the contrary is established. That is to say, the presumption is always that a person is sane, and the burden is always upon the contestant to show affirmatively and by a preponderance of evidence that the testator, at the time of executing the will, was of unsound mind." In re Wilson's Estate, 117 Cal. 262, 49 P. 172, 711; Estate of Perkins, 195 Cal. 699, 235 P. 45; 26 Cal.Jur. 756.

[13] Dr. Thurlow's evidence was that in his opinion Arnold was of unsound mind in the medical sense. No greater weight can be given to the testimony of the two other physicians who gave as their opinion that the testator was of unsound mind. Their testimony must be construed in connection with the other evidence in the case produced on behalf of the contestant which showed that Arnold did attend to his ordinary business, made loans, met his appointments made previously and also acted as the executor of his wife's will in the settlement of her estate in the probate court of Sonoma county during the years 1935, and 1936.

"A person who has mental power to understand and to transact the ordinary business affairs of life, doubtless, has capacity to make a valid will. But the converse is not necessarily true. Mental perception and power to think and reason of a lesser degree than that which is required in the understanding and transaction of ordinary business may be all that is requisite to the full understanding of everything involved in the execution of a will." Estate of Sexton, supra, 199 Cal. 759, 769, 251 P. 778, 782.

[14] Great reliance is placed by contestant upon the evidence of Doctors Pleth and Thurlow that long and excessive use of intoxicating liquor causes a disease and deterioration of the brain cells, which results in a loss of memory and impairment of the mental faculties. Contestant contends that long and excessive use of intoxicating liquors had brought this condition upon Arnold. Giving this evidence all that can possibly be claimed for it, it simply shows that Arnold had sustained, as a result of chronic alcoholism, a loss of memory and an impairment of his other mental faculties, but it failed to show that "utter inca-

pacity to know and understand those things which the law prescribed as essential to the making of a will."

"Where the point is made that a decedent was of unsound mind at the time he executed his will because of long use of alcoholic liquors, evidence of such use both before and after the execution of the will and of the effect thereof upon his mind is admissible in so far as it tends to reveal his mental condition at the time of the execution of the will. The intemperate use of alcoholic beverages, if continued for a sufficient length of time, may destroy testamentary capacity. Nevertheless, in the absence of proof that the intemperate use has actually destroyed testamentary capacity, no presumption will be indulged, however long continued the habit is shown to have been, that it has thus been destroyed." Estate of Fisher, 202 Cal. 205, 209, 259 P. 755, 756.

[15] As we have seen the will of Arnold was prepared by him and was entirely in his own handwriting. It is a perfectly natural will. Of the two principal beneficiaries, one was an old friend of his wife, during her lifetime, and the other was his personal friend who had been kind to him and cared for him during his numerous spells of sickness brought on by excessive drinking. Of those who received lesser amounts under this will, one was a lady who had lived next door to him and his wife, during the lifetime of his wife, and the others, with the exception of the contestant, were relatives of his wife or old friends of himself and his wife for years past. The contestant, as we have seen, was given $1,000. He lived at Modesto, and while he was on friendly terms with the testator they had seen little of each other for a number of years prior to the testator's death.

"Nephews are not necessarily the natural objects of the bounty of [a testator]." Estate of Jacobs, 24 Cal.App.2d 649, 651, 76 P.2d 128, 129. "Moreover, it is well settled that collateral heirs, such as brothers and sisters, are not 'natural objects of bounty' as that term is used in the interpretation of wills, and therefore, in cases such as this, where the next of kin are collaterals and one or more are unprovided for in the will, the pretermitted persons, in order to establish that the instrument is unnatural, must show affirmatively that they had peculiar or superior claims to the decedent's bounty; and, if no such claim is adduced, the instrument cannot be held to be unnatural." 26 Cal.Jur. 695, 696. Estate of Jacobs, 24 Cal. App.2d 649, 652, 76 P.2d 128, 129. There is a dearth of any showing by contestant in this action that he had any peculiar or superior claim to the bounty of the testator.

Absolutely no showing was made that the testator at the time of executing his will was not in the possession of sufficient mental capacity to understand the nature of his act, the extent and character of his property, and the relationship to persons who were the natural objects of his bounty. If a person has sufficient mental capacity to know and understand these three requirements, he is possessed of sufficient mental capacity to make a will disposing of his estate. Estate of Perkins, 195 Cal. 699, 703, 235 P. 45; Estate of Shay, supra, 196 Cal. 355, 361, 237 P. 1079; Estate of Sexton, 199 Cal. 759, 764, 251 P. 778.

[16] So far we have said but little respecting the physical characteristics of Arnold's will, except that it is holographic in form, being entirely written, dated and signed by the testator. A photostatic copy of the will is before us, having been admitted in evidence, as an exhibit in support of contestant's case. Had one the least doubt of the mental capacity of Arnold at the date of its execution to make his will, it would be entirely dispelled by an inspection of the photostatic copy. It is mute, but convincing evidence that it was not prepared by a drunken person, or by one whose hand had become palsied by the long and excessive indulgence in intoxicating liquor. It consists of two pages, and is written in plain legible style. No nervousness or trembling on the part of the testator is indicated in the body of the will. We observe but one misspelled word in the whole document. The names of the beneficiaries are set forth, and the addresses of most of them are given, and in two instances even the street on which they resided is given.

We are in accord with the opinion of the trial court respecting the will, stated in the following language: "The will is a perfectly natural will and bears no evidence upon its face of any mental weakness of the testator, much less anything amounting to mental incapacity in a legal sense. On the contrary it is convincing evidence of his testamentary capacity, for it contains within itself direct evidence of every element of competent ability in this regard."

Respecting a will in a similar form and executed under circumstances similar to those surrounding the execution of the will now before us, the District Court of Appeal made the following observations, which in our opinion may well be applied to Arnold's will: "There is, as we have in other words declared, nothing in the testimony from which the inference necessarily follows that the deceased 'had no intelligent comprehension of what he was doing' when he wrote his will. To the contrary, the will itself is mute but convincing evidence of the fact that he fully comprehended what he was doing when he wrote it. Indeed the fact that the will is holographic, and that it was prepared by himself in strict accord with the law prescribing the requisites of such a testament—that by it he indicated that he knew that, as the law requires, such a will, to be valid, must be in the testator's own writing and dated by him—is itself well-nigh indubitable evidence that he was very much 'at himself' when he drew the instrument, and at that time knew precisely what he was doing and how he desired to dispose of his estate." Estate of Little, 46 Cal.App. 776, 789, 189 P. 818, 824.

[17] We therefore conclude that there was no substantial evidence presented by contestant in support of the finding of the jury that Arnold was not of sound and disposing mind on May 6, 1936, the date of the execution by him of the document offered in probate by the proponents. It was, therefore, the duty of the trial court to grant the motion for judgment in favor of proponents notwithstanding the verdict of the jury in favor of contestant.

The judgment is affirmed.

We concur: GIBSON, C. J.; SHENK, J.; EDMONDS, J.; YORK, Justice pro tem.; MOORE, Justice pro tem.

CARTER, Justice.

I dissent.

I am of the opinion that the trial court was not justified in granting a motion for judgment notwithstanding the verdict in this case because there was ample evidence from which the jury could reach the conclusion that the testator was mentally incompetent at the time of the execution of his will.

Bearing in mind that in cases of this kind all evidence in favor of the contestant must be taken as true, and if contradictory evidence has been received, it must be disregarded, we cannot ignore the testimony of the family physician who attended the testator from 1929 until during the year of 1935, that certain cells of Mr. Arnold's brain had been destroyed by alcoholism, and that in his opinion, Mr. Arnold was of unsound mind on May 6, 1936. Mr. Arnold's case was also characterized by said physician as progressive or growing deterioration of the mind and degeneration or destruction of the brain cells due to chronic alcoholism.

When a testator is afflicted with a progressive mental disease, cases in this State have held that "evidence of the testator's mental status, together with his appearance, conduct, acts, habits and conversation, both before and after the execution of the will, are admissible so long as they have a reasonable tendency to indicate his mental condition at the time of the execution of the will." 68 C.J. 463, sec. 71; Estate of Hartley, 137 Cal.App. 630, 633, 31 P.2d 240; Estate of Alexander, 111 Cal.App. 1, 7, 295 P. 53; Estate of Ivey, 94 Cal.App. 576, 587, 271 P. 559; Estate of Sexton, 199 Cal. 759, 251 P. 778; Estate of Lenci, 106 Cal.App. 171, 177, 288 P. 841; Estate of Jones, 166 Cal. 108, 111, 135 P. 288; Estate of Albertson, 31 Cal.App.2d 211, 217, 87 P.2d 883; Estate of Miller, 16 Cal.App.2d 154, 165, 60 P.2d 498.

A summary of the evidence regarding the effect of chronic alcoholism upon the mentality of Mr. Arnold and of the progressive nature of his mental deterioration, gleaned largely from the testimony of his family physician and one other attending physician is, briefly, as follows:

The testator was addicted to the constant use of alcoholics. He was "incompetent as a thorough chronic alcoholic". Arnold was "always intoxicated" and "unaccountable"; he suffered numerous attacks of delirium tremens. He had to be treated for psychosis—alcoholic degeneration; at times he saw squirrels sitting on his bed posts, snakes squirming on the floor and other animals he could not describe. Between 1929 and 1935, he became steadily worse. During the latter part of 1933, he lost all interest in his wife, home, garden and in the things most normal people are interested in. He neglected his clothes, did not wash his face and did not button his coat. He said he was tired of living, and had to be deprived of his bottle of strychnine tablets which he kept secreted in his bed. On occasions he drank four or five quarts of whiskey or brandy in three days in his home. Those suffering from chronic alcoholism suffer a degeneration of the brain due to a frequent swelling of the membranes around the brain. Arnold's was a progressive chronic alcoholism destructive of the brain cells. The nerves extending out from the brain controlling the arms and legs were evidently damaged, because Arnold could not walk, but would stagger. He had a positive Romberg condition in that he could not balance. He had cirrhosis of the liver, arthritis, lumbago and arteriosclerosis. Repeated occurrences of delirium tremens and of a condition of intoxication over a period of years deteriorate all brain structures. In Mr. Arnold's case, according to the rules of the law of medicine, that portion of the brain where thinking is done was damaged and destroyed. Due to his alcoholic debauches, the family physician was of the opinion that the cells of Arnold's brain had shrunk and impaired his power of thought. The tortuous, twisted blood vessels revealed by an examination of his eyes, indicated a brain disturbance or degeneration from alcoholism. He suffered from an emotional disturbance, feared that enemies were talking about him. He was nervous and shaky and there was a tremor in his hands. He had no memory at all. Numerous intimate acquaintances testified that the testator was almost continuously intoxicated and irrational.

In spite of the positive and impressive character of the evidence with regard to the testator's mental incompetency, the majority opinion states that such evidence failed to show that Arnold's excessive use of intoxicating liquor over a long period of time had destroyed "utter capacity to know and understand those things which the law prescribed as essential to the making of a will."

As authority for this view said opinion relies upon the case of Estate of Fisher, 202 Cal. 205, 209, 259 P. 755, 756, and particularly upon the following excerpt therefrom: "Where the point is made that a decedent was of unsound mind at the time he executed his will because of long use of alcoholic liquors, evidence of such use both before and after the execution of the will and of the effect thereof upon his mind is admissible in so far as it tends to reveal his mental condition at the time of the execution of the will. The intemperate use of alcoholic beverages, if continued for a sufficient length of time, may destroy testamentary capacity. Nevertheless, in the absence of proof that the intemperate use has actually destroyed testamentary capacity, no presumption will be indulged, however long continued the habit is shown to have been, that it has thus been destroyed."

It seems to me that the proper view to be taken of the instant case is not that the evidence presented herein to show decedent's lack of testamentary capacity raised a presumption that said capacity had been destroyed, but that there was evidence that the continued and excessive use of liquor had caused a disease and destruction of decedent's brain tissue, with a resultant loss of memory and other faculties, and that, therefore, testimony as to the mental condition, acts, and conversations of the testator, both before and after the execution of his will was properly submitted to the jury to determine his competency on the date of its execution, and, further, that the determination of this issue was within the province of the jury.

Objections to the positive testimony that the testator was of unsound mind when the will was executed, such as those that the family physician had not seen the testator at all times or had not attended him continuously up to the time of his death, go to the weight of the testimony and are likewise matters to be determined by the trial jury and not by this court. The same rule applies to the argument that the will itself established the fact that there was testamentary capacity. It may be some evidence of the fact, but certainly is not conclusive to the extent that all other evidence to the contrary must be disregarded.

In my opinion therefore, the judgment of the trial court should be reversed.

16 Cal.2d 563

In re ESTREM'S ESTATE.

SANGUIN et al. v. HILL, Public Administrator of Alameda County.

S. F. 16294.

Supreme Court of California.

Nov. 12, 1940.

1. Wills ⚷358

An order denying contestants' motion to set aside an order admitting a will to probate was an "appealable order." Code Civ. Proc. § 473; Probate Code, § 1240.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

2. Wills ⚷249

Generally, a will should be submitted in first instance to forum at domicile of testator.

3. Wills ⚷249, 251

A probate court may acquire jurisdiction over estate of a deceased either if domicile of deceased was within the state, or if there are present assets of deceased within the state. Probate Code, § 301(3).

4. Wills ⚷241

The appropriate court of a jurisdiction in which assets of estate of nonresident testator are found may grant probate of his will even though will has not been presented for probate in state of testator's domicile. Probate Code, § 301(3).

5. Descent and distribution ⚷1
Executors and administrators ⚷12

Every state has plenary power with respect to administration and disposition of all property of a deceased found within the jurisdiction.

6. Wills ⚷241

The provisions of Probate Code providing manner in which will of a nonresident originally probated at his domicile may be offered for ancillary probate in state contain no language which would prevent original probate in state of a will of nonresident not probated at place of domicile, nor do they oust probate courts of such original jurisdiction when undertaken in ignorance of pendency of a similar proceeding at place of domicile. Probate Code, §§ 360–362.

7. Executors and administrators ⚷35(1), 453
Wills ⚷241, 245

Where superior court admitted to probate a will of deceased who died in Belgium and who, at time of death, was a resident of France, which was dated August 13, 1930, without notice of later will dated June 10, 1936, later will of 1936 could be offered in California for either original or ancillary probate and, if later will was then admitted to probate, the pre-existing grant of letters testamentary would be revoked, and executor whose grant of authority was thus terminated would be required to render an account of his administration within such time as the court might direct. Probate Code, §§ 301(3), 510.

8. Wills ⚷355

The superior court of Alameda county, in admitting to probate a will of deceased who died in Belgium and who, at time of death, was a resident of France, necessarily found in accordance with allegations of petition that deceased had left property in Alameda county, and devisees, who had been served with notice of proceeding to probate will and had full opportunity to come in and contest such finding, could not have jurisdictional facts as to existence of property of deceased in Alameda county re-examined, after time for an appeal had elapsed, by moving to have order admitting will to probate set aside as void because made without jurisdiction. Code Civ.Proc. § 473, par. 4; Probate Code, § 301(3).

9. Judgment ⚷338

When all parties affected by judgment are actually or constructively before court with an opportunity to assert their contentions and to appeal from an adverse ruling, finding of jurisdictional facts by the court can be reviewed only by an appeal or other timely and available direct attack.

10. Judgment ⚷340

The superior court has jurisdiction at any time to set aside a judgment or order void on its face independent of 1933 amendment to Code of Civil Procedure providing that court may, on motion of either party after notice to other party, set aside any void judgment or order. Code Civ.Proc. § 473, par. 4.

11. Judgment ⚷340

A superior court has power within a reasonable time, which by analogy to a provision of Code of Civil Procedure has been limited to one year, to set aside a default judgment or order void, not on its face, but because of want of jurisdiction over the person of a defendant who had at no time been present in the proceedings. Code Civ.Proc. § 473a.

12. Judgment 🔑375, 443(1)

A judgment can be attacked at any time either by motion or in an independent action in equity on grounds that judgment was secured by extrinsic fraud.

13. Judgment 🔑338

A superior court cannot, after time for appeal has elapsed, set aside a judgment or order on ground that the court lacked jurisdiction, when the facts establishing jurisdiction were found by the court in the original proceedings, and all adverse parties were properly served with notice and had opportunity to present their objections. Code Civ. Proc. § 473, par. 4.

14. Wills 🔑355

The inventory and appraisement, filed subsequent to order of superior court for Alameda county, admitting to probate a will of deceased who died in Belgium and who, at time of death, was resident of France, on ground that deceased had left property in Alameda county, which allegedly disclosed an absence of property in Alameda county, did not disclose a lack of jurisdiction of superior court to enter order on face of the judgment roll so as to permit order to be challenged at any time, since inventory and appraisement were not part of judgment roll in the proceeding to admit will to probate. Code Civ.Proc. § 473, par. 4; Probate Code, § 301(3).

15. Wills 🔑355

Even if inventory, filed subsequent to order of superior court for Alameda county admitting to probate a will of deceased who died in Belgium and who, at time of death, was a resident of France, was available to show lack of jurisdiction of superior court on face of judgment roll, inventory did not show that superior court was without jurisdiction because at time of death none of deceased's property had a situs in Alameda county, where inventory merely stated that certain property which superior court might have deemed situated in Alameda county was without value in the opinion of appraiser. Code Civ.Proc. § 473, par. 4; Probate Code, § 301(3).

In Bank.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Proceeding in the matter of the estate of Jean Estrem, deceased, by Auguste Sanguin and others, contestants, opposed by Albert E. Hill, Public Administrator of the County of Alameda, State of California, and special administrator of the estate of Jean Estrem, deceased. From an order denying contestants' motion to set aside an order admitting to probate the will of Jean Estrem, deceased, the contestants appeal.

Affirmed.

Prior opinion, 101 P.2d 510.

Joseph L. Lewinson, A. L. Abrahams, Harry G. Sadicoff, and Morris E. Cohn, all of Los Angeles, for appellants.

Ralph E. Hoyt, Dist. Atty., J. F. Coakley, Chief Asst. Dist. Atty., and Owen E. Hotle, Jr., Deputy Dist. Atty, all of Oakland, for respondent.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, Frank J. Hogan, Wellborn, Mitchell, Barrett & Rodi, Frederick D. Anderson, and Bertram L. Linz, all of Los Angeles, and Robinson, Price & Macdonald, of Oakland, amici curiæ.

GIBSON, Chief Justice.

On August 16, 1937, the superior court of Alameda county made an order admitting to probate the will of Jean Estrem, dated August 13, 1930. The order recited that notice had been regularly given to all interested parties as required by law; that the decedent died on May 28, 1937, in Belgium; that at the time of his death he was a resident of France, and that he left estate within the counties of Alameda and Fresno, state of California. Edward R. Eliassen was appointed executor. No appeal was taken from this order, and the time for appeal has long since expired.

Jean Estrem had, however, made a later will dated June 10, 1936. By decree of a French court on June 9, 1937, this will was established as the last will and testament of Estrem. The Alameda court had no notice of this subsequent will when it admitted the 1930 will to probate.

Eliassen subsequently filed an inventory and appraisement showing the property of the estate in California to consist of two parcels of land in Fresno county, a promissory note for $2,000 on which the statute of limitations had run, and shares of stock in a California corporation having its principal place of business in Fresno county. The last two items were appraised as having no value. On January 5, 1939, appellants, certain devisees under the will who had been served with notice of the original proceedings, moved to set aside and annul the order admitting the will to probate and to recall and cancel the letters testamentary issued to Eliassen as executor of the will. The court entered an order denying the motion, and from this order the devisees have appealed.

[1] A preliminary question is raised as to the appealability of this order denying the motion to set aside the probate. The decision in Re Estate of O'Dea, Cal.Sup., 104 P.2d 368, handed down since the filing of the briefs herein, was cited to us on oral argument. That case holds that section 1240 of the Probate Code specifies the only orders and judgments in probate from which an appeal will lie, and an order made on a motion under section 473 of the Code of Civil Procedure, like any other probate order, is appealable only if expressly so declared in section 1240. The effect of the order here under consideration was a refusal to revoke the probate and the letters issued pursuant thereto, and an order either granting or refusing such relief is expressly made appealable by section 1240.

Appellants contend that the order admitting the will to probate and directing issuance of letters to the executor is void on its face and therefore open to challenge at any time. The principal ground urged in support thereof is the admitted fact, appearing in both the petition for and the order admitting the will to probate, that the decedent at the time of his death was living in France, and thus was a nonresident of this state. Both the petition and order declared, however, that decedent had left property situate in Alameda and Fresno counties of this state. Based on the latter allegation, the Alameda county superior court, wherein application was first made by the executor, admitted the will to original probate.

[2, 3] Thus, the first question to be determined is whether the probate court of Alameda county had jurisdiction to grant original probate of the will of a nonresident who died leaving property in the county. Generally speaking, a will should be submitted in the first instance to the forum at the domicile of the testator. But in California a probate court may acquire jurisdiction over the estate of a deceased person in either of two situations: the domicile of such person within the state, or the presence of assets within the state. Section 301 of the Probate Code provides that "Wills must be proved, and letters testamentary or of administration granted and administration of estates of decedents had, in the superior court: * * * (3) Of any county in which he leaves estate, the decedent not being a resident of the state at the time of his death, and having died out of the state * * *".

[4, 5] Similar statutes have been enacted in other states, and in applying them it has been held that the appropriate court of a jurisdiction in which assets of the estate of a nonresident testator are found may grant probate of his will even though the will has not been presented for probate in the state of his domicile. See In re Holden's Estate, 110 Vt. 60, 1 A.2d 721, 119 A.L.R. 491. In applying a statute substantially the same as subdivision 3 of section 301, supra, the court in Re Smith's Estate, 55 Wyo. 181, 97 P.2d 677, 682, declared: "It is held by the great weight of authority under like or similar statutory provision that a will may be admitted to probate in a state other than that of the domicile of the deceased, though it has never been admitted in the latter state; and that the admission to probate in the state of the domicile is not a condition precedent to the admission in another state where the deceased leaves real or personal property." These cases represent applications of the principle that every state has plenary power with respect to the administration and disposition of all property of deceased persons found within the jurisdiction. This principle found early expression in this state in Re Estate of Clark, 148 Cal. 108, 112, 82 P. 760, 761, 1 L.R.A.,N.S., 996, 113 Am.St.Rep. 197, 7 Ann.Cas. 306. That case presented the converse of our problem, namely, whether the will of a resident could be admitted to ancillary probate here after original probate in another state. In construing and applying the sections of the Code of Civil Procedure which antedated the present Probate Code sections, the court declared that "Recognition would be given to the indisputable principle that every state has plenary power with respect to the administration and disposition of the estates of deceased persons as to all property of such persons

found within its jurisdiction. Thus the courts of a state may and do grant original probate upon wills of deceased nonresidents who leave property within that state. In California this is expressly provided for by section 1294, supra, and the rule as to other states is the same." Upon denial of a rehearing in that case the court stated page 125 of 148 Cal., page 767 of 82 P., 1 L.R.A.,N.S., 996, 113 Am.St.Rep. 197, 7 Ann.Cas. 306, that "The fact that in this state, as in other states and countries, wills of nonresidents are admitted to probate on original proceedings for the purpose of administering upon their property within the state is no impeachment of this proposition. In such cases it is the property within this state and subject to its jurisdiction which constitutes the res, and proof of the will is allowed as a mere incident or means of determining the disposition of that property. And the decree which has only that purpose is conclusive only to that extent. It binds that property here and everywhere that the decrees of our courts are accorded full faith and credit, whether by comity or by force of the federal Constitution. But such a decree is not binding as to the will itself in other jurisdictions where the decedent may have left property, and still less is it binding upon the courts of his domicile. It is not conclusive in other jurisdictions, simply because, as a will and for all purposes, it has not been duly proved and allowed. It has been proved and allowed so far as it affects the disposition of the property within the particular jurisdiction, but no further." Whether essential to the decision or not, such declaration is sound law and is in accord with the weight of authority and with the Restatement of Conflict of Laws, section 469. It was reiterated by this court in Re Estate of Edelman, 148 Cal. 233, 239, 82 P. 962, 964, 113 Am.St. Rep. 231, wherein it was stated that "the court had jurisdiction to grant original probate of the will of the deceased, although a nonresident, since she had left property within this state." See, also, Dungan v. Superior Court, 149 Cal. 98, 84 P. 767, 117 Am.St.Rep. 119, and In re Estate of Davis, 149 Cal. 485, 87 P. 17.

[6] Sections 360–362 of the Probate Code, relied on by the appellants, offer no obstacle to our conclusion. Those sections merely provide the manner in which the will of a nonresident originally probated at his domicile may be offered for ancillary probate here. They contain no language which would prevent the original probate in this state of a will of such nonresident not probated at the place of domicile, nor do they oust the probate courts of such original jurisdiction when undertaken in ignorance of the pendency of a similar proceeding at the place of domicile. The case of Patterson v. Dickinson, 9 Cir., 193 F. 328, cited by appellants, was an action in equity in which the husband of the decedent was declared to hold property in trust for certain other heirs because of his fraud in presenting for ancillary probate the will of his wife which had been declared invalid by the court of original probate at the place of domicile. The judgment roll in the present case does not disclose any facts constituting such fraud.

[7] If, as contended by appellants, the later will of 1936 was in fact the true last will and testament of decedent, and not merely a codicil to the earlier will, they are free to offer in this state for either original or ancillary probate such later testamentary instrument. Should it then be admitted to probate, section 510 of the Probate Code provides that "the pre-existing grant of letters testamentary or of administration must be revoked, and the administrator or executor whose grant of authority is thus terminated must render an account of his administration within such time as the court may direct. * * *"

This brings us to appellants' chief ground of appeal, the assertion that the decedent actually left no property in Alameda county and that the superior court of that county was therefore without jurisdiction to admit the will to probate. Section 473 of the Code of Civil Procedure, paragraph 4, provides in part: "The court may * * * on motion of either party after notice to the other party, set aside any void judgment or order." No time limit is fixed within which such a motion must be made, and appellants contend that although the time for appeal from the order admitting the will to probate has passed, they can proceed under this provision to have the order set aside as void because made without jurisdiction.

But the order does not, on its face, appear to be void; and appellants have sought to establish lack of jurisdiction by facts appearing outside the judgment roll, and contrary to the finding of the probate court. The question, then, is whether the above-quoted provision of section 473 permits a re-examination of jurisdictional facts, which the probate court has already found to exist, at the instance of a party who had proper notice of the original proceedings with an opportunity at that time to come in and contest the finding and to review any determination thereof on appeal.

[8, 9] We are of the opinion that section 473 does not permit such an attack upon the original finding of jurisdictional fact by the probate court. The jurisdiction of the court to render a judgment or order often depends upon the preliminary determination of certain jurisdictional facts. When all parties affected are actually or constructively before it with an opportunity to assert their contentions and to appeal from an adverse ruling, the finding of such facts by the court may be reviewed only by an appeal or other timely and available direct attack. This finding cannot be attacked in proceeding under paragraph 4 of section 473 to have the judgment declared void, nor can it be attacked in any collateral proceeding. In such situations the finding is as conclusive as any other finding of fact by the court in the original proceeding. While the rule of conflict of laws has been that in a suit on a foreign judgment the court of the forum could always inquire into the jurisdiction of the original court (Thompson v. Whitman, 18 Wall. 457, 85 U.S. 457, 21 L.Ed. 897; Ritchie v. Carpenter, 2 Wash. 512, 28 P. 380, 26 Am.St. Rep. 877; Reynolds v. Stockton, 140 U.S. 254, 11 S.Ct. 773, 35 L.Ed. 464; Grover & Baker Sewing Machine Co. v. Radcliffe, 137 U.S. 287, 11 S.Ct. 92, 34 L.Ed. 670; National Exchange Bank v. Wiley, 195 U.S. 257, 25 S.Ct. 70, 49 L.Ed. 184; Matera v. Hauptmann, 179 A. 626, 13 N.J.Misc. 483), the increasing tendency is to treat a finding by the original court of jurisdictional facts, whether as to person or subject matter, binding upon the court in which suit on the judgment is brought, when the question was originally duly litigated with proper notice and participation of all the parties affected by it. Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 51 S.Ct. 517, 75 L.Ed. 1244; American Surety Co. v. Baldwin, 287 U.S. 156, 53 S.Ct. 98, 77 L.Ed. 231, 86 A.L.R. 298; John Simmons Co. v. Sloan, 104 N.J.L. 612, 142 A. 15; Blakeslee v. Blakeslee, 213 Ill.App. 168; Chamblin v. Chamblin, 362 Ill. 588, 1 N.E.2d 73, 104 A.L.R. 1183; 80 U. of Pa.L.Rev. 386. This has been the rule in California with regard to attacks on judgments rendered by our own courts. Dungan v. Superior Court, 149 Cal. 98, 84 P. 767, 117 Am.St.Rep. 119; Holabird v. Superior Court, 101 Cal.App. 49, 281 P. 108; In re Eichoff's Estate, 101 Cal. 600, 36 P. 11.

In the present case the superior court of Alameda county, in admitting the will to probate, necessarily found in accordance with the allegations of the petition that the decedent had left property in Alameda county. The appellants were served with notice of such proceeding and had full opportunity to come in and contest such a finding. If the finding was erroneous, it could have been attacked on appeal. The time for appeal having elapsed, the finding has become conclusive.

[10-12] These principles were not changed by the amendment of 1933, St. 1933, p. 1851, adding the above-quoted provision to section 473 of the Code of Civil Procedure. We need not be concerned with the proper characterization of such proceedings as a direct or collateral attack. Long prior to this amendment it was well established that the superior court had jurisdiction at any time to set aside a judgment or order void on its face. Capital Bond, etc., Co. v. Hood, 218 Cal. 729, 24 P.2d 765; Baird v. Smith, 216 Cal. 408, 14 P.2d 749; Reher v. Reed, 166 Cal. 525, 137 P. 263, Ann.Cas.1915C, 737; In re Dahnke's Estate & Guardianship, 64 Cal. App. 555, 222 P. 381; Vaughn v. Pine Creek Tungsten Co., 89 Cal.App. 759, 265 P. 491; People v. Greene, 74 Cal. 400, 16 P. 197, 5 Am.St.Rep. 448; People v. Temple, 103 Cal. 447, 453, 37 P. 414; Michel v. Williams, 13 Cal.App.2d 198, 56 P.2d 546. It was further settled that it had the power within a reasonable time, which by analogy to Code of Civil Procedure section 473a was limited to one year, to set aside a default judgment or order void, not on its face, but because of want of jurisdiction over the person of a defendant who had at no time been present in the proceedings. Richert v. Benson Lumber Co., 139 Cal. App. 671, 34 P.2d 840; Smith v. Jones, 174 Cal. 513, 163 P. 890; In re Dahnke's Estate & Guardianship, supra; Barnett v. Reynolds, 124 Cal.App. 750, 13 P.2d 514; Vaughn v. Pine Creek Tungsten Co., supra. In addition, a judgment could be attacked at any time either by motion or in an independent action in equity on the grounds that it was secured by extrinsic fraud. McGuinness v. Superior Court, 196 Cal.

222, 237 P. 42, 40 A.L.R. 1110; McKeever v. Superior Court, 85 Cal.App. 381, 259 P. 373; Kasparian v. Kasparian, 132 Cal.App. 773, 23 P.2d 802; Tomb v. Tomb, 120 Cal. App. 438, 7 P.2d 1104; Kronman v. Kronman, 129 Cal.App. 10, 18 P.2d 712.

[13] Prior to 1933 this particular subdivision of 473 was in section 900a of the Code of Civil Procedure, relating to justices' courts. In that year as part of extensive amendments made to the various Code sections relating to the jurisdiction and procedure of the courts, the special sections relating to the justices' courts were repealed and their contents incorporated in the general sections relating to pleadings in civil actions, Code Civ.Proc. secs. 420 to 475, which were at that time made applicable to all courts. Code Civ. Proc. sec. 34. Fear existed that unless the contents of former section 900a was placed in some statute, courts not of record might be held to be without those powers. F. E. Young Co., Inc. v. Fernstrom, 31 Cal.App. 2d Supp. 763, 79 P.2d 1117. Thus, the 1933 amendment to section 473 added nothing to the jurisdiction of the courts with respect to setting aside their judgments or orders. Independently of this provision a court may set aside at any time a judgment or order obtained by extrinsic fraud. A court may set aside at any time a judgment or order void on its face. It may set aside a default judgment or order issued without proper jurisdiction over the person of a defendant who at no time was before the court if motion for such relief is made within one year. And, of course, it may set aside a judgment or order inadvertently made upon motion within six months, under section 473. But it cannot, after time for appeal has elapsed, set aside a judgment or order on the ground that the court lacked jurisdiction, when the facts establishing such jurisdiction were found by the court in the original proceedings, and all adverse parties were properly served with notice and had the opportunity to present their objections.

[14, 15] Appellants contend further that these principles are inapplicable because the inventory and appraisement, filed subsequent to the order admitting the will to probate, disclosed an absence of property in Alameda county. This, they claim, constituted a showing of lack of jurisdiction on the face of the judgment roll. There are several answers to this contention. First, the inventory is not a part of the judgment roll in the proceeding to admit the will to probate. Second, the inventory does not show that at the time of death none of the decedent's property had a situs in Alameda county. It cannot therefore be said to establish a want of jurisdiction in the Alameda county probate court, even assuming its availability for that purpose. Thirdly, it may be observed that the inventory merely states that certain property which the court might have deemed situate in Alameda county was without value, in the opinion of the appraiser. This does not constitute a conclusive showing that there was no property at all which the probate court could find to be situated in Alameda county.

The order is affirmed.

We concur: EDMONDS, J.; SHENK, J.; CARTER, J.; MOORE, Justice pro tem.; MARKS, Justice pro tem.

16 Cal.2d 494

GHIRARDELLI v. PENINSULA PROPERTIES CO.

S. F. 16145.

Supreme Court of California.

Nov. 6, 1940.

As Modified on Denial of Rehearing Dec. 6, 1940.

1. Contracts 🔑143

In interpretation of a contract, all of the writing must be read together and every part interpreted with reference to the whole, so that each provision therein will be effective for its general purpose.

2. Sales 🔑89

Where supplemental agreement between seller of hotel equipment and buyer entered into at time when there remained unpaid balance of $11,845, providing for assignment of notes by buyer to seller and appointment of trustee to collect notes, contained provision that when there had been collected upon notes a sufficient sum so that there remained a balance payable to seller of $11,000, seller would execute bill of sale and release buyer from obligations on conditional sales contract, the provision would not be construed as a release by seller of $11,000, but rather would be construed as referring to the gross amount, less authorized deductions, collected by trustee and payable by him to seller, in view of other provisions of supplemental agreement.

3. Sales 🔑477(1)

Notes given in connection with a conditional sales contract are but evidence of promises to pay certain sums at specified dates, and, upon default by purchaser in complying with terms of notes, seller is not restricted to an action based upon notes, but may retake possession of the property, or ratify the contract as one for an absolute sale and sue for recovery of all moneys payable thereunder.

4. Limitation of actions 🔑65(1)

Where terms of supplemental agreement entered into between seller of hotel equipment and buyer provided for assignment of notes by buyer to seller and appointment of trustee to collect notes, and that remedies of seller on original conditional sales agreement would be suspended until trustee had made a full accounting and returned uncollected notes, statute of limitations did not commence to run on seller's action until trustee had made a full accounting and returned the uncollected notes, since trustee's act was a "condition precedent" to commencement of the action. Code Civ.Proc. § 337.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition Precedent".

5. Damages 🔑71

Seller of hotel equipment was properly allowed attorney's fees in action against buyer for unpaid balance, where original conditional sales agreement provided that buyer would pay attorney's fees if seller employed an attorney to collect any unpaid amount thereunder.

6. Damages 🔑68

Where seller of hotel equipment and buyer entered into a supplemental agreement providing that buyer was to assign notes to seller and trustee was to be appointed to collect notes, and that remedies of seller on original conditional sales agreement were to be suspended until trustee had made a full accounting and returned the uncollected notes, seller was entitled to interest as damages for detention of amount owing, but interest was recoverable only from date trustee rendered his account.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by D. Lyle Ghirardelli against the Peninsula Properties Company to recover a balance claimed due for goods sold and delivered. From a judgment for plaintiff, the defendant appeals.

Judgment modified and, as modified, affirmed.

Prior opinion, 98 P.2d 734.

Carlyle Miller, of San Francisco, for appellant.

Oliver Dibble and Samuel I. Jacobs, both of San Francisco, for respondent.

EDMONDS, Justice.

The dispute which resulted in this litigation arose over the construction of an agreement made by Peninsula Properties Company, the owner of Rio Del Mar Country Club, in connection with a conditional sales contract executed by it. The appeal is from a judgment in favor of the assignee of the seller, respondent herein.

In 1930, the respondent's assignor sold furniture for the club to an amount of approximately $31,000. Practically all of the purchase price was represented by four promissory notes. Later there was a dispute concerning the performance of this contract by the seller. A supplemental agreement was then executed by the parties providing for certain weekly payments of principal and interest on two notes aggregating $21,000.

A second supplemental agreement was afterward executed. This contract, dated in February, 1932, recites that $11,845 being then due and unpaid, the buyer agrees to transfer certain membership notes of the club to Harold E. Haven, as trustee, for collection and application of the net proceeds upon this amount. It stipulates that the seller shall look solely to the net proceeds of these notes for payment of the amount due as long as the trustee continues to collect them. Other provisions are: "It is further agreed that if the sum of Eleven Thousand ($11,000.00) Dollars is not paid through the aforesaid collections or by * * * (the buyer) prior to March 1st, 1933, then upon a full accounting and the return of all uncollected notes, the * * * (seller) shall be restored to all rights it has under the original conditional sales agreement as to any moneys that may then be due to it." "The * * * (seller) further agrees that if and when there has been collected upon the * * * notes a sum sufficient so that after the * * * authorized deductions there remains a balance payable to it of Eleven Thousand ($11,000.00) Dollars, that it will execute a bill of sale of the * * * furniture and furnishings and release the * * * (buyer) from all obligations on the * * * agreement."

No accounting was made by the trustee until January 22, 1937. On that date he rendered an account showing that on May 30, 1932, the unpaid amount had been reduced to $10,916 and that $5,680 was due on January 1, 1937. The seller's action, commenced April 27, 1937, is upon a common count for the balance due for goods sold. Judgment was rendered in favor of the seller for the sum of $5,685 with interest from the date of suit and $1,000 as attorney's fees.

Appellant's principal contention is that its obligations under the original contract have been released by the fulfillment of the terms and conditions of the second supplemental agreement. He asserts that the quoted provisions of this agreement must be construed as a promise on the part of the seller to execute a bill of sale to the furniture whenever the unpaid balance upon the sale price of the furniture was reduced to an amount less than $11,000. Furthermore, he argues that an action for a balance due is not one of the remedies agreed upon by the parties but, assuming it may be stated upon the terms of the original contract, it is now barred by the statute of limitations. Code Civ.Proc. § 337. Another contention is that the trial court erred in awarding attorney's fees and interest.

[1, 2] In the interpretation of a contract, it is a fundamental rule that all of the writing must be read together and every part interpreted with reference to the whole, so that each provision therein will be effective for its general purpose. Lemm v. Stillwater Land, etc., Co., 217 Cal. 474, 19 P.2d 785; Homer Laughlin Eng. Corp. v. J. W. Leavitt & Co., 116 Cal.App. 197, 2 P.2d 511; Res., Contracts, sec. 235 [d]; Williston on Contracts, Revised Ed., sec. 618. Applying this rule, it is apparent that the purpose of the February, 1932, agreement was to provide a special means for the payment of the amount then owing by the buyer. In consideration of the transfer to the trustee of the notes held by the buyer upon its membership accounts, the seller, for a stipulated period, agreed to waive the right to proceed under its contract and to look for payment solely to the collections made by the trustee. But it certainly could not have been the intention of the parties that when only $845 of almost $12,000 then owing was paid to the seller, it would then execute a bill of sale to the furniture and release the buyer from all of its obligations. Such a construction entirely ignores the further provision that if $11,000 was not paid by March 1, 1933, then the seller "shall be restored to all rights it has under the original conditional sales agreement as to any moneys that may then be due to it". But if the "balance payable to it" of $11,000 is construed as the gross amount, less authorized deductions, collected by the trustee and payable by him to the seller, the several provisions of the contract are entirely consistent. This construction may be reasonably drawn from the words used by the parties and it fully supports the trial court's finding that the buyer's obligations under the contract have not been cancelled and that it is not entitled to a bill of sale.

The next question is whether the seller's cause of action is barred by the statute of limitations. The parties agreed on February 2, 1932, that the amount then due upon the contract was $11,845. It is the appellant's contention that under this agreement, an action for a balance due for goods sold and delivered cannot be maintained.

In connection with the conditional sales contract, the buyer executed four promissory notes having different maturities. The latest installment payable upon any of them was due on November 1, 1931. The appellant contends that the statute of limitations then began to run, at the latest, and now bars recovery. This argument is made upon the theory that the seller may only recover under the terms of the notes, or by forfeiture, repossession, and sale. But conceding, the appellant continues, that the first supplemental agreement operated to suspend the running of the statute, this suspension was only effective until March 1, 1933, because of the provision in the latter agreement that if the sum of $11,000 was not paid in accordance with its terms, "then upon a full accounting and the return of all uncollected notes, the first party shall be restored to all rights it has under the original conditional sales agreement as to any moneys that may then be due to it."

It was wholly within respondent seller's power, the appellant insists, to render the accounting and return the uncollected notes which were necessary to the seller's cause of action, and the statute began to run when it could have first performed the acts upon which its rights depend. If this contention is correct, then the present suit, commenced four years and two months after the date of the supplemental contract, is barred.

[3] The fact that the parties executed promissory notes evidencing the amounts payable under the conditional sale contract does not restrict the seller to an action based upon them. When promissory notes are given in connection with such a contract, they are important in a suit for the balance due on the purchase price only as they indicate more clearly the definite nature of the vendee's promise to pay the purchase price. Arthur E. Guth Piano Co. v. Adams, 114 Me. 390, 96 A. 722. The notes given are but evidence of promises to pay certain sums at specified dates. Upon default by the purchaser in complying with the terms of such notes, the seller may retake possession of the property, or ratify the contract as one for an absolute sale and sue for the recovery of all moneys payable thereunder. Johnson v. Kaeser, 196 Cal. 686, 239 P. 324; and cases cited; Cocores v. Assimopoulos, 127 Cal. App. 360, 15 P.2d 892; Cummings v. Gleason, 72 Conn. 587, 45 A. 353; Sager v. Schmidt, 98 Conn. 736, 120 A. 504; Slocomb v. Lurty, 22 Fed.Cas. 337, No. 12,949; Jones, Chattel Mortgages and Conditional Sales, 6th Ed., vol. 3, sec. 1324.

[4] By the terms of the supplemental agreement, these remedies were suspended until the trustee had made a full accounting and returned the uncollected notes. Pending that event, the creditor could not sue for the amount unpaid. The cause of action was not within its control and depended upon an act to be performed by a third person. Under such circumstances the statute of limitations did not begin to run until the performance of the act which was a condition precedent to the commencement of the action. Williams v. Bergin, 116 Cal. 56, 47 P. 877; 37 C.J. 954.

The principles applicable to contracts which include a forfeiture and acceleration clause are likewise relevant in this connection. For example, where a lessor had the right to declare a lease void if the lessee failed to pay the rent within a stipulated time, it was held that this provision, being for the benefit of the lessor, operated only at his option. The lessee had not paid the rent and later contended that the lease was thereby terminated, but the lessor was allowed to enforce all of his rights under it. Bank of America, etc., Ass'n v. Moore, 18 Cal.App.2d 522, 64 P.2d 460. So, also, upon default in the payment of an installment due upon a promissory note which includes an acceleration clause, although the creditor may sue for the entire amount, as the provision is for his benefit, he need not take advantage of it, and the statute of limitations does not then begin to run. Andrews v. Zook, 125 Cal.App. 19, 13 P.2d 518.

[5] Nor may the buyer's position concerning the trial court's allowance of attorney's fees be sustained. By the original contract, it agreed to pay such fees if the seller employed an attorney to collect any unpaid amount thereunder. The present action falls squarely within that provision.

[6] Finally, the appellant declares that the trial court erred in allowing interest on the sum of $11,845 for the period from January 1, 1932, to March 1, 1937, because the supplemental agreement of February, 1932, does not provide therefor. By the terms of that agreement "$11,845 was due on the * * * conditional sales agreement as of January 1, 1932 * * * and the parties * * * desire to provide for a method of payment of said balance. * * *" The account of the parties was thereby stated and the seller agreed to forego its rights under the original contract until March 1, 1933, and the "full accounting" of the trustees to be later made. These provisions clearly contemplated a new basis for payment of the indebtedness. The amount owed by the buyer still remained "due", in the sense that it continued to be an existing obligation payable at a future time. But the creditor could not enforce payment until the trustee rendered his account and the debtor was not in default until that event occurred. See Gelgud v. Los Angeles Rock, etc., Co., 14 Cal.App. 2d 604, 58 P.2d 673.

However, the creditor is entitled to interest from the date of the debtor's default in payment, not because of any provision of the contract but as damages for the detention of the amount owing. Nesbit v. MacDonald, 203 Cal. 219, 263 P. 1007. It was stipulated that the amount of $5,685.13 sued for and for which judgment was rendered includes $2,554.57 interest accrued to March 31, 1937, the date the trustee rendered his account. As interest is recoverable only from that date, the judgment is modified by striking out the words "the sum of $6,043.64 together with interest thereon from date hereof" and inserting in lieu thereof "the sum of $3,130.56 with interest thereon from March 31, 1937, in the sum of $213.66", and as so modified it is affirmed, without costs on appeal to either party.

We concur: GIBSON, C. J.; CURTIS, J.; SHENK, J.; CARTER, J.; YORK, J. pro tem.; MOORE, J. pro tem.

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41 Cal.App.2d 389

ST. CLAIR ESTATE CO. et al. v. SUPERIOR COURT IN AND FOR KERN COUNTY et al.

Civ. 2723.

District Court of Appeal, Fourth District, California.

November 6, 1940.

Depositions 🔑7

A "question of fact" within meaning of statute was involved in proceedings for supervision of the winding up of affairs of corporation being voluntarily dissolved by certain stockholders, on ground that statement of corporation's affairs was incomplete, untrue, and inaccurate, so as to justify order directing one who was director, secretary, and treasurer of corporation, to appear to have his deposition taken. Code Civ.Proc. §§ 1063 et seq., 2021, 2023, 2055, 2103; Civ. Code, § 403.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

◆

Prohibition proceeding by the St. Clair Estate Company and others against the Superior Court of the State of California in and for the County of Kern and the Honorable H. S. Gans, acting judge of the Superior Court of the State of California in and for the County of Kern, to prevent the respondents from enforcing compliance with an order directing a witness to answer questions on the taking of a deposition.

Writ discharged.

Hanna & Morton, of Los Angeles, and Borton, Petrini, Conron & Borton, of Bakersfield, for petitioners.

Warren E. Libby, of Los Angeles, and Osborn, Burum & Shortridge, of Bakersfield, for respondents.

GRIFFIN, Justice.

The St. Clair Estate Company, hereinafter referred to as the company, is a corporation organized under the laws of California, and petitioners L. P. St. Clair, L. W. Lowell, C. S. Curran, E. S. St. Clair and F. C. St. Clair are directors of the corporation. On December 28, 1938, the stockholders of the company, by vote in excess of 50 per cent thereof, adopted a resolution to voluntarily dissolve and wind up the affairs of the corporation under section 403 of the Civil Code. The Security First National Bank of Los Angeles, as trustee for Cora M. St. Clair and Leonard St. Clair, was the holder of stock in the corporation to the extent of 25 per cent of the outstanding shares thereof. On January 10, 1939, the above-named parties filed in the superior court of Kern county a petition for court supervision of the proceedings for the winding up of the affairs of the company. The court fixed January 20, 1939, as the time for hearing the proceedings and ordered notice to be given to the company, the shareholders and creditors thereof. Notice was duly served. On February 3, 1939, the date to which the hearing was continued, counsel for petitioners therein personally appeared without filing any written answer or written objections, but did argue certain demurrers. The minutes of the court, dated February 7, 1939, show that petitioners herein appeared through their counsel and made certain objections to the proceedings. Thereafter the court made an order as of February 6, 1939, reciting that "F. E. Borton, Esq., appearing for Borton, Petrini, Conron & Borton, and Andrews, Blanche & Kline, attorneys for St. Clair Estate Company * * * and hearing herein having been regularly had upon said petition" it was ordered that winding up of the affairs of the company be supervised and that the company and its officers refrain from distributing or removing any of its assets or altering or destroying its books of accounts. On February 15, 1939, the petitioners in the dissolution proceeding petitioned the court to appoint a separate auditor to make a full and complete audit of the company's affairs and report the same to that court. On April 25, 1939, the petition was opposed by the company, and after both oral and documentary evidence was introduced the court appointed a separate auditor. On March 25, 1940, the auditor filed a partial report which showed many facts indicating that the published report of the company received in evidence and considered at the first hearing was not only incomplete but showed certain transactions and questions of fact which were, at least, deserving of explanation by the company before the court could properly determine the true condition of the affairs of the corporation.

Upon petition to extend the scope of the audit and upon request of the auditor for more information, by a proper showing, the court, over opposition of the company, ordered additional extension of the scope of the audit. On May 21, 1940, the petitioners therein applied to the superior court for an order directing the individual directors of the company to produce their individual reports, books, etc., in court for examination by the auditor. After considering the request and the opposition of the parties, the petition was denied. On June 26, 1940, petitioners therein filed a notice of intention to take the deposition of F. C. St. Clair, director, secretary and treasurer of the company, under the provisions of section 2055 of the Code of Civil Procedure, before a notary public in Kern county on July 2, 1940. The witness appeared personally before the notary public, as directed, with counsel and was duly sworn. Petitioners therein undertook to ascertain from the witness the information of fact requested in the auditor's reports, in order that the auditor might file a complete certified audit and report therein as contemplated by the orders of the court. On advice of counsel for the company, the witness refused to answer questions or to give any testimony upon the ground that there had been no foundation laid under the provisions of section 2021 or 2055 of the Code of Civil Procedure or any other section of the code, and that there was no issue of fact raised in any pending proceedings upon which the deposition could be taken and that there was no showing that F. C. St. Clair was a party to the proceeding, whose deposition could be taken pursuant to any proceeding pending in the matter of the dissolution of the company.

Continuance of the matter was taken, by stipulation. Upon affidavit showing these facts and events the trial court on July 8, 1940, issued an order directed to the witness requiring him to appear and show cause if any he had why he should not be directed to answer questions upon the taking of his deposition. On July 16, 1940, that order came on regularly for hearing in the superior court before Judge H. S. Gans, and upon the conclusion of the hearing the judge announced that he would enter an order requiring the witness to give his deposition and to answer the questions to be propounded upon the taking of the deposition. On July 24, 1940, the judge signed an order that the witness appear before the notary public and that he answer certain specified questions and that he further answer other pertinent questions propounded to him and give his deposition before the notary public, and in default thereof that he be held subject to the punitive powers of the court.

The petitioners herein allege that it is the intent and purpose of the superior court to enforce compliance with the terms of its order and in the event that the witness refuses or declines to have the deposition taken, to punish him for contempt of court for such refusal or declination. They further allege that they have no right of appeal from the action of said court and no plain, speedy or adequate remedy at law.

Section 2021 of the Code of Civil Procedure provides: "The testimony of a witness in this state may be taken by deposition in an action at any time after the service of summons or the appearance of the defendant, and in a *special proceeding after a question of fact has arisen therein* * * * 1. When the witness is a party to the action or proceeding or an officer, member, agent, or employee of a corporation * * *."

That the proceeding is a special proceeding is not questioned. Sec. 1063 Code Civ.Proc., et seq.; former sections 1227 to 1235, Code Civ.Proc.; Bixler's Appeal, 59 Cal. 550, 555; In re Herman, 183 Cal. 153, 156, 191 P. 934.

First, it is argued and the point is raised by demurrer that a writ of review of either the order directing the witness to give his deposition or the order appointing the auditor is not available to petitioners herein at this time for the reason that the issuance of the order did not go to the question of the excessive jurisdiction of the tribunal issuing the order, which is required before a writ of certiorari may be granted but is, if anything, an error of law or of fact within the jurisdiction of the court below, and therefore not reviewable in this proceeding, citing 4 Cal.Jur. p. 1022, sec. 4; 4 Cal.Jur. p. 1041, sec. 16; Howe v. Superior Ct., 96 Cal.App. 769, 274 P. 992; Marblehead Land Co. v. Superior Ct., 60 Cal.App. 644, 213 P. 718; and Bryant v. Superior Ct., 16 Cal.App.2d 556, 564, 61 P.2d 483, and that a writ of prohibition to prevent the taking of the deposition was a proper remedy, if any, rather than a writ of review, citing Most v. Superior Ct., 25 Cal.App.2d 394, 77 P.2d 532; Kibele v. Superior Ct., 17 Cal.App. 720, 722, 121 P. 412.

The contention that a writ should not issue at this stage of the proceedings seems to be supported in the late case of C. S. Smith Metropolitan Market Co. v. Superior Ct., reported in Cal.Sup., 105 P.2d 587, 588, and might justify such a disposal of this proceeding. In that case petitioner sought, by writ of prohibition, to prevent the court from enforcing a similar order. In discharging the writ the court said:

> "The function of the writ of prohibition is to provide a remedy when rigidity of the ordinary procedure fails to protect a litigant from the wrongful exercise of jurisdiction by a court. Sec. 1103, Code of Civ.Proc. But the mere showing that an inferior court is about to do an act beyond the scope of its powers is not enough to justify the issuance of the writ. In other words, the writ may not be used to restrain the commission of error or to regulate or control procedure. Many orders which are made during the progress of a case depend for their validity upon the jurisdiction of the court, but, ordinarily, prohibition may not be invoked to challenge such rulings. If that were allowed, the trial of an ordinary civil action would be constantly interrupted by attacks upon procedural orders which are properly reviewable upon appeal. [Citing cases.]
>
> "These basic principles have been applied in cases where it is claimed that one must either comply with an order, which it is asserted the trial court had no jurisdiction to make, or be subjected to the penalties for contempt of court. In such cases, it has been repeatedly held that prohibition will not be granted upon the ground that the trial court has erred in making the order upon which the charge of contempt is, or may be, based. The remedy of the one against whom such an order is directed is to present his defense upon the hearing of the contempt proceeding, and then, if found guilty, to apply for a writ of certiorari or habeas corpus." (Citing cases.)

However, to preclude a further application for a similar writ, we deem it advisable to discuss the main question presented, which resolves itself into this: In the special proceeding, at the time the deposition was sought to be taken, had a *question of fact arisen* therein, within the meaning of section 2021 of the Code of Civil Procedure. In support of the contention of petitioners herein that an issue of fact had not arisen, Waller v. Weston, 125 Cal. 201, 204, 57 P. 892; In re Principal's Guardianship, 101 Cal.App. 669, 671, 282 P. 26; Hoag v. Howard, 55 Cal. 564, 565; San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 34, 99 P. 359, 17 Ann. Cas. 933; Whann v. Doell, 192 Cal. 680, 684, 221 P. 899; sec. 2103, Code Civ.Proc.; Kibele v. Superior Court, supra; Rossbach v. Superior Court, 43 Cal.App. 729, 185 P. 879; Most v. Superior Court, supra; and 18 C.J., p. 633, sec. 69, are cited.

Petitioners herein argue that the term "after a question of fact has arisen therein" means after an issue of fact has been raised in the proceeding and that an *issue of fact* can only be raised by one party's denial of or exception to the averment or statement of another and that since petitioners herein had not filed any written answer or written denial at the time the deposition was sought, no question of fact arose therein.

Respondents herein argue (1) that a question of fact arises in a special proceeding whenever a court is required to determine the truth of an averment as a condition to granting relief, for the reason that in every special proceeding the jurisdictional facts, at least, must be proved, and that the question whether the jurisdictional allegations are true clearly arises at the very moment the court is called upon to hear and determine that question of fact; (2) that a question of fact has been raised and it has been and is raised by the above proceedings had at the time of the hearing and by subsequent proceedings, although specific pleadings are not necessary; (3)

that the petition, requesting the court to appoint a certified public accountant to make a complete audit, after petitioners herein introduced in evidence at the original hearing a purported statement of the affairs of the company, also alleges that the purported statement so received in evidence was not prepared from an audit of the affairs of the company, but was prepared merely from an examination of its books, and that it did not contain a full, true and accurate statement of the affairs of the corporation and that the petitioners herein proposed and intended to proceed with the liquidation of the affairs of the company upon the basis of such statement, and that thereby a question of fact arose therein and that the court was not bound to accept such statement as a basis for winding up the affairs of the company; (4) that an actual set of pleadings, to raise a question of fact in such a special proceeding, is not required under section 2021 of the Code of Civil Procedure or by statute, citing California, etc., Co. v. Schiappa-Pietra, 151 Cal. 732, 91 P. 593; Most v. Superior Court, supra; and San Francisco Gas & Electric Co. v. Superior Court, supra; (5) that it is the potential question of fact, and not necessarily the actual pleadings setting forth facts, which is to be considered, and that the pleadings seeking a true and correct accounting and the order given in pursuance thereto clearly raise a question of fact; (6) that the power to procure testimony by means of depositions is inherent in courts of equity, such power having been borrowed from the Civil Law, citing 18 C.J., p. 607, secs. 3, 4 and 5; and that independent of any authority conferred by statute, the court has power in every cause and proceeding pending before it, where it is necessary in order to obtain the truth of the matters in dispute, to have the evidence of witnesses taken by deposition. Una v. Dodd, 38 N.J.Eq. 460, 463. It is therefore claimed in the instant case that the court is merely aiding its officers in ascertaining "the matters in dispute", that is, the audit, and that it has power so to do. Respondents herein insist that each and every requirement of the language of section 2021 of the Code of Civil Procedure has been complied with in that (a) it is squarely shown that a question of fact has arisen; (b) that the witness is a party to the proceeding in that he is one of the trustee directors of the corporation being dissolved and necessarily is one of the individuals who must account to the court for the assets entitled to be distributed by the corporation to its stockholders; (c) that the witness is an officer, to wit, a director and the secretary and treasurer of the corporation; and (d) that the testimony is required upon a motion as referred to in the notice of intention to take the deposition and in the affidavit in support thereof; (7) that the court was empowered to appoint an auditor under section 403 of the Civil Code and section 639 of the Code of Civil Procedure, and that the legal qualifications of the auditor as to residence cannot be raised at this time under these proceedings; and (8) that by failing to object to the order appointing the auditor for fifteen months before the writ herein was asked, when money was expended on the cost of the audit in reliance upon the order the bar of laches is available to respondents herein, citing Bryant v. Superior Court, supra; and 4 Cal.Jur., p. 1062, sec. 32.

It seems clear to us that the writ must be denied not only for the reason first stated but for the reason advanced by respondents herein that a *question of fact* in the special proceeding arose within the meaning of section 2021 of the Code of Civil Procedure before the deposition of the witness was sought to be taken.

In Kibele v. Superior Court, supra, in construing section 2065 of the Code of Civil Procedure, it was held that the words "a witness must answer questions legal and pertinent to the matter in issue" are not to be construed narrowly as applying solely to allegations of the complaint which are denied by an answer, and it was further stated that such construction would not only nullify the plain provisions of section 2021 of the same code, but would likewise destroy the right given by the statute for the perpetuation of testimony and that the matter of the complaint is a matter to be litigated, and for that purpose its allegations are deemed denied.

When the trial court took jurisdiction of the proceedings, at which hearing the petitioners herein appeared by counsel and made certain objections, and the court proceeded to determine whether the affairs of the corporation should be wound up and a copy of the purported statement of the company's affairs was received in evidence and which petitioners therein claimed to be incomplete, untrue and inaccurate, it is apparent that *a question of fact* immediately arose for the determination of the court. Otherwise the court would have been bound to distribute the assets in accordance with what is claimed to be the incomplete, untrue, and inaccurate report prepared by petitioners herein, without a proper determination of the true facts. If, as respondents herein contend, no question of fact arose at the hearing because no written answer or written objection was filed thereto, conversely it must be true that they were in default. If they were in default at the time the deposition was sought to be taken, then section 2023 of the Code of Civil Procedure clearly applies and fully authorized the taking of a deposition. It reads in part: "* * * If, in a special proceeding, some or all of the parties interested have not appeared, the court may authorize a deposition to be taken without the service of any affidavit upon, or the giving of any notice to, the party so in default or not appearing, or may provide that notice be given to him in such mode as to the court may seem proper".

For the reasons expressed it is unnecessary to determine the other points presented.

The writ heretofore issued is discharged.

We concur: BARNARD, P. J.; MARKS, J.

41 Cal.App.2d 463

BAZZELL v. ENDRISS et al.

Civ. 11176.

District Court of Appeal, First District, Division 1, California.

Nov. 12, 1940.

Husband and wife 🔑265

Where widow of insured claimed a half interest in life policy on ground that premiums thereon were paid with community funds and that widow had not consented to a gift of policy to mother, evidence warranted finding that naming of mother as beneficiary constituted a voluntary gift without consideration, and that widow did not consent to gift of widow's community interest in policy, and justified judgment for widow. Civ.Code, §§ 161a, 172.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Suit by Nellie Endriss Bazzell, executrix of the last will and testament of Annie Sabra Endriss, also known as Anna Sabra Endriss, and Anna S. Endriss, and A. S. Endriss, deceased, against Alice D. Endriss and another for declaratory relief concerning conflicting claims to proceeds of a life insurance policy. From an adverse judgment, plaintiff appeals.

Affirmed.

H. J. Kleefisch and Zimdars & Warren, all of San Francisco, for appellant.

Harvey S. Craig, of Oakland, for respondents.

WARD, Justice.

This action for declaratory relief and to quiet title involves conflicting claims to the proceeds of a life insurance policy in the sum of $1,000, issued to R. C. Endriss, in which the mother of the insured was named as beneficiary. Endriss died on June 6, 1938, and the mother less than two months thereafter. Plaintiff, a sister of the insured, as the executrix of the mother's estate, brought this action against the insured's surviving widow who claims a half interest in the policy by reason of the fact that premiums thereon were paid with community funds and that she had not consented to a gift of the policy to the mother. The trial court found the facts to be in accordance with this contention and gave judgment for the widow, from which plaintiff prosecutes this appeal.

It is the contention of appellant that the evidence shows the insured was indebted to his mother in an amount exceeding the value of the policy, and that under such circumstances there could be no gift of the policy.

The insured and defendant were married in 1918, and the policy was issued in 1929. The widow testified that all premiums were paid from earnings of the insured's business. In Union Mutual Life Ins. Co. v. Broderick, 196 Cal. 497, 507, 238 P. 1034, 1038, the court said: "It is no doubt the settled law of this state that where the premiums on an insurance policy issued on the life of the husband after coverture are paid entirely from community funds, the policy is a community asset, and, in view of the provisions of section 172, Civil Code, the husband cannot make a valid gift thereof without the written consent of the wife; and that where the husband attempts to do so by naming a third party as beneficiary, the transaction as to the wife's share is voidable and subject to her right of revocation." This view of the law was also held in Mundt v. Connecticut Life Ins. Co., 35 Cal. App.2d 416, 421, 95 P.2d 966, 968, where the court said: "From the leading case of New York Life Ins. Co. v. Bank of Italy, 60 Cal.App. 602, 214 P. 61, through the many intervening cases, down to Travelers' Ins. Co. v. Fancher, 219 Cal. 351, 26 P.2d 482, the only test applied to this problem has been whether the premiums (on a policy issued on the life of a husband after coverture) are paid entirely from community funds. If so, the policy becomes a community asset and the non-consenting wife may recover an undivided one-half thereof 'without regard' (as said in Dargie v. Patterson, 176 Cal. 714, 721, 169 P. 360, 362) 'to the amount or condition of the estate remaining in his (the husband's) hands at the time of his death', and we might add, without regard to the disproportionate size of the premium when compared with the face of the policy." In the first cited case it was held that the change of beneficiary was made by reason of the fact that the insured was indebted to his sister, and that under such circumstances the change was made for a consideration and was not a gift. In the second case the trial court found against an indebtedness of the insured to his mother and the judgment for the widow was sustained.

In the present case the insured's mother was named at all times as the beneficiary. There is considerable evidence that the insured at various times, before and after marriage, had given certain sums of money to his mother. Bank accounts indicated also that the mother had withdrawn various amounts and delivered them to the insured for use in his business, for his hospital bills and different unexplained purposes. Appellant, the sister of the insured, testified that in April of 1937 her brother had said "I owe Mother $3,000". There was no showing that the mother had, since her husband's death, any source of income except that given her by her son, plus some indefinite amount earned by keeping a rooming house.

The court found that the naming of the mother as beneficiary constituted a voluntary gift without valuable consideration, and that at no time did the wife consent to a gift of her community interest in the policy. Reading the record in its entirety, and taking into consideration statements that prior to marriage the insured had contributed to his mother's support, and that she in turn had loaned money to establish him in business and to pay his hospital and other bills; also the fact that the widow paid the last premium during the insured's illness, and considering conflicting evidence and inferences that could be drawn from the testimony, we find ample evidence to sustain the trial court's conclusion. Civ.Code, secs. 172, 161a; Travelers' Ins. Co. v. Fancher, 219 Cal. 351, 26 P.2d 482; Blethen v. Pac. Mut. Life Ins. Co., 198 Cal. 91, 243 P. 431; Siberell v. Siberell, 214 Cal. 767, 7 P.2d 1003; Ballinger v. Ballinger, 9 Cal.2d 330, 70 P.2d 629.

The judgment is affirmed.

We concur: PETERS, P. J.; KNIGHT, J.

41 Cal.App.2d 447

PEOPLE v. OGDEN.

Cr. 3385.

District Court of Appeal, Second District, Division 1, California.
Nov. 8, 1940.

As Modified Nov. 22, 1940.

Hearing Denied Dec. 5, 1940.

1. Criminal law ⇨1144(13)

On appeal in criminal case, District Court of Appeal must view evidence adduced at trial in light most favorable to prosecution.

2. Rape ⇨51(2)

Evidence, including battered and bruised condition of prosecutrix as testified to by herself and corroborated by police officers and receiving hospital physician, sufficiently established "corpus delicti" of offense of forcible rape, as against contention that evidence failed to show resistance on part of prosecutrix and use of force and violence by defendant.

See Words and Phrases, Permanent Edition, for all other definitions of "Corpus Delicti".

3. Rape 🔑57(3)

In forcible rape prosecution, the sincerity and genuineness, as well as extent, of prosecutrix' resistance or nonconsent are questions addressed solely to jury

4. Criminal law 🔑1159(6)

An appellate tribunal can not disturb findings of triers of fact unless it is made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence, circumstantial or otherwise, to support the conclusion reached in the lower court.

5. Kidnapping 🔑1

Under statute defining offense of kidnapping, as amended in 1905, it is sufficient if the taking is with intent and purpose to transport person to another part of the county in which the abduction takes place. Pen. Code, § 207.

6. Kidnapping 🔑4

A count in an information charging kidnapping was not defective because of failure to allege that prosecutrix was abducted "with a design to take her out of the state." Pen.Code, § 207.

7. Kidnapping 🔑6

An instruction on issue of kidnapping was not defective because of failure to charge that it was necessary to show that prosecutrix was abducted "with a design to take her out of the state". Pen.Code, § 207.

8. Kidnapping 🔑5

Evidence supported conviction for kidnapping. Pen.Code, § 207.

◆

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Roy B. Ogden was convicted of kidnapping and forcible rape, and he appeals.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an information filed by the district attorney of Los Angeles county defendant was accused in count I of the crime of kidnaping; count II charged the crime of rape; count III a violation of section 286 of the Penal Code, and count IV alleged a violation of section 288a of the same code. Following denial of a motion to set aside the information, and the entry of not guilty pleas to all counts, defendant was tried by a jury which returned verdicts finding him guilty of kidnaping and forcible rape and not guilty of violating sections 286 or 288a of the Penal Code. A motion for a new trial was denied and judgment accordingly pronounced. From the order denying him a new trial and from the judgment of conviction defendant prosecutes this appeal.

[1] Stating the evidence adduced at the trial in the light most favorable to the prosecution, as we are required to do following a guilty verdict, the record discloses that the prosecutrix, a woman 28 years of age, totally deaf, and who had been married, was earning her living selling flowers to the patrons of various clubs and cafes along and in the vicinity of Vermont avenue in the city of Los Angeles. About 8 o'clock on the night of December 12, 1939, in the Friars Club, she encountered defendant, whom she had not theretofore known, and to whom on that occasion she sold a flower. About 11:30 p. m. of the same night she again saw defendant at the 741 Club located across the street from the Friars Club. Defendant followed her out of the last-named club, and by motions indicated an offer to take her elsewhere to sell flowers, which invitation she rejected and re-entered the Friars Club, where she continued the sale of flowers. About 12:30 a. m. the prosecutrix left the Friars Club and went to other resorts in the neighborhood to sell flowers. Shortly before 2 a. m. she returned to the Friars Club to put her unsold flowers on ice preparatory to going home. Here she again encountered the defendant, who was coming out of the club as she was about to enter. Defendant renewed his invitation to take her elsewhere to sell flowers, which offer she again rejected, whereupon defendant took hold of her arm and motioned to a man called "Leo" to get his automobile, which the latter did, driving it up in front of the club. According to the testimony of the prosecutrix, defendant pushed her into the automobile, and as "Leo" drove the car away she was seated in the single seat between the driver and the defendant. She remonstrated and told them she wanted to go back to the Friars Club, but they stopped at another club where she sold a couple of flowers; then the driver of the car in-

dicated he was going in the other direction and that the prosecutrix was to go with the defendant. According to her testimony, expecting to be taken back to the Friars Club, she entered appellant's car, but he drove to another club at Eighth and Western. With the defendant she entered this club and was by him introduced to the owner, who gave her permission to come to his place and sell flowers. Just a few minutes before 2 o'clock they left this club, the prosecutrix telling appellant she wanted to go to the Friars Club before it closed at 2 a. m. The prosecutrix preceded defendant into the car. Noticing that defendant was watching her through the window of the automobile, she started to get out of the car, but appellant grabbed her and held her down while he put the car in motion and drove away. He had his arm around her neck and smothered her down against his clothes so that, according to her testimony, it was with difficulty she was able to breathe. Eventually she opened the door of the automobile with her foot, at about which time they came to a main thoroughfare, when she started to jump out of the car and defendant lost control of the automobile while trying to hold her in it. Defendant then stopped the car suddenly, and regarding what there occurred the prosecutrix testified as follows (quoting from the transcript of her testimony taken at the preliminary examination, and which transcript, by reason of the deafness of the prosecutrix was by stipulation used at the trial):

"* * * and I fell out on the street on my back, hit my head hard and it made me dizzy, on the hard pavement. He leaned over, I started to scream then and he leaned over and took ahold of the back of my hair to hold on to me and I said, 'Oh, they can't hear me screaming,' and at the same time he pulled me back in. He was pulling with all his strength to get me back in and I was pulling in the other direction with all mine, went like that until my hair all came loose, and it threw him off his balance and he fell on the street on top of me. I fell back on the pavement again when my hair came loose, it left me dizzy, we started struggling in the street there. I fought for a few minutes and then my hand was broken fighting with him. I didn't have any more strength left, it was getting dark because of the blows on my head and I could not see, so he threw me back head first in the front seat of the car and sprawled over me so that I could not get away, and he held me down like that and drove away. He drove for a long time holding me down, I didn't see where we were going, it was up in the hills somewhere. He stopped at the top of the hill where it was deserted, no cars or anything. I sat talking to him, I didn't know what he intended to do, I appealed to his nobility, asking him to take me home, I told him I had a mother and that I didn't go in for such things, and he laughed at me for a while, put his arm around me and ordered me to take off my clothes. Meanwhile he was—

"Mr. Lavine (Defense Counsel who appeared for the defendant only at the preliminary examination and did not represent him at the trial): What happened to your clothes? Who took them off? A. While we were fighting the buttons were all ripped off and there wasn't much to take off, just slipped off, he took them off, told me to get out and get in the back seat with him.

"Mr. Lavine: Did you slip your clothes off? A. No, he did. My hand was broken, I had to get out of the way, I could no longer object to anything he did do, I had no defense.

* * * * *

"Q. * * * Did he insert his penis in you? A. Yes.

"Q. In your vagina or in your rectum? A. (Witness points to the word vagina in the written question.) He started that and it didn't seem to satisfy him and after a few minutes he gave it up. * * *

"A. I resisted against it as well as I could and it seemed hours we struggled, with him trying it over and over again. He did not give it up until he succeeded in his purpose. * * *

* * * * *

"A. After he raped me he let me dress again and asked me where I lived. I didn't want to tell him where I lived because it was on a dark street, and I didn't know what else he would do, and I told him I lived at a hotel on Main street because I knew there were cars and things out at that hour and I could get away from him, so he took me down there and was telling me that he would take me out on Christmas, and tried to make a date for then. He asked me what room and what floor I lived on, and my name, so he could send me the money, $25.00. While we were talking he said he was going in with me and I told him the hotel rules were against it, he could not go in, and we were arguing about it and the radio cops came along and they stopped and looked in the window. I thought they were going to pass on and so I did not make any move until I found they were waiting down the street a little ways, and then I made a jump for it * * * and I was trying to tell the police what happened and he turned around behind them and drove away. I was taken to the hospital. * * *

"Q. Did you kick him at any time? A. I did when I fell out of the car the first time, when he was getting out then on top of me. I thought I kicked him in the face, I was not sure.

"Q. Did you at any other time? A. That was all.

"Q. Did you kick him at any other time? A. I don't think so.

"Q. Did you scratch him at any time? A. Oh, his face was scratched afterwards, but I don't know whether it was from kicking him or scratching him or what it was while I was fighting with him.

"Q. You don't know then whether you scratched him or not? A. He had cuts on his forehead that were bleeding, but I don't know if it was a scratch or a kick. He may have got them on the pavement when he fell out and when I fell and he was trying to pull my hair out and when my hair came loose it broke the fall. * * *

"* * * Q. (By Mr. Lavine): But you kept your legs spread apart all the time he was doing that? * * * A. * * * I was fighting with him all the time, whether they stayed that way or not I could not say".

The radio patrol officers testified that on the morning of December 13 about 5 o'clock they saw the prosecutrix standing beside a green sedan parked on Main street about 40 feet south of Seventh street. To them it appeared that she and the occupant of the car were engaged in an argument. The officers cruised past the parked automobile about 30 yards or so, when they observed the prosecutrix running after them. They stopped the police car and awaited her approach. Her hair was mussed up, she was crying and hysterical, her lip was cut, and she was holding her left hand. The officers discovered several large locks of her hair were loose, and as one of the officers testified, "I took hold of it, and I could pull large locks of hair out." To the officers the prosecutrix made a complaint, but by that time the car in which defendant was riding had disappeared, and the police officers took the prosecutrix to the receiving hospital, where the attending physician examined her at about 5:45 a. m. Her clothing was dirty and disheveled; she was crying and complaining of her back. There was a contusion on the right side of her head above and behind her ear. She also had a contusion and abrasion in the region of the middle of her backbone, which was bleeding at the time of the examination. There was a contusion on the back of her right hand, which was swollen. A vaginal smear was made, examination of which indicated spermatozoa upon it.

Defendant was not apprehended for several months after the alleged offenses were committed, and on January 15, 1940, he addressed a letter, bearing a Canadian stamp and postmarked, "Little Forks, a. m., Jan. 15, 1940, B. C." This letter was addressed to the proprietor of the Friars Club, and read in part: "How is the hot shot? Well, is the heat still on or has it started to cool off in L. A.? Here is a little surprise for you. I am in the army now and it won't be long before I am over hunting down a few squareheads. * * * Say hellow to all the coppers for me and tell them to take a vacation and come on over but be sure they don't get in front of me when I am firing at the squareheads. * * *"

Appellant admitted having an act of sexual intercourse with the prosecutrix, but testified that the same was with her consent. He also testified that after he accomplished the sexual act she wanted pay, and when he refused she started to cut the upholstery of his car with a penknife, and that when he attempted to restrain her a scuffle ensued. He was arrested by the Federal Bureau of Investigation in March, 1940, at a mine about 2 miles above Kernville, California, where he had been, according to his testimony, since December 14, 1939, and while at the mine he used the alias of Roy Martin. Defendant admitted that after his arrest he told the investigating officers he was not in Los Angeles on the date when the prosecutrix stated she was assaulted; that he had never seen the prosecutrix, and denied writing the letter above referred to.

[2] We have set forth the evidence in some detail because as his first ground of appeal it is earnestly urged by appellant that the corpus delicti of the charge of forcible rape was not proved, in that the evidence shows that the prosecutrix did not resist and that the use of force and violence by the accused is not established by the testi-

mony. We have no hesitancy in saying that the evidence herein narrated certainly shows that the victim resisted with all reasonable means. The battered and bruised condition of her body, as testified to by herself and corroborated by the police officers and receiving hospital doctor, gives mute evidence not only that she most vehemently exercised the physical means at her command to resist the assault upon her by appellant, but also that no small degree of force and violence was used upon her. In the face of the evidence in the case at bar it would severely tax one's credulity to say that by her conduct the prosecutrix did not make nonconsent and actual resistance reasonably manifest. We find ourselves in accord with the views expressed in the classical language of the supreme court of Idaho in the case of State v. Neil, 13 Idaho 539, 90 P. 860, 862, 91 P. 318, which we herewith quote: "A large number of authorities are cited by counsel for appellant to the effect that the state must show in such cases that the female 'showed the utmost reluctance and used the utmost resistance.' Devoy v. State, 122 Wis. 148, 99 N.W. 455. To our minds the trouble with a number of these authorities is that they reverse the order of the inquiry. They go about inquiring into the kind, character, and nature of the fight put up by the woman, rather than the nature of the assault and evident and manifest purpose and intent of the assailant. For the purpose of reaching the conclusions announced in some of these cases, it is necessary to assume that, in the first place, a man has a right to approach a woman, lay hold on her person, take indecent liberties with her, and that, unless she 'kicks, bites, scratches, and screams' (People v. Morrison, 1 Parker Cr.R. [N.Y.] 625), to the 'utmost of her power and ability,' she will be deemed to have consented, and indeed to have invited the familiarity. Such is neither justice, law, nor sound reason. * * * It is true that she [the prosecutrix] must not have consented, because, if she did, there would be no offense; but, on the other hand, men should not be allowed, under the protection of law, to construe every indiscreet act or word of a woman into a consent to carnal knowledge, nor should they be allowed to indulge in presumptions against the virtue and chastity of women. Rather let the evil-minded man incur the risk and hazard of misjudging the opposite sex, and endeavoring to degrade them and destroy their peace and happiness. A little of this kind of law would go a long way with some of the brutes who unfortunately bear the names of men. There would be far less illicit intercourse if there were no assaults by the seducer in the first place, and the oftener he is brought to justice the less annoyance the community will suffer from the graver offenses towards which his conduct leads."

[3, 4] The fact that the jury may have believed that when at intervals throughout her harrowing experience the prosecutrix remained calm and collected, she was acting upon the honest belief that she could thereby best extricate herself from her predicament by relying on her wits rather than making an attempt to escape or give utterance to an outcry at the risk of being further assaulted and injured, affords no ground for reversing the judgment, when, as heretofore pointed out, there was every evidence of a bona fide and genuine resistance on her part. The sincerity and genuineness, as well as the extent, of the resistance or nonconsent are questions addressed solely to the jury. An appellate tribunal cannot disturb the findings of the triers of fact unless it be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence, circumstantial or otherwise, to support the conclusion reached in the lower court. People v. Newland, Cal.Sup., 104 P.2d 778; People v. Gidney, 10 Cal.2d 138, 143, 144, 73 P.2d 1186. No such showing is made in the instant case. True, there is an irreconcilable conflict between the testimony of the prosecutrix and that given by the defendant. However, our appellate jurisdiction extends only to questions of law, and where the evidence which militates against the defendant, considered by itself and without regard to conflicting evidence is sufficient to support the verdict, the question ceases to be one of law—of which alone this court has jurisdiction—and becomes one of fact upon which the decision of the jury and the trial court is final and conclusive.

[5-7] It is next contended that the information is defective so far as count I thereof is concerned, because it is not alleged that the prosecutrix was abducted "with a design to take (her) out of the state", and that for the same reason an instruction given by the trial judge omitting the phrase just quoted was erroneous and prejudicial. Without doubt, when in 1890 the case of Ex parte Keil, 85 Cal. 309, 24 P. 742, relied upon by appellant, was

decided, section 207 of the Penal Code did require that the forcible taking of a person must be under circumstances which involved a design to take the victim out of this state or from one county to another in this state; but in 1905 the legislature amended the section by adding thereto the words "or into another part of the same county". Under the amendment just quoted it is plain that among the several offenses or acts intended to be described by the legislature as constituting kidnaping there was included the forcible taking or stealing of a person and carrying him or her into "another part of the same county". It is not now required that there be an intent or design to carry the kidnaped person out of the state or from one county into another. It is sufficient if the taking is with the intent and purpose to transport the person to another part of the county in which the abduction takes place. People v. Fernandes, 127 Cal. App. 45, 15 P.2d 172. The information herein clearly charged an offense under section 207 of the Penal Code, and the instruction given in connection with the issue thus framed was proper.

[8] Appellant insists, however, that the evidence is insufficient to sustain a conviction of any form of kidnaping. Let us assume, as contended by appellant, that the victim, notwithstanding her denial thereof, did in fact voluntarily get into appellant's automobile and accompany him from the Friars Club along with "Leo," the driver of the automobile; nevertheless, there is very substantial evidence in the narrative heretofore in this opinion set forth to justify the jury in concluding that she did not go with him voluntarily when they left the Caliente Club shortly before 2 a. m., at which place, according to her testimony, she became apprehensive of appellant's intentions and purposes toward her and attempted to get out of his automobile, when he forcibly restrained her, drove her into the hills and ravished her. It must be conceded that the testimony of the victim, if capable of belief, is sufficient to support the verdicts; but it is urged that her testimony, when taken in conjunction with her conduct and behavior, must be held by this court to be so inherently incredible as to amount to no evidence at all, and that the verdicts were the result of passion and prejudice, rather than a calm and impartial judgment resulting from a dispassionate consideration of the evidence. Before we are authorized to say that the testimony of the prosecutrix herein bears upon its face the brand of inherent improbability and is unbelievable per se, we must be warranted in concluding that what she testified to would seem impossible to have taken place under the circumstances described by her. This we cannot do, and hence must conclude, under well-established rules governing the prerogatives of the jury in the matter of determining questions of fact, that the verdicts are supported by the evidence.

Finally, appellant urges that the trial court committed prejudicial error in the giving and rejection of certain instructions. In view of what we have herein said, it follows that in this complaint appellant cannot be upheld. Reading the instructions as a whole, we conclude that they fairly and correctly advised the jury of the kind, quality and quantum of evidence required to justify a guilty verdict on either the kidnaping or rape charges.

For the reasons herein stated the judgment and the order denying defendant's motion for a new trial are, and each is, affirmed.

We concur: YORK, P. J.; DORAN, J.

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41 Cal.App.2d 501

SCOTT v. GEORGE A. FULLER CO. et al.

Civ. 12088.

District Court of Appeal, Second District, Division 1, California.

Nov. 15, 1940.

1. Appeal and error 🔑109

An order granting motion for judgment notwithstanding jury's verdict is not appealable.

2. Negligence 🔑121(3)

In action against general building contractor and carpenter-foreman for injuries to subcontractor's employee as result of fall from joist, put up by general contractor as part of incomplete form for pouring concrete and used by plaintiff as scaffold while painting angle iron or brace, "res ipsa loquitur" rule was inapplicable.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

3. Negligence 🔑121(2)

To justify invocation of "res ipsa loquitur" rule, instrumentality which caused injury sued for must have been under defendant's exclusive management, and such rule is inapplicable where cause of accident is unexplained and it might have been due to one of several causes, for some of which defendant is not responsible.

4. Appeal and error 🔑1067

A plaintiff, appealing from judgment rendered for defendant after granting of motion for judgment notwithstanding jury's verdict for plaintiff, has no cause to complain of trial court's refusal to give instruction requested by plaintiff, as such failure did not prejudice his case.

5. Negligence 🔑121(2)

Evidence is not created or manufactured through application of "res ipsa loquitur" rule, which is applied merely for purpose of deciding how much evidence is necessary to establish prima facie case.

6. Negligence 🔑67

A subcontractor's employee, injured by fall from joist, put up by general contractor as part of unfinished form for pouring concrete, while using it as scaffold in painting angle iron or brace, cannot recover damages from general contractor and carpenter-foreman on ground of latent defect in such form, as it was incumbent on such employee to ascertain that form was sufficiently completed and safe before undertaking to use it as scaffold.

7. Negligence 🔑30

A subcontractor's employee, injured by fall from joist of incomplete form, set up by general building contractor for pouring of concrete, while using it as scaffold in painting angle iron or brace, cannot recover damages from general contractor and carpenter-foreman, though it was impossible to paint brace from such form after its completion, as it was incumbent on subcontractor to provide some other reasonably safe means for employee to do such work at another more appropriate time, notwithstanding contrary custom or policy. St.1937, pp. 308, 309, §§ 6401–6403.

8. Negligence 🔑44, 80

Actual or imputed knowledge of general building contractor and carpenter-foreman that subcontractor's employee would use form for pouring concrete as scaffold in painting angle iron or brace did not excuse such employee's negligent act in venturing out on joists of such form before its completion or impose on general contractor and such foreman burden of constructing form so as to serve purpose of scaffolding, in absence of agreement to that effect between general contractor and subcontractor.

9. Negligence 🔑44

A general building contractor is not liable for injuries to subcontractor's employee, falling from joist of incomplete form for pouring concrete while using it as scaffold to paint angle iron or brace, in absence of showing that general contractor or its agents had direction, management, control, or custody of such employee or his employment, as any breach of duty toward him was that of subcontractor in failing to furnish all appliances and equipment essential to safe working conditions.

10. Negligence 🔑135

In action against general contractor and carpenter-foreman for injuries to subcontractor's employee, falling from joist of incomplete form for pouring concrete while using it as scaffold in painting angle iron or brace, evidence *held* to show conclusively as matter of law that plaintiff was negligent in venturing out on joist at time he did.

11. Judgment 🔑199(3)
Negligence 🔑136(31)

In action against general building contractor and carpenter-foreman for injuries to subcontractor's employee, falling from joist of incomplete form for pouring concrete while using it as scaffold in painting angle iron or brace, evidence *held* to show as matter of law that proximate cause of accident was plaintiff's failure to take reasonable precautions for his own safety, so that defendants' motion for directed verdict should have been granted and court properly rendered judgment for defendants notwithstanding jury's verdict for plaintiff. Code Civ. Proc. § 629.

◆

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by Wesley P. Scott against the George A. Fuller Company and another to recover damages for personal injuries. Judgment for defendants, and plaintiff appeals.

Affirmed.

Fred C. Fenton, of Los Angeles, for appellant.

Jennings & Belcher and Frank B. Belcher, all of Los Angeles, for respondents.

DORAN, Justice.

[1] This is an appeal from a judgment in favor of defendants and against the plaintiff rendered after the granting of a motion for judgment notwithstanding the verdict of the jury in an action for damages for personal injuries. Appellant also attempts to appeal from the order granting the motion for judgment notwithstanding the verdict. There is no appeal from such an order.

At the time appellant suffered the injuries for which he sought damages against respondents, he was at work painting structural steel in the new post office building, then under construction, in Los Angeles, California; and was so employed by the Industrial Maintenance Engineering Company, a subcontractor. Respondent George A. Fuller Company was the general contractor for the construction of said building, and respondent Deatherage was a carpenter foreman employed on the job by said general contractor. Appellant sustained the injuries complained of when he fell from a horizontal beam or joist set up by the general contractor as part of a form for the purpose of pouring concrete. There is no direct evidence as to the exact cause of his fall, but it may reasonably be inferred that the joist gave way under him.

There is no material conflict in the evidence. Appellant at the time of the accident was engaged in painting an angle iron or brace running diagonally across an open rectangle or "bay" formed by structural steel "I" beams, and was using the joist in question in lieu of scaffolding. The joist was one of a parallel series extending across the "bay" and appellant was moving from joist to joist as his painting progressed. None of the joists were securely fastened, and the form of which they were intended to be a part was unfinished at the time appellant ventured out upon them. Appellant was sitting upon the joists while painting.

Appellant was engaged in painting all structural steel in the building which was not to be encased in concrete. This appears to be the usual procedure in construction work of this nature. It does not appear, however, that there was any necessity for appellant to have painted the brace above referred to at the time he did, nor does it appear that there was any absolute necessity for him to rely on the concrete forms as scaffolding.

The joists were not put up for the purpose for which appellant was using them. There was no connection between the building of the forms for the concrete and the duties of appellant in the employ of the subcontractor. There is some evidence to the effect that after the form was completed appellant would not be able to paint the brace in question. It does not appear, however, that the brace could not have been painted at an earlier time through some other method.

While appellant had not been warned to keep off the particular joists where he suffered his accident, he had been warned previously by respondent Deatherage to keep off other such joists until they were set. At the time of the accident the joists from which appellant fell had not been set.

It does not appear that appellant was given any express permission by the general contractor or its agents to use the said forms as scaffolding, nor does it appear that the manner in which the forms were constructed rendered them unsafe for the purpose for which they were intended.

The record fails to reveal any facts from which it might be concluded that there was any duty on the part of the general contractor to furnish scaffolding for use in appellant's work.

It cannot be reasonably inferred from the evidence that appellant understood that the forms set up for the pouring of concrete were also set up for his use as scaffolding. The only logical inference that can be drawn from the evidence is that appellant was using the forms for scaffolding because the general contractor was erecting them at the time when appellant was engaged in painting the structural steel. Nor is there anything in the record to show that respondents should not have been erecting their concrete forms at the time they were being erected.

The most favorable inferences which may be drawn from the evidence lead to the conclusion that appellant was a mere licensee with respect to the use of the concrete forms as scaffolds. The record negatives any inference from which it could be concluded that appellant was invited to use the forms for this purpose. Moreover, it does not appear that respondents were at all careless in failing to have completed the form in question before the time when appellant ventured out upon it, or in having at least firmly set the joists before that time.

[2] Appellant contends that the court erred in refusing to instruct the jury regarding the rule of res ipsa loquitur. Such a rule could have no application to the instant case. Far from being an accident which in the ordinary course of things does not happen, appellant's mishap is one that frequently occurs where a person fails to take ordinary precaution for his own safety. The mere happening of the accident under the circumstances here shown could not possibly establish a prima facie case, when it appears that the instrumentality was being used by appellant for a purpose other than that for which it was intended.

[3] "To justify the invocation of the rule, the instrumentality which caused the injury must have been under the exclusive management of the defendant, and it does not apply where the cause of the accident is unexplained and might have been due to one of several causes, for some of which the defendant is not responsible." Davidson v. American Liquid Gas Corp., 32 Cal.App.2d 382, 387, 89 P.2d 1103, 1105, citing Biddlecomb v. Haydon, 4 Cal.App.2d 361, 40 P.2d 873. And in a case where the injuries complained of resulted from an iron trap door having fallen upon plaintiff's hand, and the door fell because the protecting iron bar had not been attached, and the parties conceded that the bar was not attached at the time of the accident and that its absence was the proximate cause of the injuries, it was held under such circumstances that plaintiff's knowledge of the cause of the accident was equal, if not superior, to that of the defendants and there was no room for the application of the rule of res ipsa loquitur. Alexander v. Wong Yick, 25 Cal.App.2d 265, 269, 77 P.2d 476.

[4, 5] Moreover, the jury having found in favor of appellant, appellant has no cause to complain of the refusal to give any instruction. Obviously such failure did not prejudice his case. Appellant is apparently under the impression that had such an instruction been given there would then have been some evidence of negligence before the jury, and argues to this effect. Evidence is not created or manufactured through the application of the rule of res ipsa loquitur. Whether the instruction was given or not the amount of evidence before the jury would be the same. The rule is applied merely for the purpose of deciding how much evidence is necessary to establish a prima facie case.

[6] There can be no question of a latent defect in the form, as contended by appellant. The form was not finished and, as pointed out above, appellant must have known that it was not intended for use as a scaffold. Under the circumstances it was clearly incumbent upon appellant to ascertain that the form was sufficiently completed and sufficiently safe before he undertook to use it as a scaffold.

[7] If, as it appears, it was not possible for appellant to paint the said brace from the concrete form when completed, it was incumbent upon appellant's employer to provide some other reasonably safe means for appellant to do his work, and at another more appropriate time custom or policy to the contrary notwithstanding. See sections 6401, 6402, 6403 of the Labor Code, St.1937, pp. 308, 309.

[8] Even assuming that respondents knew or should have known that appellant would use the form in question as a scaffold, that did not excuse appellant's proceeding to venture out on the joists at the time he did, nor did it place upon respondents the burden of constructing their forms so as to serve both the purpose of scaffolding and that of forms for concrete, in the absence of any agreement to that effect between the general contractor and appellant's employer, the subcontractor. The record reveals no such agreement.

[9] It does not appear that the respondent general contractor or its agents had direction, management, control or custody of appellant or his employment. If there was any breach of a duty toward appellant it was on the part of appellant's employer, the subcontractor, in failing to furnish appellant with all appliances and equipment essential to safe working conditions.

[10] The record is devoid of any evidence from which the jury could reasonably find negligence on the part of respondents. On the other hand, the evidence shows conclusively that appellant was guilty of negligence in venturing out upon the joists at the time he did. Brown v. Board of Trustees, 41 Cal.App. 100, 182 P. 316; Gleason v. Fire Protection Engineering Co., 127 Cal.App. 754, 757, 16 P.2d 750; Bruce v. Risley, 15 Cal.App.2d 659, 664, 59 P.2d 847; Slyter v. Clinton Construction Co., 107 Cal.App. 348, 290 P. 643.

[11] At the close of the evidence respondents made a motion for a directed verdict in their favor. Disregarding conflicts, if any, in the evidence and indulging in every reasonable inference in appellant's favor, one conclusion only is possible, namely, that the proximate cause of the accident was the failure of appellant to take reasonable precautions for his own safety. Respondents' motion for a directed verdict should have been granted and the court did not err, therefore, in rendering judgment for respondents notwithstanding the verdict of the jury in appellant's favor. Sec. 629, Code Civ.Proc.

For the foregoing reasons the judgment is affirmed and the attempted appeal from the order granting the motion for judgment notwithstanding the verdict is hereby dismissed.

We concur: YORK, P. J.; WHITE, J.

PEOPLE v. SHAW et al.*

Cr. 3249.

District Court of Appeal, Second District, Division 1, California.
Nov. 13, 1940.

Rehearing Denied Nov. 26, 1940.
Hearing Granted Dec. 13, 1940.

1. Criminal law 🔑507(1)

One is an "accomplice" who knowingly, voluntarily and with common intent with the principal offender unites in the commission of the crime, the word "accomplice" including all persons who have been concerned in the commission of an offense. Pen.Code, § 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice".

2. Criminal law 🔑507(1)

In prosecution for aiding, abetting and by threats and coercion compelling manager and other employes of city civil service department to alter and falsify civil service records, the employees who under orders of the manager directly committed acts which they admitted they knew were wrongful, and which defendants were charged with aiding and abetting were "accomplices" within statute requiring corroboration of accomplice's testimony. Pen.Code, §§ 113, 1111.

3. Criminal law 🔑511(2)

In prosecution for aiding and abetting and by threats and coercion compelling manager and other employees of city civil service department to alter and falsify civil service records, corroborating evidence must of itself and without the aid of testimony of accomplices connect or tend to connect defendants with the commission of offenses charged against them. Pen.Code, §§ 113, 1111.

4. Criminal law 🔑511(2)

Under statute requiring corroboration of accomplice's testimony, "corroborating evidence" must tend directly and immediately to connect defendant with commission of the offense and regardless of how strong corroborating evidence might be in other respects, it must point to connection of defendant with commission of crime charged to be of any avail, and corroborating evidence is insufficient where it only casts a grave suspicion upon the accused. Pen.Code, § 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Corroborating Evidence".

5. Criminal law 🔑419(1)

In prosecution against mayor's secretary and civil service commissioner for aiding, abetting and compelling manager and other employees of city civil service department to alter and falsify civil service records, testimony of witness that on certain date he received a list of numbers and list of names of police officers from secretary's friend and was told which numbers represented true or false answers and that he gave such list of numbers to police officers and received from some of them campaign contributions which he turned over to such friend was inadmissible as "hearsay." Pen.Code, §§ 113, 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Hearsay".

6. Criminal law 🔑1169(2)

In prosecution against mayor's secretary and civil service commissioner for aiding, abetting and compelling manager and other employees of city civil service department to alter and falsify civil service records, error in admitting hearsay testimony that witness received a list of numbers and names of police officers from secretary's friend and was told which numbers represented true or false answers and that witness gave such numbers to officers some of whom gave campaign contributions which witness turned over to secretary's friend was not cured by showing that secretary made a speech at a dinner attended by police officers at which time secretary returned to them through the witness certain contributions which they had previously made to the mayoralty campaign. Pen.Code, §§ 113, 1111.

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* Subsequent opinion 112 P.2d 241.

7. Criminal law ⚷369(1)

In prosecution against mayor's secretary and civil service commissioner for aiding, abetting and compelling manager and other employees of civil service department to alter and falsify civil service records, testimony that commissioner aided a candidate who took examination of sanitary and housing inspector which had no connection with examinations upon which indictment was founded, was incompetent. Pen.Code, §§ 113, 1111.

8. Criminal law ⚷511(1)

Corroborating testimony which merely raises a suspicion of a defendant's guilt is not sufficient under statute requiring corroboration of an accomplice's testimony. Pen.Code, § 1111.

9. Criminal law ⚷511(1)

In prosecution against mayor's secretary and civil service commissioner for aiding and abetting and through threats and coercion compelling manager and other employees of civil service department to alter and falsify civil service records of some 33 candidates in connection with five civil service examinations, evidence was insufficient to corroborate testimony of accomplices so as to justify conviction. Pen.Code, §§ 113, 1111.

◆

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Joseph E. Shaw and another were convicted of aiding, abetting and compelling the general manager and other employees of the city civil service department to alter and falsify civil service records, and they appeal.

Appeal from order denying objections to pronouncement and imposition of judgment and sentence dismissed, and judgments of conviction and orders denying motions for new trial reversed.

Richard H. Cantillon, John E. Glover, and Morris Lavine, all of Los Angeles, for appellants.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

By an indictment containing sixty-six counts, appellants were charged with violations of section 113 of the Penal Code, in that upon certain stated dates they "did wilfully, unlawfully and feloniously aid and abet, advise and encourage, and by threats, menaces, command and coercion, compel and cause one Glenn G. Gravatt, who was then and there the duly and regularly qualified and acting manager of the civil service department of the city government of the city of Los Angeles, California, and other employees in said civil service department, to mutilate, deface, alter and falsify" certain civil service records then in the custody of said Gravatt and the other employees of said department, who were officers of the city of Los Angeles.

Each odd-numbered count referred to the falsification of part of a report of a civil service examination pertaining to the mark, grade and rank of a named applicant, which report was known and designated by the civil service department as "rough sheet". Each even numbered count of the indictment referred to the falsification of the grade notations which were written on the back of the application of the particularly named candidate in consonance with the notations entered on the so-called "rough sheet".

The charges of the indictment related to five examinations conducted by the civil service department as follows:

1. Counts 1 to 16, inclusive, to changes made in the oral interview grades of eight named candidates who took an examination for the position of engineer in the fire department prior to December 16, 1936, to-wit: on October 30, 1936;

2. Counts 17 to 22, inclusive, had reference to changes made in the oral interview grades of three candidates who were examined for the position of captain of the fire department approximately on April 10, 1937;

3. Counts 23 to 38, inclusive, referred to falsification of oral interview grades of eight candidates for the position of auto

fireman, an examination for which was conducted on July 29, 1937;

4. Counts 39 to 50, inclusive, related to the falsification of oral interview grades of six candidates who took an examination for the position of fireman, held on or about January 8, 1938;

5. Counts 51 to 66, inclusive, had reference to the changes made in the oral interview grades of eight candidates for the position of motorcycle officer of the police department, an examination for which was held on or about May 8, 1937.

In each instance it is alleged that the oral interview grade was falsely entered on the so-called "rough sheet" and upon the back of the application of the particularly named candidate.

At the conclusion of the trial, the jury returned its verdicts finding appellants guilty on sixty-three counts, as charged in the indictment, verdicts of not guilty having been returned to counts 42, 44 and 50. Appellants' motions for new trial and in arrest of judgments were denied, and judgments of conviction were pronounced. The sentences on the individual counts composing each of the five groups were made to run concurrently, and the sentences on the five groups were made to run consecutively, there being five consecutive sentences imposed upon each appellant.

This appeal is prosecuted from the judgments of conviction, from the orders denying motions for new trial, and from the order denying the objections of each appellant to the pronouncement and imposition of judgment and sentence.

It is contended in the twenty assignments of error set forth in appellants' briefs that (1) the evidence is insufficient to sustain a charge under section 113 of the Penal Code for the reason that said section has been superseded by section 118 of article IX of the charter of the city of Los Angeles (Stats. 1925, p. 1068); (2) the application blanks and rough sheets were not records within the meaning of section 113, supra; (3) the evidence is insufficient to support the judgments of conviction for the reason that appellants were convicted upon the testimony of accomplices without the corroboration required by section 1111 of the Penal Code; (4) the court erred in its rulings as to the admission and rejection of evidence, and in its instructions to the jury, as well as in its refusal to give certain instructions; (5) the court erred in refusing to allow appellants to impeach the testimony of the witness Gravatt; (6) there was misconduct on the part of the deputy district attorney which amounted to prejudicial error; (7) it was error to impose upon appellants a sentence under section 113 of the Penal Code.

It is disclosed by the evidence that at the time in question under the charter of the city of Los Angeles the civil service department was presided over by a board of five commissioners, and that the business of the department was to examine the qualifications and select applicants for positions of employment in the classified civil service. The department was generally divided into two divisions, one an examining division and the other a clerical division, both of which were under the supervision and control of the general manager, Glenn G. Gravatt.

When employees were needed to fill positions in any of the governmental departments of the city, the board of civil service commissioners would be duly notified and they in turn, through consultation with the head of the department requiring such employees, would determine the requisite qualifications for the particular employment. The general manager would then be instructed to arrange to conduct an examination to test the applicants' qualifications, and the examination was publicly advertised. Applicants were required to fill out application blanks setting forth their age, education and experience, and these blanks were filed with the clerical division. Before the time set for the written examination, such applicants were notified when and where to appear therefor.

Each civil service test was divided into two phases, one consisting of a written examination and the other of an oral interview. The written examination was conducted first, whereupon the papers were graded and the grades received by the applicants were forwarded to the clerical division and there entered in pencil on a document known as the "rough sheet", as well as on the back of each candidate's written application. Those candidates receiving a passing grade in the written examination were summoned to the civil service department, to be interviewed by one of the examiners of the department, who wrote on a memorandum pad called the "oral sheet" his appraisal of the candidate's education and experience. Thereafter, these oral sheets were forwarded to the clerical division and the marks so entered thereupon were placed in the proper column in pencil on the "rough sheet", opposite the grades representing the result of the written examination. The mark received on the oral interview was then noted on the back of the written application previously filed by the candidate.

There was then noted and added to these oral and written grades in the proper columns such credit as the particular applicant might be entitled to by reason of seniority or for military service, and a general average computed by the clerical staff which was entered in pencil in the proper column on the rough sheet. The rank of the applicant was determined from a computation of the general averages, and his numbered place in rank in the order of his relative excellence was entered in pencil upon the rough sheet which was then delivered to the general manager for inspection, review and approval. Under the rules of the commission, the general manager also occupied the office of chief examiner. If the general manager approved the gradings on the rough sheet he returned it to the clerical division with instructions that a typewritten sheet, designated as the "smooth sheet" be prepared therefrom and forwarded to the board of civil service commissioners for consideration and approval. It appears that if the general manager disapproved the contents of the rough sheet, it was within his discretion to return it to the examiners or the clerical division with instructions to make any proper corrections or changes, with corresponding changes on the back of the applications. The smooth sheet was not prepared until the general manager, as chief examiner, first approved the grades appearing on the rough sheet. Upon presentation of the smooth sheet to the board, it was duly published, and candidates dissatisfied with their grades were notified to file written protests within a certain prescribed period of time. When that period had elapsed, the board approved the smooth sheet from which would then be prepared a list of persons eligible for appointment to positions in the classified civil service, and subsequently appointments were made therefrom in the order of rank obtained by the respective applicants as the city required their services.

Appellants were not charged with actual participation in the alteration and changing of the grades and marks in the question, but with having aided and abetted, advised and encouraged Glenn G. Gravatt and other employees of the civil service department to make such changes.

The said Glenn G. Gravatt, who admitted he was an accomplice and who was the main witness for the prosecution, had been employed by the city in various capacities over a period of twenty years, and on April 7, 1933 he became the general manager and chief examiner of the civil service department. On July 1, 1933 Frank Shaw took office as mayor and shortly thereafter Gravatt met appellant Shaw, the mayor's brother and secretary, at which time appellant Cormack was a member of the board of civil service commissioners.

Gravatt was named in the indictment as the principal actor and it was his testimony which formed the background of the instant convictions and judgments. He testified that around the first of October, 1933, appellant Shaw called him to his office on the first floor of the city hall at which time the following conversation took place between them:

"Well, Mr. Shaw said that he had some friends who had assisted the Mayor in his recent campaign, and said that he was very anxious to do something for them toward getting them a job with the city under civil service; and he asked me what could be done to help them. I said I didn't know anything that could be done, that I didn't know of any short cuts in civil service positions. So Mr. Shaw said, 'Well, just what is the procedure in connection with getting a civil service job?' and I said. 'Well, we accept applications from candidates who meet the qualifications and the specifications that are set up by the Commission, and following that we hold a written examination, and when those papers are marked and graded, we have an oral interview for those candidates who hold a sufficiently high grade in the written portion of the examination to be called for the oral interview.' Mr. Shaw said, 'Well, couldn't we make some changes in the grades?' and I said, 'Well, I didn't see how that could be possible.' I said, 'The marks are entered on a number of different papers and documents and it is not any one man's job but goes through several hands and goes through several clerks and several examiners, and all of these papers and marks on the—all the grades on the different papers have to correspond.' And Mr. Shaw said, 'Well, I didn't mean so much the written part of the examination.' He said, 'Couldn't some change be made in the oral part of the examination?' And I said, 'I don't know.' And he said, 'Well, isn't it a fact that only one examiner gives the oral examination?' I said, 'That is usually the case.' He said, 'Wouldn't it be a very easy and simple matter to make a change in the oral grade?' I said, 'Well, I guess it could be done, but I don't like to do it. I have never done anything like that before.' So Mr. Shaw said, 'Well, you know I am the boss', and he said words to this effect: 'You do as I tell you to do and play ball with the administration or I will kick you out.' I said, 'All right.'"

Gravatt further stated that appellant Shaw on that same day gave him names of two or three candidates in some examination, that Shaw dictated the names to him and gave him a pad of paper and a pencil and Gravatt wrote them down. Three or four weeks later the two men had another conversation, no one else being present, with reference to which Gravatt testified as follows:

"I told Mr. Shaw that in connection with these few names that he had given me on the previous occasion that I had not been able to get them right at the top of the list and he asked why and I told him that their written grades were not sufficiently high and even if I gave them the maximum oral grade that could be given, there were still others who took the examination who were higher in the examination, and he said, 'How is that?' And I said, 'Well, they made higher marks on the written part of their examination.' He said, 'How did they make it?' I said, 'I don't know; I guess they were just smarter.' He said, 'No, they couldn't be that smart. There couldn't be anybody make that high a grade on the square.' He said, 'Did anybody see the questions before the examination?' And I said, 'Well, nobody but Mr. Cormack. He had asked to see them, one of the Commissioners.' He said, 'Well', he said, 'I will talk to Mr. Cormack about that.'"

A few days later another conversation was had in appellant Shaw's office, with reference to which the witness Gravatt testified: "Well, Mr. Shaw said that he had seen Mr. Cormack and talked to him and that Mr. Cormack was all right and I should do anything that he told me; that would be all right, and that if he gave me any names of any candidates taking examinations it would be all right to place them as high as I could on the eligible list, but to check with him, Mr. Shaw, first." Within a day or two thereafter, the witness Gravatt testified that the appellant Cormack gave him a list of names of candidates and told him to see that they got as high a rank as possible in the examinations that were being conducted; that Mr. Shaw was interested. Two or three weeks later, the witness called on appellant Shaw at his office and "showed Mr. Shaw a rough report for an examination and pointed out the names of the candidates which he had previously given me and showed him where it was impossible to place them at the top of the list, due to the fact that others had such high grades, and he said: 'I don't understand that.' He said, 'We had the questions and answers and we got a good oral mark and still you have got some strangers in here up higher on the list that should not be here.' And he said, 'Are you sure there aren't any leaks in your office?' I said, 'Well, I don't know of any. All the people, or most of the people have been there for some time, and I have had no reason to suspect that any of them would give out any information in advance of the examination and I use all the precautions we have to prevent leaks, and I don't know of any.' He said. 'Well, then, there is only one thing to do and that is to take these people that are so high up that we can't get rid of them and don't know who they are and just simply cut their oral grade so low that they will be out of the picture.'"

The lists of names which the witness received from appellant Shaw were dictated to him in each instance, while the lists of names handed to him by appellant Cormack were written, both lists often containing the same names. When asked if he retained possession of such lists, the witness stated that he did not; that in some cases he threw them into the wastebasket and in others he turned them over to the clerk or examiner who had charge of the paper work in the examination. The witness also said he received lists of names from Mr. Charles Welch, assistant secretary to the mayor, beginning in the early part of 1937 under the following circumstances: "Mr. Shaw had stated that it would be necessary for him to be away from the office a good deal of the time, and that whenever Mr. Welch asked me for any questions and answers in advance of an examination, I was to deliver those to Mr. Welch, and whenever Mr. Welch gave me lists of names of any candidates participating in any examinations, that I was to take care of them in the same way that

I had been for him." The witness testified that with reference to any examination for position or promotion in the police or fire departments, he did not give a list of questions or answers in advance of the examination to any person other than appellants Shaw and Cormack and Charles Welch; that after receiving lists of names from these three men, he "computed from the rough report about what oral grade would be necessary for them to have in order to bring them on the list in accordance with the lists which I had received and then instructed * * * two clerks, two examiners in the department to make those changes * * * on the rough report", to-wit: Mr. Arthur Dvorin, executive clerk and later research examiner, assigned to co-ordinate the work of the other examiners, and Mr. Bernard Kauffman, a general clerk in the examination division of the civil service department; that such changes were made on the rough sheet prior to the preparation of the smooth sheet, and he thereafter checked the rough report to see that his instructions were carried out.

The witness Gravatt testified that all the persons named in the indictment had received grade adjustments on his orders which he gave to comply with the requests of appellants. With respect to the memorandum which he handed to Dvorin in connection with the examination for captain of the fire department (counts 17 to 22), Gravatt testified he told Dvorin that the mayor's office and the commission wanted the changes made.

Over the objections of appellants that they were offenses not included within the charges of the indictment, Gravatt was permitted to testify concerning conversations he had with appellants in which they gave him lists of changes to be made in the grades for examinations other than police and fire department examinations, notably an examination which took place in 1935 for the position of sanitary and housing inspector. The witness testified he had a conversation with appellant Shaw on the subject of one Max Yedwalsky after the list for that particular examination had been certified, to the following effect: "Mr. Shaw said, 'There is a man by the name of Yedwalsky who took the examination for sanitary inspector and he didn't do so well. Is there anything we can do to give him a higher grade?' I said, 'No, there is not.' He said, 'Why not?' I said, 'Because the report has been approved and the list has been fully established.' And I said, 'Furthermore, the book of civil service rules and regulations which provides for protests to be heard within one week after the list is tentatively approved and which provides for the adjusting of grades by the commission in case an injustice is found by the commission. That time has expired and I don't know of anything that can be done.' Mr. Shaw said, 'This is very important and we will find a way to do it.' And I said, 'All right.' He also said he had a conversation on the same subject with appellant Cormack a day or two later at which time Mr. Cormack said, 'There is going to be a board meeting this morning and I want you to go in there and make a recommendation that Mr. Yedwalsky's grade be raised and I will make the motion.' I said, 'Well, I can't make any recommendation like that.' Mr. Cormack said, 'Why not?' I said, 'Because the time has elapsed for hearing of protests on examinations and after that time has elapsed there is no way on earth that the board can make any changes in marks or grades.' Mr. Cormack said, 'Well, there is a provision in the book of civil service rules and regulations whereby even after the protest period has expired a clerical error can be corrected at any time.' I said, 'Well, there isn't any clerical error.' Mr. Cormack said, 'Well, you can find one, can't you?' I said, 'Well, I don't know how,' and he said, 'Now, listen, this Mr. Yedwalsky is a very important man. He is very important to the administration. He is a strong-arm man. He has worked for Al Lushing over in the water and power department, and he will do anything the administration wants. He will go out and commit robbery, burglary or even murder if necessary and we have got to do something for this man.' I said, 'All right, I will go in and make a recommendation.'" (A motion to strike, on the ground that the questions eliciting the above-quoted answer were asked by the deputy district attorney in bad faith and constituted misconduct, was denied.) The witness then testified that he appeared at the said meeting of the board and heard commissioner Cormack tell the "other members of the board that it had been discovered that in transposing the grades from one sheet to another that Max Yedwalsky had been marked lower than he should, and that he made a motion to raise him a number of points, I forget the exact number."

S. May Smith, secretary to the city civil service commission, testified that she attended meetings of the commission taking minutes of all proceedings, and with reference to the meeting of August 7, 1935, she read from the minutes (Vol. 17, p. 6259) kept by her, that upon that date the general manager Gravatt submitted a report regarding the examination of Yedwalsky for sanitary and housing inspector, to the effect that a clerical error had been discovered by which Yedwalsky's oral grade of 87 had been transferred to the record as 77. The general manager asked the board to order the correction under the provisions of its rules and regulations and appellant Cormack moved such correction be made, whereupon the motion was seconded and adopted by the vote of all commissioners present.

The cross-examination of Glenn G. Gravatt disclosed that there was then pending against him a misdemeanor charge for violation of section 118 of the city charter; that as general manager of the civil service department he had charge and control of all affairs of the department, and he regarded the individual commissioners as his superiors; that he did not make it a practice to submit questions and answers to the commission prior to the examination; that the rough reports constituted the data from which the smooth reports were made, and the smooth reports were the only reports that went to the commission for its action. An examination was not complete until the report had gone to the commission and had been acted upon; that in his experience the commission had frequently changed grades; that the record and certification department was under his management and control, and its card system was called the register which the city charter requires shall be kept. After the register of eligibles was made up the smooth report was filed in a vault in the civil service offices. Rough reports were kept on file as a custom rather than at his direction.

Arthur Dvorin, who had been employed in the civil service department for thirteen years and ten months in the following capacities: messenger, junior clerk, general clerk, half code general clerk, executive clerk and research examiner, testified that his duties as executive clerk consisted of supervising the clerical staff in the examining division, the scheduling of examinations, contacting various departments as to specifications and in drawing up requirements and duties for various examinations; that the duties of research examiner were primarily the same, except that he was very occasionally called upon to write and conduct an examination; that in general he directed the work of the examining division and assigned examinations to examiners under the direction of the general manager Gravatt.

It was brought out upon cross-examination that he first noticed changes being made in grades when he was executive clerk in 1934 or 1935; that such changes were made upon rough reports in the oral columns; that he received yellow sheets regarding such changes directly from Gravatt; that most of them were written in long hand and a few were typewritten; the fireman's list was received the second week of June, 1938, the engineer's list in 1936, the motorcycle list in 1937, and the auto fireman and captain's lists in 1938. He testified that he turned over all of these yellow lists to the district attorney about one hundred twenty-five in all; that he kept the lists in his office for a while and then took them home and surrendered them to the prosecution; that there were four hundred fifty or five hundred names on the yellow sheets which he received, names of candidates whose grades were to be changed according to Gravatt's instructions. He testified that this had been going on for four years; that Gravatt told him to make the changes on the rough reports; it was not part of the witness' duties to keep the yellow sheets in his office or at his home; that he kept them for personal reasons, i. e., because he thought there was something wrong about Gravatt's grade changing orders and he wanted to protect himself; that he explained to the board of civil service commissioners his failure to report Gravatt, because he thought if he did it would have cost him his job; that Gravatt never did anything to lead him to believe he would fire Dvorin, if the latter remonstrated about the grade changing orders, nor did Gravatt say anything or threaten him in any way. The witness identified People's exhibit 26 as the slip pertaining to the fireman's entrance examination of January 8, 1938, and stated that when that slip was handed to him Gravatt did not say in effect that the mayor's office and the commission wanted the changes made. The witness stated that he never knew the mayor nor Joe Shaw, and in his opinion the "higher-ups" in his department were Gravatt and the commissioners; that in telling the board that neither he nor his clerks ever changed grades, he meant to say "of our own volition"; that the only supervision he had over these changes was to hand the oral sheets to the clerks and tell them to make the changes; that his resignation became effective in February, 1938; that at the time he handed in his resignation, the then commission had started its investigation and had been under way a week or two.

The witness Dvorin also testified that the only instructions he received were to have the examiners make the changes on their oral sheets; that these instructions he received from Gravatt and there were no others; that he had a conversation with appellant Cormack in October, 1937, at the time Gravatt was away (on a European trip); that his talk with appellant Cormack concerned auto machinists' examination (which examination is not referred to in the indictment herein) and occurred in Gravatt's office with only himself and appellant Cormack present; that Cormack asked for a copy of the questions for said examination and the witness told him they had not been mimeographed; that Cormack then asked him where the rough copy was and the witness told him that Mrs. Tracy probably had it; that the witness then left the room and brought back the mimeographed copies for the test of auto machinist; that appellant Cormack looked at the stencil and removed the cushioned stencil sheet; whereupon Cormack returned the stencil to the witness but kept the cushion sheet which contained a copy of the questions for the said examination; that he complied with Cormack's request because he presumed Cormack had authority to make the same by virtue of the fact that he was a member of the board; that he assumed, since the commissioners composed the administrative body of the department, that they were in a sense superiors of the employees; that he considered appellant Cormack one of the higher-ups of the municipal government.

With reference to the Dvorin-Cormack episode last referred to, Phyllis Tracy, executive secretary to the department, testified she recalled cutting stencils for the auto machinists' examination during Gravatt's vacation in 1937; that she saw Cormack in her office with Mr. Dvorin; that she did not hear any of the conversation between the two men; that she saw appellant Cormack and Dvorin go into Gravatt's office and in a few moments she saw Dvorin come out again, at which time he returned to her the stencils for the auto machinist's examination; that the cushion sheets from the stencils were missing; that on no occasion, except the one testified to, had any person ever requested her to turn over the stencils to be taken from her room; that she took precautions in locking the questions in her desk if she left the room and at night they were locked in a safe. On cross-examination she testified that all persons coming and going to Gravatt's office passed through her room, including the examiners and other office help; that she occupied the room next to Gravatt's room since 1933, or four years prior to the incident just narrated; that there was a door from Gravatt's office leading directly into the hall, besides the one connecting with her room.

Bernard Kauffman, general clerk of the department, testified that he worked under Dvorin; that after the written part of the examination for engineer in the fire department was held on October 30, 1936, he made erasures and substitutions of figures opposite names of certain candidates on rough sheets for that examination at the direction of Dvorin. He then recited in detail the various changes and erasures made in the grades shown on the rough sheets and in the final grades shown on the applications of various candidates, identifying People's exhibits 2, 7, 9, 10, 12, 13, 14, 15, 27, 30, 32, 33, 36, 38, 39, 40; and stated he often made changes on rough sheets and applications other than those shown him during the instant trial; that all changes were made on orders from Dvorin and with Dvorin's knowledge and under his supervision; that no one else ever ordered him to make any changes; that appellant Shaw never talked to him about making changes; that he did not even know appellant Shaw; that neither did appellant Cormack talk to him about such a matter; that the witness made no objection to making the changes because he was only a clerk and had no alternative; he thought the grade changing was unusual but did not discuss it with anyone; that Gravatt ordered the examiners to make grade changes by sending in yellow sheets; that he received yellow slips from Mr. Gravatt in Mr. Dvorin's absence; and that it was his understanding from past experience and conversations with Dvorin that he was to take such slips to the examiners so they could change the grades.

Charley S. Walbridge, employed in the civil service department in various capacities for eighteen years, testified that he was director of classification when Gravatt became general manager and that he became an examiner either in July, 1933 or 1934; that he was one of the two examiners who conducted the practical tests in connection with the examination for engineer in the fire department on October 30, 1936; that the other examiner was Harvey W. Webber; that he and Webber graded without reference to each other and the two grades were added and the sum divided by two to arrive at an average grade which was the official grade for that part of the examination; that Dvorin delivered to the witness and Webber a slip of paper (People's exhibit 1) about the time when the official report of the examination was submitted to the board for tentative approval; that the witness drew a line on his oral sheet through the grades he had given the candidates named in the yellow slip and substituted therefor the grades shown on the slip, and then initialed the oral sheet to indicate that the adjustments had been made, making a memorandum of the changes in his own handwriting; that by reference to said memorandum (People's exhibit 41) he was able to tell what the grades had been and to what they had been changed. The witness then recited various changes made in other examinations about which he was questioned, and testified he was instructed to make the changes by either Dvorin or Kauffman. Upon cross-examination, the witness stated that all the changes about which he testified were made under orders from Gravatt, in accordance with his authority as the witness' superior officer; that he made certain memoranda as to the changes as a matter of self-protection, because he assumed there was something wrong about Gravatt's orders; that he protested about the grade changes to Dvorin, Kauffman and to other examiners but he never protested to Gravatt; that he made two records of the same transaction, did not file his memoranda, but took them home immediately and put them in a safe place.

Mavis Moulton, a junior clerk in the department working under Dvorin, testified that she made changes in the rough report of auto fireman's examination, and changed the oral average and final grades upon certain named applications to conform to the changed grades on the rough report; that she first erased the original grade figures on the application before putting down the new figures in her own handwriting; that when she made the changes on the rough report she had before her an oral sheet given to her by Dvorin; that she had no conversation with him at that time.

Harvey W. Webber, who was continuously employed by the civil service department as an examiner for a period of thirteen years which ended on January 19, 1939, testified that during the time he was an examiner he was instructed to make changes in oral grades, the first of such instructions coming to him about January, 1934, from the general manager's office in a written memorandum through the research examiner's department. Referring to the examination of October 30, 1936, for engineer in the fire department, he testified that while conducting that examination he made grade entries on his rough report; that he was working with examiner Walbridge; that after the grading had been completed he received instructions to change the oral grades of certain candidates, such instructions being in the form of a written memorandum delivered to him by Dvorin; that the said witness made the changes as ordered, not because the qualifications of the candidates warranted such changes, but because he was ordered to do so.

Another witness for the prosecution was Guy Kuykendall, who testified that he entered the employ of the city as an ordinary fireman on August 11, 1915, was appointed battalion chief in 1934 and retired November 11, 1938. During the 1933 campaign he met appellant Shaw at the campaign headquarters of Frank L. Shaw, who was then running for mayor; that he participated in both the 1933 and 1937 campaigns and during that time saw appellant Shaw a number of times; that two to four weeks before the examination for battalion chief was conducted in July, 1936, the witness had a conversation with appellant Shaw at the latter's office in the city hall, at which time said Kuykendall told "Lieutenant Shaw that that was an important position in the fire department, the position of battalion chief, and that those positions were men that carried quite a little influence, had men under their supervision and that those key positions should be filled with capable, competent men as well as men that were favorable to the administration * * * the Shaw administration. * * * He (Shaw) said he realized it was an important position and he would find ways and means of helping the men out that I thought were competent and capable to fill those positions." At a second conversation between the two men, fifteen or sixteen days before the examination for battalion chief took place, the witness testified he told "Lieutenant Shaw that the examination was going to be held in a short time and I was willing to do anything to aid that man if I could do it right away, and he told me that within a day or two he would have the questions and answers for me for the coming examination * * * (he) asked me if I knew Herbert Dikeman and I told him that I did * * * that he was a good man and well qualified and would make a good officer in the department and he (Shaw) said he thought he was the right type of man for an officer in the department." Two or three days later the witness met appellant Shaw at the Los Angeles Athletic Club at which time appellant gave Kuykendall a list of questions and answers for the battalion chief's examination, consisting of between two hundred and two hundred fifty true and false questions. After receiving them, the witness asked appellant Shaw what he wanted him to do with the questions and answers after he was through with them and appellant told him to destroy them. He further testified that when he had coached the various applicants on the questions and answers he did destroy them; that thereafter he coached Captains Dikeman, Fien and Schroeder and during Mayor Shaw's campaign in 1937 he collected $100 from Dikeman, $250 from Fien and $50 from Schroeder, and he told appellant Shaw that "those men felt very grateful for what had been done for them in the examination and that they had offered their willingness to work during the campaign or to help out in any way they could at any time they were called upon".

The foregoing testimony of Kuykendall has reference to the examination of battalion chief held in July, 1936, and is not included among the examinations specified in the indictment herein.

The witness Kuykendall testified with reference to the examination for engineer of the fire department conducted October 30, 1936 (covered by counts 1 to 16 of the indictment) that he again contacted appellant Shaw and received from him a list of questions and answers which he thereafter used to coach men personally selected by him, reciting the names of those men who were specifically referred to in counts 1 to 16 of the indictment and from whom he collected sums of money ranging from $10 to $100; and that, thereafter, between the time of the written examination and the time when the eligible list was made public, he gave appellant Shaw a list of the names of the men he had coached for this examination.

With reference to the examination for captain of the fire department held in April, 1937, and referred to in counts 17 to 22 of the indictment, this witness testified he received questions and answers from appellant Shaw and coached certain candidates including Woodruff and Evans from whom he collected $300 and $85 respectively; that about the time he received the questions he gave them and a list of names to Captain Bentley employed at engine house No. 27; that he later gave to appellant Shaw a list of the names of the various candidates which he and Captain Bentley had coached for this examination, and received from Bentley $1,600 to $1,800, of which he delivered to appellant Shaw approximately $1,500 in currency, and the rest he used in the campaign for the election of Mayor Frank Shaw.

Some time before the examination for auto firemen conducted on July 29, 1937 (counts 23 to 38 of the indictment), Kuykendall had a conversation with appellant Shaw to the effect that if he was going to coach any men for that examination he must have the questions in advance, and appellant Shaw told him to see appellant Cormack about it; that between three and four weeks prior to that examination, he saw appellant Cormack at the latter's office at Ninth and Los Angeles streets, at which time Cormack told the witness that he would see appellant Shaw and get his approval; that the witness subsequently did receive the questions but did not remember whether from Shaw or Cormack, but from either one of the two; that he thereafter coached several men and also gave the questions and answers to Captain Bentley together with three or four names and collected from Bentley five or six hundred dollars, a portion of which was used during the campaign of 1937 and the remainder was turned over to appellant Shaw. The witness also testified that he gave to Cormack a list of the candidates that he and Captain Bentley had coached for this particular examination.

With respect to the examination for fireman held about January 8, 1938 (counts 39 to 50 of the indictment), Kuykendall testified he talked to appellant Cormack about thirty days prior thereto and told him that he (Kuykendall) had several candidates he wanted to coach for that examination and he would need a list of questions in order to do that work in advance of the examination and appellant Cormack told him he would see appellant Shaw and let Kuykendall know later as to what he could do about it; that he thereafter received the questions and answers from appellant Cormack which he used in coaching candidates and also turned over a list of four or five names to Captain Bentley; that he made up a list of all candidates which he and Captain Bentley had coached and gave it to appellant Cormack. He collected seven or eight hundred dollars from Captain Bentley on this examination and received from Bentley a total of approximately $3,000 in connection with all of these fire department examinations; that "some of that money was turned during the 1937 campaign, some of it was turned over in 1938 to Lieutenant Shaw, some of it was used in the campaign of 1937 and some was used in the campaign of 1938, * * * the recall election". This witness further testified that the aggregate amount of money that he collected personally and received from Bentley for coaching candidates for the various oral examinations for the fire department amounted to $7,000 or $7,500; that he organized a political club (the F. L. S. Club) and received from the members some $1,000 or $1,200, some of which was used for the expenses of the club and the remainder turned over to appellant Shaw for campaign purposes. He testified that this club was active in both the 1937 and 1938 campaigns; that he made suggestions to appellant Shaw with reference to changes and transfers of men in the fire department on the theory that it would help to build up the Shaw administration by putting certain men in important positions; that he knew Glenn G. Gravatt only by sight and never had a conversation with him.

The testimony of this witness disclosed that the persons coached by him and Bentley and whose names were contained in the lists which he later presented to appellants were the same persons in the main whom Glenn G. Gravatt claimed he was asked to favor by falsely altering their oral interview grades, and by such process move such candidates forward in rank.

The main contention of appellants is that there was not sufficient corroboration of the testimony of their accomplices to satisfy the requirements of section 1111 of the Penal Code: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

[1] Quoting from 8 California Jurisprudence 173: "The word 'accomplice' has been defined as including all persons who have been concerned in the commission of an offense. (People v. Kraker, 72 Cal. 459, 14 P. 196, 1 Am.St.Rep. 65; People v. Ruef, 14 Cal.App. 576, 114 P. 48, 54; see, also, People v. Bunkers, 2 Cal.App. 197, 84 P. 364, 370; People v. Kinsley, 118 Cal. App. 593, 5 P.2d 938; People v. Frahm, 107 Cal.App. 253, 290 P. 678.) In other words, one is an accomplice who knowingly, voluntarily and with common intent with the principal offender unites in the commission of the crime. (People v. Bolanger, 71 Cal. 17, 11 P. 799; People v. Davis, 210 Cal. 540, 293 P. 32; People v. Linde, 131 Cal.App. 12, 20 P.2d 704; see, also, People v. Howell, 69 Cal.App. 239, 230 P. 991.) In several cases, the courts derived a definition from the language of section 31 of the Penal Code, holding that accomplices are all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense, or aid and abet in its commission, or not being present, have advised and encouraged its commission. (People v. Coffey, 161 Cal. 433, 119 P. 901, 39 L.R.A.,N.S., 704; People v. Collum, 122 Cal. 186, 54 P. 589; People v. Lawlor, 21 Cal.App. 63, 131 P. 63; see, also, People v. Moran, 144 Cal. 48, 77 P. 777.)"

In People v. Stanley, 92 Cal.App. 778, 783, 269 P. 465, 467, it was held that "except in those instances where the rule is altered by special statute, an accomplice is one who has been concerned in the commission of a crime, whether he has directly committed the act or aided and abetted in its commission or advised and encouraged its commission and is liable to prosecution for the identical offense charged against the defendant. As thus construed it does no violence to our sense of justice by saying that an innocent man may as a matter of law be the accomplice of a debased felon and is entirely consistent with those authorities which hold that persons are not accomplices, who, although present for one reason or another, are not guilty of criminal participation."

[2] A review of the testimony hereinbefore narrated in detail clearly indicates that the named employees of the civil service department under the orders of their superior officer, Gravatt, directly committed the acts which they admitted they knew were wrongful and which the appellants were charged with aiding and abetting. This constituted them accomplices under the law. Moreover, the very precise wording of each count of the indictment itself, that appellants did "aid and abet, advise and encourage, and by threats * * * and coercion compel" said Gravatt and other employees of his department to violate the provisions of section 113 of the Penal Code, definitely placed both Gravatt and the other employees of the civil service department in the category of accomplices, rendering them liable to be prosecuted for the same offenses with which appellants were charged.

This is likewise true of the retired battalion chief Kuykendall. Positions for employment in the fire department were all within the classified civil service of the city of Los Angeles, and according to the testimony of said Kuykendall, he and appellant Shaw entered into an agreement to place in those positions men friendly to the Shaw administration. To accomplish this purpose, appellant Shaw secured from Gravatt copies of questions and answers for forthcoming examinations which he gave to Kuykendall, who in turn used them in coaching such candidates as he might select. Thereafter, Kuykendall supplied appellants with recommended lists of names which appellant Shaw passed on to Gravatt for further action. The alteration and falsification of the grades of candidates as alleged in the first fifty counts of the indictment was done to insure the ultimate appointment of those candidates which were selected and recommended by Kuykendall as persons disposed to be friendly to the Shaw administration.

In answer to appellants' contention with respect to the lack of evidence corroborating the testimony of the accomplices, respondent urges that "by not only eliminating the testimony of the admitted accomplice Gravatt, but also omitting the testimony of Kuykendall and the employees of the civil service department of the city of Los Angeles * * * there is substantial evidence to connect appellant Shaw with the conspiracy to build up a political machine in the city of Los Angeles and to use whatever means necessary, either criminal or otherwise, to accomplish this purpose".

[3] Appellants were charged with violations of section 113 of the Penal Code, in that they aided and abetted, advised and encouraged, and by threats and coercion compelled Glenn G. Gravatt and other employees of the civil service department to alter and falsify public records, consequently the corroborating evidence must of itself and without the aid of the testimony of the accomplices connect or tend to connect appellants with the commission of the offenses charged against them.

[4] In the case of People v. Braun, 31 Cal.App.2d 593, 88 P.2d 728, the question presented was similar to the question here, as to whether or not there was corroboration of the testimony of an accomplice to the effect that defendant had advised and encouraged him to commit the crime of robbery in the perpetration of which a murder resulted. The opinion of this court in the Braun case stated that the corroborating evidence must tend directly and immediately to connect the defendant with the commission of the offense and that, regardless of how strong the corroborating evidence might be in other respects, it must point to the connection of the defendant with the commission of the crime charged to be of any avail, and that corroborative evidence is insufficient where it only casts a grave suspicion upon the accused.

We quote from the opinion in the Braun case at page 599 of 31 Cal.App.2d, at page 731 of 88 P.2d: "There is no direct evidence connecting appellant with the crimes charged in the information, for the reason that he did not actually participate in the robbery or the shooting in connection therewith. He could be convicted, therefore, only on the ground that though inactive during the commission of the offenses, he had previously advised and encouraged the hold-up in the perpetration of which one man was killed and another wounded. The only direct evidence that appellant knew of the contemplated robbery or that he had previously advised and encouraged it is supplied by the witness Roble, and he concededly being an accomplice, his testimony must be corroborated. 'A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense, or the circumstances thereof. * * *' Pen.Code, sec. 1111.

"It will thus be seen that the statute imperatively makes corroboration of the testimony of the accomplice an essential prerequisite to the conviction of the defendant, where the crime charged rests primarily and solely upon the testimony of an accomplice; and it is apparent, therefore, that the court has no control over the subject except to apply the statute. In People v. Morton, 139 Cal. 719, 724, 73 P. 609, 611, our Supreme Court quoted with approval the following language found in Welden v. State, 10 Tex.App. 400: '* * * eliminate from the case the evidence of the accomplice, and then examine the evidence of the other witness or witnesses with the view to ascertain if there be inculpatory evidence—evidence tending to connect the defendant with the offense. If there is, the accomplice is corroborated; if there is no inculpatory evidence there is no corroboration, though the accomplice may be corroborated in regard to any number of facts sworn to by him.' In the same case of People v. Morton, supra, our Supreme Court voices its approval of the rule as stated in Simms v. State, 8 Tex. App. 230: 'The evidence must tend directly and immediately to connect the defendant with the commission of the offense.'

"In New York, under a code provision similar to our own (Code Crim.Proc. sec. 399), it was said in People v. Ryland, 28 Hun 568, 570, 'The corroboration, however strong in all other respects, must point to the connection of the defendant with the commission of the crime to be of any avail.'

"That more is required by way of corroboration than mere suspicion is firmly established in the law of this state. People v. Kempley, 205 Cal. 441, 456, 271 P. 478, and cases therein cited; People v. Davis, 210 Cal. 540, 293 P. 32; In People v. McLean, 84 Cal. 480, 24 P. 32, we find the following:

"'But, although more is required by way of corroboration than to raise a mere suspicion (see People v. Thompson, 50 Cal. 480), yet the corroborating evidence is sufficient if it of itself tends to connect the defendant with the commission of the offense, although it is slight, and entitled, when standing by itself, to but little consideration.'

"The query of how much is required in order to constitute corroboration has been answered by many cases wherein it is decided that 'corroborative evidence is insufficient where it merely casts a grave suspicion upon the accused'. People v. Robbins, 171 Cal. 466, 470, 154 P. 317, 319; People v. Woodcock, 52 Cal.App. 412, 417, 199 P. 565; People v. Janssen, 74 Cal.App. 402, 407, 240 P. 799. In People v. Allison, 200 Cal. 404, 253 P. 318, the court is given no alternative but to set aside the conviction unless the testimony of the accomplice is corroborated in accordance with section 1111 of the Penal Code as that statute has been interpreted by the courts. See, also, People v. Robbins, supra, at page 469 [of 171 Cal., at page] 317 [of] 154 P."

Again in People v. White, 35 Cal.App. 2d 61, at page 69, 94 P.2d 617, at page 621, it was stated in regard to the subject of corroboration: "There is, of course, no dispute respecting the provisions of section 1111 of the Penal Code that the testimony of the accomplices must be corroborated and in the absence of any such corroboration a conviction may not stand. The difficulty comes in determining what corroboration is sufficient. First, we must eliminate from the case the evidence of the accomplice, and then examine the evidence of the remaining witness or witnesses with the view to ascertain if there be inculpatory evidence,—evidence tending to connect the defendant with the offense. If there is, the accomplice is corroborated; if there is no inculpatory evidence, there is no corroboration, though the accomplice may be corroborated in regard to any number of facts sworn to by him. People v. Kazatsky, 18 Cal.App.2d 105, 110, 63 P.2d 299; People v. Morton, 139 Cal. 719, 73 P. 609; People v. Davis, 210 Cal. 540, 293 P. 32; People v. Kempley, 205 Cal. 441, 271 P. 478."

In People v. Hobson, 7 Cal.App.2d 392, 394, 46 P.2d 278, 279, it is stated: "The question of the corroboration of an accomplice was discussed at length and the authorities reviewed in the case of People v. Kempley, 205 Cal. 441, 456, 271 P. 478, 485, where it is said: 'The question of how much more than a mere suspicion is required in order to constitute corroboration has been answered by many cases in declaring further that—"corroborative evidence is insufficient when it merely casts a grave suspicion upon the accused." People v. Robbins, 171 Cal. 466, 470, 154 P. 317; People v. Woodcock, 52 Cal.App. 412, 417, 199 P. 565; People v. Janssen, 74 Cal.App. 402, 407, 240 P. 799. The Code section is mandatory (People v. Allison, 200 Cal. 404, 253 P. 318), and a conviction cannot stand unless the testimony of the accomplice is corroborated in accordance with the standards laid down by the courts in the interpretation of the statute. "The court has no discretion in the matter, but is bound to apply the statute indiscriminately to all cases wherever an accomplice appears as a witness, and the State's case depends solely upon his uncorroborated testimony." People v. Robbins, 171 Cal. 466, 469, 154 P. 317, 318. If the testimony of the accomplice is not sufficiently corroborated, the conviction of the accused is wholly wanting in a legal foundation to support it. People v. Viets, 79 Cal.App. 576, 587, 250 P. 588.'"

For the purpose of applying these rules of law, a summary of the evidence, which respondent urges is corroborative of the testimony of the accomplices, follows:

Officer Morris testified he had a conversation with appellant Shaw and Peter Del Gado in March of 1937 when they discussed certain charges which had been brought against him (Morris) by the chief of police and upon which he had a hearing in January, 1937 when he was exonerated and restored to duty; he said appellant Shaw wanted to know if he had received his back pay for the time he was suspended —from December 16, 1936 to sometime in January, 1937, and Del Gado asked what he had done with it, to which the witness replied he had used it to pay his honest bills and support his family; that Del Gado then said there was a preferred list of officers who contributed to the campaign and were friendly to the administration, to which appellant Shaw agreed, saying that all friends of the administration would be taken care of. Del Gado then asked the witness if he intended taking the examination for sergeant scheduled for April of 1937, to which the witness replied that he did, whereupon Del Gado said, "Well, I just wanted to know if you were going to take the examination because there might be some way that I could help you." Del Gado also told said witness that the reason he had been acquitted of the charges preferred against him was because appellant Shaw "had fixed it", to which Morris replied that everything had been above board and that no fixing had been necessary. He also testified that neither Del Gado nor appellant Shaw suggested that he give them any money.

Roy Groom, transportation manager for a local bread company, testified that about May of 1937 he received a list of numbers and a list of names of police officers from Peter Del Gado and was told which numbers represented true or false answers; that he gave this list of numbers to various police officers and received campaign contributions from some of them which he turned over to Peter Del Gado. The witness also testified that he was present at a banquet at Rene & Jean's Cafe when appellant Shaw thanked the various motorcycle officers there present for their contributions and told them that the money was not needed and would be returned to them by a friend they all knew and trusted, Roy Groom; that thereafter an envelope containing money and a list of names was handed to him, but not by appellant Shaw. Upon examination he discovered that the list of names was larger than the list of names he had previously given to Del Gado; that he returned the money to the officers named in the list. This witness also testified that he had known appellant Cormack to speak to for a couple of years and had a telephone conversation with him prior to October or November, 1938, at which time Cormack told him he understood the motorcycle officers had put him (the witness) and Del Gado "in the middle", to which said Groom replied, "What do you mean by that?" Appellant Cormack is alleged to have answered, "Well, I understand they involved you in a payoff", to which Groom replied, "I don't understand what you are talking about. You know better than to involve me in such a situation."

Walter E. Weyerman, acting captain of police, stationed in Highland Park, testified he had been with the department for twenty-two years, knew appellant Shaw and had kept a luncheon engagement with him at the Los Angeles Athletic Club in

September, 1936, at which time they discussed his job with the department and Shaw asked him how long he had been acting captain and how he would like to be captain; also if he had passed any of the examinations. Weyerman replied he had passed all but one but had received no appointments; Shaw then asked him if he favored the administration and he replied that he did not, whereupon Shaw asked him how he would like to be fourth on the list and Weyerman wanted to know what was the matter with being first, also that he wanted nothing more than a break and that he had never asked for favors in his long years of service with the department. He further testified that he never became a captain and at the time appellant Shaw talked to him he had just been reduced to a lieutenant and had been sent to Highland Park.

Herbert E. Dikeman, who had been employed in the fire department for a period of twenty-four years, testified that in 1934 he met appellant Shaw in San Pedro while the witness was captain of fireboat No. 2, and discovered that he had been on the United States battleship Vermont with appellant Shaw between 1910 and 1914; that appellant Shaw invited him to call on him at the city hall; that in June, 1936, the witness presented himself at Shaw's office to discuss the forthcoming examination for battalion chief, at which time he told Shaw he had taken two examinations and was number nine on the list for the 1934 examination, but had been moved back four places on the final list; that he wanted to know if there was anything Shaw could do to keep him from being moved back on the forthcoming examination, to which Shaw replied that he was not civil service, and then asked if the witness had studied for the job; the witness replied that he had spent six years studying and felt qualified for the position, and Shaw said he appeared to be a man who would return a favor. Subsequently, the witness called upon Guy Kuykendall at his home in response to a telephone call, and thereafter Kuykendall coached said Dikeman in preparation for the examination of battalion chief. In October, 1936, after the examination had been held, the witness met appellant Shaw at a dinner attended by other firemen, and thanked Shaw for what he might have done for him in this examination. Subsequently, he paid Kuykendall $100 as a contribution to the Shaw campaign fund; that at the time he attended the dinner the eligible list had been published giving the witness number two place thereon; that he received his appointment in July of the following year.

According to the witness Morris, his brother officer Del Gado, who later fled the jurisdiction of the courts while at large on bail which was forfeited by his bondsmen, seemed interested in the fact that said Morris expected to take a promotional examination and stated to him that there might be some way in which he (Del Gado) could help him. How this was to be accomplished was left unexplained, and while appellant Shaw was present at this conversation, nothing was either said or done by him which could be construed as inculpatory on his part. In order to give this evidence effect as tending to connect appellant Shaw with the offenses charged against him, it is necessary to interpret and explain it in the light of the testimony of the accomplice Gravatt. Eliminating the testimony of the accomplices, this evidence standing alone is insufficient to raise even a suspicion of guilt upon the part of either appellant.

This applies with equal force to the testimony of officers Weyerman and Dikeman. While it is true that subsequent to his meeting with appellant Shaw, said Dikeman was coached for the examination of battalion chief by Kuykendall, his testimony requires the testimony of the accomplice Kuykendall to give it direction before it is capable of becoming inculpatory, because nothing was said or done by appellant Shaw during this transaction which tended to connect him with any offense, if the testimony of the accomplice Kuykendall is eliminated from consideration.

In so far as the witness Weyerman is concerned, he testified directly that he never received any favors from appellant Shaw or from the civil service department.

Moreover, neither the police sergeant's examination referred to by officer Morris, the examination for police captain referred to by officer Weyerman, nor the examination for battalion chief referred to by the witness Dikeman, forms the basis of any of the transactions charged as offenses in the indictment.

The evidence furnished by these three witnesses, under the authority of the Braun case and the other cases cited, supra, does nothing in the way of corroborating the testimony of the accomplice Gravatt to the effect that appellants aided and abetted, advised and encouraged, and by threats and coercion compelled him to alter the grades of some thirty-three candidates as charged in the sixty-six counts of the indictment, in connection with the five civil service examinations therein specifically referred to. In other words, it is not the type of evidence which tends directly and immediately to connect appellants with the offenses charged against them.

[5, 6] The testimony of the witness Groom with respect to his transaction with Peter Del Gado which was permitted to be introduced over the objection of appellants was purely hearsay and therefore incompetent, and the fact that the prosecution attempted to connect it up by showing that appellant Shaw made a speech at a dinner attended by a group of motorcycle officers at which time he returned to them through the witness Groom certain contributions which they had previously made to the Shaw campaign, did not cure the error of its admission. Further, the purported conversation between this witness and appellant Cormack only shows to what lengths the prosecution went in its vain attempt to corroborate the testimony of the accomplices Gravatt and Kuykendall.

[7, 8] The testimony introduced with reference to the Yedwalsky matter was incompetent because it was an attempt to establish the commission by appellant Cormack of an offense completely outside the issues herein, it having reference to the examination of sanitary and housing inspector which had not the slightest connection with the five examinations upon which the indictment herein was founded. The testimony of these witnesses, as well as of the various police officers who testified they received coaching for civil service examinations in return for campaign contributions has no evidentiary force concerning the offenses charged, except to create an atmosphere of suspicion. Corroborating testimony which merely raises a suspicion of a defendant's guilt is not sufficient. People v. Davis, 210 Cal. 540, 559, 293 P. 32.

[9] A review of the voluminous transcript of the evidence which was adduced at the trial of this cause shows conclusively that the conviction of appellants rested solely upon the uncorroborated testimony of accomplices; therefore, the judgments founded thereon cannot be sustained.

The appeal from the order denying the objections of each appellant to the pronouncement and imposition of judgment and sentence is dismissed. The judgments of conviction and the orders denying appellants motions for new trial are, and each of them is, reversed.

I concur: DORAN, J.

WHITE, Justice (concurring).

I am in thorough accord with the views expressed and the conclusions reached by my associates in the main opinion, but to my mind there are several other obviously prejudicial rulings of the trial court, as well as erroneous instructions given, which should not go unnoticed; all of which, added to what is said in the main opinion, necessitate and demand a reversal of these judgments and orders in the interest of justice. The record before us is voluminous. The reporter's transcript contains more than three thousand pages. Briefs in excess of eight hundred printed pages have been filed, the last of which was lodged with this court on July 23, 1940. We have painstakingly examined this lengthy and involved record.

The accomplices in the instant case, and particularly the main accomplice, Gravatt, acknowledged from the witness stand their own infamy. Some admitted changing, altering and falsifying civil service records, while others confessed to selling questions to be propounded and the correct answers thereto in forthcoming examinations. I do not refer to these matters for the purpose of suggesting a conclusion that the stories told by these accomplices ought not to be believed by the jury, but for the purpose of emphasizing the duty which devolves upon this court to scrutinize other evidence in the record which the prosecution claims measures up to that standard of corroborative evidence demanded by our law; and also as indicative of the necessity for examining the rulings of the trial judge in the admission and rejection of evidence, as well as the correctness of his instructions to the jury, by the latter of which the jury was to measure the sufficiency of such corroborative evidence. These defendants, like any defendant in criminal proceedings, whether guilty or innocent, were entitled to have the accusations against them tried in accordance with established rules of law. As was said by a learned judge, "Though unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained, is unjust and dangerous to the whole community." Hurd v. People, 25 Mich. 405. Respect for the law cannot be engendered by withholding the protection of the same from those accused of crime. Courts have uniformly adhered strictly to the rule requiring a legal sufficiency of corroboration of the testimony of accomplices, for to do otherwise would make the best citizens of the land subject to the danger of conviction at the hands of any guilty scoundrel who might attack them.

As I view the record in the instant case, grievous error was committed when the court refused to allow the defendants to impeach the testimony of the witness Gravatt to the effect that no changes in the records of applications had ever been made by him prior to the advent of the Shaw administration. While on the witness stand Gravatt testified in part as follows:

"I direct your attention to the following testimony which you gave at the close of yesterday's session for the purpose of asking you if you wish to correct it in any sense.

"Mr. Williams (Deputy District Attorney): What—

"Mr. Swaffield (one of defense counsel): I will read it.

"Mr. Williams: May I have the page?

"Mr. Swaffield: Yes, I am going to give the page.

"Mr. Swaffield: Page 365, Mr. Williams, beginning at Line 13: 'Q.—In the year 1934 were you still in fear and trembling of your job? A.—Yes. Q.—You didn't have the courage to resist doing what you thought was wrong on account of the fear of losing your job then, is that right? A.—That is right. Q.—And you sacrificed your knowledge and consciousness of what you understood to be right for the purpose of holding your job throughout that period, is that right? A.—That is right.' Do you wish to correct that testimony in any sense? A. No, no, sir, because the testimony is correct the way it stands.

"Q. Very well. Now, as a result of the conference which you had with the gentlemen, whom you have named, do you wish to make any corrections in any other testimony that you gave yesterday? A. Yes, sir.

"Q. Will you state what you wish to correct? A. I wish to correct the impression that I may have given yesterday that it was customary before the Shaws came into office to make changes in oral grades. If I gave that impression it was because I was thinking of the oral sheets or work sheets that are used by the examiners, and on which the examiners sometimes make changes before turning them in. I didn't wish to leave the impression that any changes were ever made on the rough report after the oral grades were entered on the rough report. I also want to correct any impression I may have given that any changes made in the oral marks before the Shaws came into office were made arbitrarily. If any were made, they were made as a result of a legitimate estimation of what the grades should be."

During the cross-examination of this witness he was shown various sheets from the files of the civil service examinations held in 1926, long prior to the Shaw administration, and was asked how many different erasures were apparent on the rough sheets of the examination papers handed him. An objection by the district attorney was sustained. Whereupon the following proceedings took place outside the presence of the jury:

"Mr. Cantillon (one of defense counsel): If your Honor please, at this particular time we desire to—

"Mr. Swaffield: I think any counsel has the right to propound the questions and I don't know any way of trying a lawsuit without propounding them, and unless it is manifest that he is doing it for an improper purpose, he certainly has a right to do it and propound his questions before the jury. He doesn't have to propound a question that may meet with the approval of the district attorney, neither does he have to submit them in advance. We are acting in good faith in this matter. We can't prove it all at once—it has to be done step by step, and we are using our best judgment. I think Mr. Cantillon is absolutely right, and the Court doesn't even know now what question he is about to propound. I don't know how it could be ruled on.

"The Court: What do you want to offer to prove?

"Mr. Cantillon: I want to offer to prove that on April 24th, 1926, an examination was held for the position of policeman by the city of Los Angeles, by the Civil Service Department; that the witness Gravatt was one of the examiners that participated in that examination and that, according to the docket and records of the department, the witness Gravatt was in charge of that examination. I want to show that—through the defendants' exhibits, 'E' and 'E-1', I desire to interrogate the witness to ascertain if, in the column marked 'General Average' appearing on the defendants' Exhibit 'E', if there are not the following grades, have not been changed; the grades of Dewey M. Keeton in the column marked 'General Average' and also his grade changed in the column marked 'Education and Experience' and we want to show that it appears from Defendants' Exhibits E and E-1, that those two grades have been changed relative to that applicant; that the grade of John F. Kelly in the 'General Average' appears to have been erased and changed; that the grade of Arthur E. Kezan in the 'General Average' appears to be changed, erased and changed; that the grade of Raymond L. Knowle in the 'General Average' appears to be erased and changed.

"The Court: All right. Now, just a minute.

"Mr. Cantillon: And that there is, if your Honor please?—

"The Court: Just a minute, please.

"Mr. Williams: Is it necessary to mention all those names?

"Mr. Cantillon: No. From there on, if your Honor please, *I will say that the education and experience grades of 35 applicants have been changed and that the general average grades of 46 applicants appear upon the face of the document to have been erased and changed in connection with that examination.*

"Mr. Williams: I object to that offer of proof on several grounds. The first is that whether in the opinion of this witness these grades have been changed or have not been changed is not material to any issue in this case. The best of evidence whether they have or have not been changed is the document itself. In the second place neither the statement of the witness nor the examination itself is material or competent, for the reason that it does not respond to the examination in chief or any issue involved in this case and we resist any offer to show that any grade in this or any other examination has been changed, except it be on the basis that this witness, himself, has actually made the change.

"Mr. Swaffield: That is what we expect to prove.

"Mr. Williams: Just a moment. In that connection the evidence shows it is not the examiner himself or the person in charge of the examination who makes the rough sheet, and therefore the examiner would have no reference to the making or changing of any grades.

"The Court: Submitted, gentlemen?

"Mr. Swaffield: No; this is just one link. We intend to follow it up. This witness has testified repeatedly that there were no changes ever made by him except these particular ones that he has testified to; that he knew of no other changes; that he told Joe Shaw that it was something that had never been done before, to his knowledge, or by him. We expect to prove numerous instances in which this witness has either directly or indirectly made changes and caused changes to be made in these examinations even before he became general manager, even while he was secretary and while he was examiner, and to show that it was his habit and that it was a custom that he was thoroughly familiar with, something that he did over and over again or caused to be done and that consequently his testimony as to what he said to Joe Shaw cannot be true.

"The Court: Submitted, gentlemen?

"Mr. Williams: Submitted.

"Mr. Swaffield: Submitted.

"The Court: It will be sustained. * * *"

Subsequently the following proceedings were had:

"Mr. Cantillon: Then, if your Honor please, on behalf of the defendants and each of them, we will ask leave to reopen for the purpose of pursuing our interrogation relative to the Policemen's Entrance Examination in 1926.

"Mr. Williams: We object to the matter on the ground that the matters, concerning which counsel is interrogating are not matters material to the case, not cross-examination, have been fully covered in previous cross-examination of this witness, and that the whole matter is entirely too collateral and remote.

"The Court: It will be sustained.

"Mr. Cantillon: Then, if your Honor please, we desire at this particular time to renew our offer of proof as contained in document which was heretofore marked in evidence as a memorandum and I believe that it bears the mark of the Defendants' Exhibit 'Q', explaining to the Court that the numerals appearing on the face of the document containing the letter 'C' opposite the numerals indicate the corresponding grade changes on the face of the rough report of the Policemen's examination of April 24th, 1926, participated in and conducted by this witness. * * *"

An objection by the district attorney to the foregoing offer of proof was sustained.

Certainly the line of testimony proffered by the defendants went to the credibility and veracity of the witness. The gist of the charges against the defendants was that they advised, encouraged and coerced Gravatt to make alterations in the civil service examination records. Why, therefore, were they foreclosed from showing that this self-asserted paragon of virtue, who, notwithstanding his modest salary was able to bask in the luxury of a string of race horses and to enjoy a mode of living that would be regarded as expensive to one possessing a much more princely income than was his salary—that instead of being in "fear and trembling" of his position by reason of the threats made by the defendants, he was in fact most proficient in the art of altering civil service records and changing examination papers for more than seven years before either of the defendants became identified with the public service of Los Angeles city? What credit would the jury have given Gravatt's claim that his fall from virtue was occasioned by the coercion of defendants if they had known what the defendants offered to prove, viz., that his perfidy and falsity to his trust was a matter of fact before he ever heard of either defendant or they of him? This testimony should have been admitted. Nor was the error cured, as urged by the attorney-general, when later in the trial the court admitted in evidence defendants' exhibit "R", which document, according to a handwriting expert, showed changes made in the examination of which it was a record, and which examination was held under Gravatt's direction. Respondent contends that by reason of the admission of the last-named exhibit and the testimony incidental thereto the excluded evidence was merely cumulative and its exclusion nonprejudicial. Conceding, but not deciding, that the evidence was cumulative, it was nevertheless corroborative, and who can say but that its introduction might have brought about a different verdict? There can be no denial of the probative force of the excluded evidence, showing as it would according to the offer of proof, which we must accept as true, 36 separate and distinct false alterations made by Gravatt as far back as 1924. Guided by the provisions of section 2044 of the Code of Civil Procedure, the trial judge should have admitted into evidence the testimony in question.

It was also error for the trial court to refuse defendants' instruction No. 15, which admonished the jury that in giving them the general instruction that the testimony of a witness is said to be corroborated when it is shown to correspond with the testimony of other witnesses or to comport with some facts which are conceded, or presumed in law or otherwise, that the jury should not confuse the principle just enunciated with the rule that governs the corroboration of an accomplice. In view of the testimony of the witnesses Dvorin and Kauffman, which corresponded identically with the testimony of the admitted accomplice Gravatt, the jury should have been told that such evidence was not the type of corroboration required under the law to confirm the testimony of Gravatt, because such evidence did not tend to connect either of the defendants with any of the offenses charged against them. A defendant in a criminal action has a right to instructions which set forth explicitly the law applicable to the particular facts of his case, to thereby dispel any ambiguity or doubt concerning the same; and this is true even though general instructions have been given thereon. People v. Myrick, 112 Cal.App. 117, 296 P. 320; People v. Sheffield, 108 Cal.App. 721, 293 P. 72, 77; People v. Sylva, 143 Cal. 62, 76 P. 814.

In advising the jury that a conviction cannot be had upon the testimony of an accomplice unless it be corroborated by other evidence as provided in section 1111 of the Penal Code, the trial judge instructed the jury that "in case the defendant voluntarily becomes a witness in his own behalf, it may be furnished by his own testimony, or *by his conduct and attitude as a witness*, and the entire conduct of the accused, whether established by his testimony *or his conduct and attitude as a witness*, or by proof of his extrajudicial statements, declarations or admissions, may be looked to for corroborative circumstances. * * *"

By this instruction the jury were told that when both defendants took the witness stand and testified in their own behalf, their "conduct" and "attitude" upon the witness stand might be considered as sufficient corroboration to meet the requirements of section 1111 of the Penal Code. Let us here pause to consider the meaning of the two words, as defined in Webster's New Dictionary:

Conduct: "Manner of guiding or carrying oneself; personal deportment; mode of moral action; behavior. * * * Syn., deportment, demeanor, bearing."

Attitude: "* * * The posture or position of a person, an animal, or sometimes an inanimate object, or the manner in which the part of the body are disposed; position assumed or studied to serve a purpose; as a threatening attitude. * * * Position or bearing as indicating action, feeling, mood; * * *."

How can the "posture", "position" or "bearing" of a defendant upon the witness stand give rise to corroboration of the testimony of accomplices? Can corroboration be gleaned from the fact that a witness assumes an upright position on the stand or that his position is stooped or leaning? In other words, can the corroboration of the testimony of an accomplice as required by the cited code section be supplied by the personal deportment of the defendant while on the witness stand? I think not. In Quercia v. United States, 289 U.S. 466, 471, 53 S.Ct. 698, 700, 77 L.Ed. 1321, 1326, the trial judge, in commenting to the jury upon the evidence, based his assumption that the accused was lying upon the fact that the latter while testifying wiped his hands. Of the merit of such a premise the United States Supreme Court said:

"In the instant case, the trial judge did not analyze the evidence; he added to it, and he based his instruction upon his own addition. *Dealing with a mere mannerism of the accused* in giving his testimony, the judge put his own experience, with all the weight that could be attached to it, in the scale against the accused. He told the jury that *'wiping' one's hands while testifying was 'almost always an indication of lying.'* Why it should be so, he was unable to say, but it was 'the fact.' He did not review the evidence to assist the jury in reaching the truth, but in a sweeping denunciation repudiated as a lie all that the accused had said in his own behalf which conflicted with the statements of the government's witnesses. This was error and we cannot doubt that it was highly prejudicial.

"Nor do we think that the error was cured by the statement of the trial judge that his opinion of the evidence was not binding on the jury and that if they did not agree with it they should find the defendant not guilty. His definite and concrete assertion of fact, which he had made with all the persuasiveness of judicial utterance, as to the basis of his opinion, was not withdrawn." (Italics added.)

If the mannerism or deportment of a defendant testifying as a witness in wiping his hands while testifying will not support a verdict of guilty or the rejection of his testimony, then by the same token his "position", "posture" or "attitude" upon the stand cannot and will not supply the corroboration necessary to give confirmation to the testimony of an accomplice. The type of corroboration necessary is fully and completely set out in the main opinion, and neither the required quantum nor character of such corroborative evidence can be supplied by the deportment of a defendant on the witness stand. It is true that in determining the credibility of a defendant testifying as a witness, as in the case of any witness, the jury may scrutinize the manner of such witness while on the stand, but the mannerisms of a defendant witness will not avail to supply the corroboration required by section 1111 of the Penal Code, by which it is made mandatory that such corroborative evidence must not merely show the commission of the offense or the circumstances thereof, but must tend to connect the defendant with the commission thereof. Conceding that corroboration may be furnished by the testimony given by a defendant, I am led to ask what kind of "conduct", what kind of "attitude", what personal deportment on the part of a defendant testifying in his own behalf, could or would furnish the corroboration required by the code section? Pertinent indeed to the unrestrained limits to which the jury might go in search of evidentiary confirmation of the accomplices under the instruction last herein narrated, is the classical language of the late Mr. Presiding Justice Works in the case of People v. Black, 73 Cal.App. 13, 34, 238 P. 374, 383, wherein he said: "To tell the jury that they might draw such inferences 'as the case may justify' and 'as you desire' was to say to them that the members of that body might make an unbridled excursion into a field of riotous speculation concerning the guilt or innocence of appellants. So far as this particular question was concerned, they were left, absolutely untethered, to pasture themselves at will upon such succulent surmise as might suit their fancy."

If it was intended by the decision in People v. Todd, 9 Cal.App.2d 237, 49 P.2d 611, to hold that in a case requiring the corroboration specified in section 1111 of the Penal Code, the jury may be instructed that when they cannot find the requisite corroboration of the evidence furnished by the accomplice in the testimony of the accused, they may look for such corroboration in the attitude, demeanor or personal conduct of the defendant on the witness stand, then I find myself in disagreement therewith, because if such be the law it leaves the defendant in such a case, under our present procedure in criminal cases, in a position where if he does not take the witness stand his failure to do so may be commented upon by the court and counsel for the prosecution; or if he does testify, he is thereby placed at the mercy of the jury to decide what corroboration has been supplied because, forsooth, the jury forms a dislike of his "attitude", "position", or personal behavior or mannerisms on the witness stand.

In my opinion the lower court also erred in refusing to charge the jury that the witnesses Guy Kuykendall, Arthur Dvorin, Charles S. Walbridge and Benjamin Kauffman were accomplices. From the resume of their testimony as contained in the main opinion it is at once apparent that they were liable to prosecution for the identical offenses charged against the defendants on trial in this cause, and were therefore accomplices as defined by section 1111 of the Penal Code. It was the duty of the trial court, therefore, to instruct the jury that as a matter of law they were accomplices. While the case of People v. Ferlin, 203 Cal. 587, 265 P. 230, cited by respondent, does hold that notwithstanding the trial court erred in not instructing the jury that as a matter of law a certain witness was an accomplice, such error was not prejudicial, it is my opinion that the cited case is readily distinguishable from the one now before us. In the Ferlin case the instructions given on the question of accomplices and the corroborative evidence required to support the testimony of such witnesses were correct pronouncements of the law relating to these propositions, while in the case at bar the jury might well have been misled by the erroneous and conflicting instructions on the subject of accomplices, as hereinbefore pointed out. It is my judgment, therefore, that in the case before us it might easily have been that if the testimony of the abovementioned witnesses had been definitely placed before the jury as the testimony of accomplices, different verdicts would have been returned. Therefore the rule declared in People v. Allison, 200 Cal. 404, 253 P. 318, and People v. Schumann-Heink, 98 Cal.App. 225, 276 P. 625, should here be applied; and upon the authority therein contained the action of the trial judge in refusing to instruct the jury that as a matter of law the aforesaid witnesses were accomplices should be held to be both erroneous and prejudicial.

I am not unmindful of the rule announced by this court in People v. Macken, 32 Cal.App.2d 31, 42, 89 P.2d 173, that instructions must not be considered singly, but in their entirety, and that where a review of all the instructions indicates that the jury was fairly and correctly advised as to the kind, quality and degree of proof necessary before a defendant may be convicted the judgment will not be disturbed; but the principle just enunciated is not applicable to the situation presented in the case at bar. Here the court gave to the jury contradictory and confusing rules for their guidance, thereby permitting them to be led to either one of two different results by following one or the other line of instructions. It is impossible, after the verdict has been rendered, to determine whether the jury's decision as arrived at was predicated upon the incorrect instructions. For instance, there can be no doubt that the instructions given on the question of corroboration of the accomplices were contradictory and some of them erroneous. Consequently those which were bad cannot be aided by those which were good. Considered as a whole the charge to the jury did not present, under the facts of this case, a fair and correct exposition of the law.

Experience has taught us that permitted deviations from long-established legal modes of procedure give rise to illegitimate and unconstitutional practices. The right of liberty under law is an inherent and inalienable one. It is not the gift of the state, but as enunciated in our Declaration of Independence, "We hold these truths to be self-evident; that all men are created equal; *endowed by their Creator* with certain unalienable rights; that among these are life, liberty and the pursuit of happiness." The highest obligation of the state is to protect and preserve these rights to liberty until they are forfeited by due process of law, and it is the bounden duty of the courts to be watchful of the constitutional and individual rights of the citizen as well as to be alert in preventing any stealthy encroachments thereon. As was said in a vigorous dissenting opinion delivered by Mr. Justice Sutherland of the Supreme Court of the United States in Associated Press v. National Labor Relations Board, 301 U.S. 103, 57 S.Ct. 650, 659, 81 L.Ed. 953, "For the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time."

To permit a breakdown in these prescribed procedural rules, which are the outgrowth of human experience and are of the essence of social justice, is but to provide means for the conviction of the innocent. And as was said by this court in People v. Braun, 31 Cal.App.2d 593, 603, 88 P.2d 728, 733, "The acquittal of a guilty person is truly a miscarriage of justice, but the conviction of an innocent person through relaxation of those fundamental legal principles such as the one with which we are here concerned, would be a tragedy."

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41 Cal.App.2d 458

IRVINE v. J. F. SHEA CO. et al.

Civ. 12634.

District Court of Appeal, Second District,
Division 2, California.
Nov. 8, 1940.

1. Evidence 🔑20(1)

The trial court properly took judicial notice of fact that a "spreader-board" or "cross-brace" is a contrivance, the purpose of which is to give lateral support in trenches or ditches to preclude cave-ins. Code Civ. Proc. § 1875, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Cross-Brace" and "Spreader-Board".

2. Negligence 🔑111(1)

Where complaint alleged that plaintiff was employed as an inspector on construction job being performed by defendants for inspector's employer, that while acting within employment inspector climbed upon a "spreader-board technically known as a cross-brace" maintained by defendants and attempted to walk on it, and that defendants so carelessly, recklessly, and negligently maintained, controlled, installed, operated, and kept the spreader-board that it gave way and caused injuries to inspector, complaint did not allege negligence on part of defendants.

3. Negligence 🔑32(1)

An invitee to premises in the process of construction is invited to use the premises in its then condition, and the equipment thereon for its ordinary functions.

4. Pleading 🔑238(3)

An application for leave to amend a pleading made after the granting of a motion for a judgment on the pleadings amounts to an application for relief under statute regarding amendment of pleadings and must be supported by an affidavit of merits. Code Civ.Proc. § 473.

5. Pleading 🔑238(3)

Where plaintiff filed application for leave to amend complaint after granting of motion for judgment on the pleadings, but plaintiff failed by affidavit or otherwise to show to trial court that plaintiff could amend complaint to state cause of action against defendants and could support such amendments with substantial evidence, there was no abuse of discretion on trial court's part in denying application. Code Civ.Proc. § 473.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Personal injury action by Robert James Irvine, also known as Robert J. Irvine, against the J. F. Shea Company and others. From an adverse judgment, plaintiff appeals.

Affirmed.

John Moore Robinson and Walter R. Powers, both of Los Angeles, for appellant.

George H. Moore and Hugh B. Rotchford, both of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants predicated upon the granting of their motion for a judgment on the pleadings in an action to recover damages for personal injuries, plaintiff appeals.

The complaint alleges in substance that plaintiff was employed as an inspector for the Metropolitan Water District upon a construction job being performed by defendants for plaintiff's employer, and that, while acting within the scope of his employment and endeavoring to remove himself from a construction ditch on the job, "climbed upon a spreader-board technically known as a cross-brace" maintained by defendants, and attempted to walk on it and "that the defendants * * * did so carelessly, recklessly and negligently maintain, control, install, operate and keep the aforementioned spreader-board" that said spreader-board gave way, thereby precipitating plaintiff into the ditch and causing him injury.

These are the questions necessary for us to determine:

First: May the trial court in passing upon a motion for a judgment on the pleadings take judicial notice of the purpose and functions of a mechanical contrivance alleged to be the cause of plaintiff's injury?

Second: Did the complaint allege negligence on the part of defendants?

Third: Did the trial court abuse its discretion in denying plaintiff permission to amend his complaint?

[1] The first question must be answered in the affirmative. The trial court took judicial notice of the fact that a spreader-board or cross-brace is a contrivance, the purpose of which is to give lateral support in trenches or ditches to preclude cave-ins. In so doing the trial court merely followed the rule as announced in section 1875, subdivision 1, of the Code of Civil Procedure to the effect that the courts will take judicial notice of the true significance of all English words and phrases. Some examples of words and phrases, the meanings of which the courts have taken judicial notice are: "shaft", "tunnels", "levels", "chutes", "stopes", "uprises", "cross-cuts", "inclines" (Hines v. Miller, 122 Cal. 517, 519, 55 P. 401), and "jackass brandy". People v. Silva, 67 Cal.App. 351, 357, 227 P. 976).

[2] The second question must be answered in the negative. The only attempt in the complaint to allege negligence on the part of defendants is this allegation: "That at said time and place as aforesaid the defendants * * * did so carelessly, recklessly and negligently maintain, control, install, operate and keep the aforementioned spreader-board."

[3] It thus appears from the complaint that plaintiff, an invitee on the premises, used the spreader-board for a purpose other than that for which it was intended and was thereby injured. Since the rule is established in California that an invitee to premises in the process of construction is invited to use the premises in its then condition (Kolburn v. P. J. Walker Co., 38 Cal.App.2d 545, 101 P.2d 747), and the equipment thereon for its ordinary functions, it is evident that the allegation of the complaint above mentioned did not allege actionable negligence upon the part of defendants, and the trial judge properly granted defendants' motion for a judgment upon the pleadings.

[4] The final question must be answered in the negative. It is the rule in California that an application for leave to amend a pleading made after the granting of a motion for a judgment on the pleadings amounts to an application for relief under section 473 of the Code of Civil Procedure and must be supported by an affidavit of merits. Janson v. Bryant, 52 Cal.App. 505, 506, 199 P. 542; 21 Cal.Jur. [1925] 179.

[5] Plaintiff has wholly failed by affidavit or otherwise to comply with this rule by showing to the trial court that he could amend his complaint to state a cause of action against defendants and could support such amendments with substantial evidence. Therefore, no abuse of discretion upon the trial court's part in denying the motion for leave to amend the complaint has been shown to this court.

For the foregoing reasons the judgment is affirmed.

We concur: MOORE, P. J.; WOOD, J.

41 Cal.App.2d 482

VERO v. SACRAMENTO CITY EMPLOYEES' RETIREMENT SYSTEM et al.

Civ. 6495.

District Court of Appeal, Third District, California.
Nov. 13, 1940.

Hearing Denied Jan. 8, 1941.

1. Workmen's compensation ⚷5, 2145

Provision of charter of city of Sacramento providing for system of benefits for physically disabled city employees, and providing that money paid under such provision could be deducted by city in event of a workmen's compensation award, provided for a "compensation" system and not a "pension" system, and did not authorize pension board to deduct amount of compensation award from allowance due widow of deceased employee under city retirement system. St.1935, pp. 2516, 2517, §§ 172, 173(e)(1).

See Words and Phrases, Permanent Edition, for all other definitions of "Compensation" and "Pension".

2. Workmen's compensation ⚷2086

A city "pension" system and a "compensation" system providing benefits for injured employees are based upon different theories and are mutually exclusive, and payment under one does not constitute a deductible credit upon the other in absence of manifest intent. St.1935, pp. 2516, 2517, §§ 172, 173(e)(1).

3. Constitutional law ⚷102(2)

Under provision of charter of city of Sacramento granting widow a definite and unqualified pension upon death of city employee within retirement system during performance of duty, widow acquires "vested right" to the pension from date of employee's death until widow dies or remarries, and such right may not be impaired by subsequent action of the legislature or other authority. St.1935, p. 2517, § 173(e)(1).

See Words and Phrases, Permanent Edition, for all other definitions of "Vested Right".

4. Municipal corporations ⚷220(9)

The provision of charter of city of Sacramento for pension allowance to widow of city employee within retirement system upon death of such employee during performance of duty should be liberally construed to carry out beneficial purposes of the provision. St.1935, p. 2517, § 173(e)(1).

5. Workmen's compensation ⚷2145

The provision of charter of city of Sacramento for benefits for "physical disability" of city employees as result of injury received in performance of duty, and for reduction of such benefits by amount of any workmen's compensation award against city, does not cover death of an employee during performance of duty, and hence does not authorize pension payment to widow of employee within city retirement system to be reduced by any compensation award against city for such death. St.1935, pp. 2516, 2517, §§ 172, 173(e)(1).

See Words and Phrases, Permanent Edition, for all other definitions of "Physical Disability".

6. Workmen's compensation ⚷2145

Widow of fireman, who was member of retirement system of city of Sacramento and who died during performance of his duty, was entitled to pension allowance provided by city charter without any deduction for workmen's compensation award which had been granted against city for fireman's death. St.1935, pp. 2516, 2517, §§ 172, 173(e)(1).

7. Workmen's compensation ⚷390

A city cannot abridge the right of its employees and their dependents to compensation under Workmen's Compensation Laws, notwithstanding city maintains a pension system of its own.

◆

Original proceeding by Frank Vero, as guardian of the estate of Edith Vero, an insane person, against the Sacramento City Employees' Retirement System and others, for a writ compelling payment of allowance allegedly due under charter of City of Sacramento upon death of member of retirement system.

Writ issued.

George L. Popert and Earl D. Desmond, both of Sacramento, for petitioner.

Hugh B. Bradford, City Atty., of Sacramento, for respondents.

PER CURIAM.

Manuel Vero, who died in October, 1938, as the result of injuries received in the performance of his duties as a member of the fire department of the city of Sacramento, had served as a fireman in that department continuously since April, 1919, to the date of his death.

At the time of his death he left surviving his wife, Edith Vero and a minor daughter, then of the age of twelve years.

For many years prior to the death of Vero, the city of Sacramento had maintained a pension or retirement system for its employees. Pursuant to an amendment to the city charter in 1935, St.1935, p. 2511, firemen contributed four per cent of their gross annual salary into the retirement fund which contributions were matched by contributions of an equal amount by the city, and at the time of his death Vero was a contributing member in good standing and was receiving from the city a monthly salary of $200.

Following the death of Vero, a demand was filed with the retirement board for the payment to his widow of an allowance as provided by section 173(e) (1) of the charter, which provides that in the event a member of the system dies as a result of injuries received in the performance of his duty, his widow, as long as she remains unmarried, shall be paid an allowance equal to one-half of the monthly salary of the deceased member at the time of his death.

While this demand was still pending before the retirement board, and more than one year after the death of Vero, the city of Sacramento filed an application with the state industrial accident commission, claiming that there was an industrial dispute between the city and the widow and minor child of the deceased fireman, because of the death of Vero.

In due time the commission made its findings and award against the city and in favor of the widow and minor child of $5,000, payable to them at the rate of $25 each week. This award has now become final.

Thereafter, the retirement board granted Mrs. Vero a death allowance in accordance with the foregoing charter provisions, but directed that such portion of any allowance payable because of the death of Vero, which was provided by contributions of the city, should be reduced by the amount of any benefits payable on account of the death of Vero under the workmen's compensation insurance and safety law of this state.

Upon the refusal of the board to pay to the widow the death allowance in full, petitioner, as guardian of the widow, who is now insane, sought by mandate to compel the board to make the payments without any deduction or offset.

Respondents contend that petitioner is seeking a double payment for the same injury and death—once under the award of the industrial accident commission, and again under the retirement system of the city. It is also claimed that section 172 of the city charter is authority for the action taken by the city and the retirement board.

We are of the opinion petitioner is entitled to the relief here sought. We fail to find in section 172 of the charter, authority to make any deduction from the allowance to the widow.

Section 172 reads as follows: "Sec. 172. Any city employee who shall become physically disabled by reason of any bodily injury received in the performance of his duty, shall be entitled to such medical, surgical, and hospital treatment, including nursing, medicines, and medical and surgical supplies and apparatus, as may be required on account of such injury, the same to be provided by the City. Such injured employee shall receive full pay from the city during the continuance of his disability or until retired upon a retirement allowance, but not to exceed one year. That portion of any allowance payable because of the death or retirement of any such employee which is provided by contributions of the City shall be reduced, in the manner fixed by the City Council, by the amount of any benefits payable to or on account of such person, under the Workmen's Compensation Insurance and Safety Law of the State of California. The City Council may provide for the administration of each case under this section by the City Manager independently of the Retirement Board, until the retirement of the injured employee."

[1, 2] Prior to the enactment of this section no provision seems to have been made for caring for a city employee injured in the performance of his duty until such employee had been given disability retirement by the board, but this section authorizes the city to furnish the necessary care and attention to the injured employee pending his recovery or retirement within a year, and also provides that any money so paid out by the city on account of such injury or subsequent death, may be deducted by the city in the event of an award by the industrial accident commission. This sec-

tion is not a pension statute, and no authority is given therein to the retirement board to deduct anything from an award against the city for an industrial death. In fact no reference to the pension board is found in the section except to exclude the board from acting until the injured employee is retired.

In brief, section 172 of the charter provides a system of benefits for employees of the city who have been injured. This in effect is a compensation plan rather than a pension system, and as pointed out by Campbell, Workmen's Compensation, volume 2, section 1559, at page 1292, each of such systems are based upon a different theory and are mutually exclusive, payment under one not constituting a deductible credit upon the other, unless such an intent is clearly apparent.

To the same effect is a statement in McNamara v. Industrial A. C., 130 Cal.App. 284, 20 P.2d 53.

Section 173 seems to more clearly cover the factual situation here existing. That portion particularly pertinent hereto reads as follows:

"Section 173. Persons who shall be in the employ of the City on the effective date hereof shall become members of the Retirement System on that date, subject only to the following provisions in addition to the provisions contained in Sections 167 to 172 both inclusive, of this Charter. * *

"(e) The Retirement Board shall provide as follows for the family of any member of the Retirement System who may die as the result of injuries received in the performance of duty:

"(1) Should the decedent leave a widow, she shall, as long as she remains unmarried, be paid an allowance equal to one-half of the monthly salary paid the decedent at the time of his death. * *"

[3] Such language clearly grants to the wife of a member of the retirement system a definite allowance, and unless there can be found a power giving the right to make a deduction, then such a reduction cannot be made. No such provision has been pointed out to us. Where a widow is granted a definite and unqualified pension, then, "upon the happening of the contingency the right to a pension becomes vested and may not be impaired by subsequent action of the legislature, or other authority". 20 Cal.Jur. 998; Sheehan v. Board of Police Commissioners, 47 Cal. App. 29, 190 P. 51; Klench v. Board, etc., 79 Cal.App. 171, 249 P. 46; O'Dea v. Cook, 176 Cal. 659, 169 P. 366.

[4] In Hurley v. Sykes, 69 Cal.App. 310, 231 P. 748, the question presented was as to whether petitioner was a "member" of the fire department and entitled to the benefits of the fireman's relief fund. It was contended petitioner was simply an employee, a blacksmith's helper, and not a "member" of the department within the meaning of the charter which provided for the fireman's relief fund.

At page 316 of the opinion of 69 Cal. App., at page 751 of 231 P., the court said: "In ascertaining the intent and meaning of the charter provision, a liberal construction should be indulged in to carry out the beneficial purposes aimed at. * * * The spirit of these provisions is to protect all members of the fire department in the benefits which the fund insures, and they should not be narrowed by any strict or technical construction, but should be interpreted on broad principles."

Although the Hurley case, supra, was concerned with the question as to whether the petitioner therein could be deemed to be an included individual within the meaning of the charter, and had a right in any event to protection of the provisions, and although we are not confronted with such a question in the present case, nevertheless the same principle arises in the construction of section 172, which if construed as contended for by respondent, would result in precluding the employee's widow and minor child from receiving benefits under the pension system. The same principle of liberal construction as followed in the Hurley case, supra, should be here applied.

In the case of Foster v. Pension Board, 23 Cal.App.2d 550, 73 P.2d 631, 632, upon which respondents here strongly relies, the petitioner therein, a lieutenant in the fire department, was retired because of disability regardless of his length of time of service. The retirement provisions in such a case provided for monthly pensions in an amount equal to one-half the monthly salary, subject to certain limitations expressed in the ordinance in question. The limitations in section 3(d) expressly stated as follows:

"The monthly pensions payable under this ordinance shall not be additional to any monthly compensation insurance payable to any member of the police or fire department in case of accident resulting in the course of his employment, unless the compensation payments are less than one-half (½) of the salary of the member. * * *

"The amount of such compensation and the amount of pension allowed by the Board shall not in any event, exceed one-half (½) of the member's salary at the time of his injury."

Petitioner contended that he was entitled to receive from the pension board an amount equal to one-half the monthly salary he had received, even though he had already received payments from the city's insurance carrier as compensation insurance.

The court held that petitioner was not so entitled and that even though the pension ordinance was loosely drawn and ambiguous that the clause, "The amount of such compensation and the amount of pension allowed by the Board shall not *in any event*, exceed one-half (½) of the member's salary at the time of the injury," was entirely clear and controlling as to the rights of petitioner.

It will be noted, however, as stated by the court, that the title of the ordinance in question in that case, and the various provisions thereof, clearly showed that it was a pension ordinance and that the provisions in question referred to under section 3(d) thereof contemplated apportionment of payments where a member had received injury or become disabled.

[5] Assuming that section 172 of the Sacramento Charter entitled "Injury in Performance of Duty", and commencing with "Any city employee", embraces employees who are within the pension or retirement system, nevertheless there remains the question as to whether section 172 was intended to include individuals who have died in the performance of duty but who have not received injuries for which they have been treated. Petitioner herein died immediately or within a very short time after a heart attack.

Assuming that the husband of petitioner, who was at the time of his death a member of the retirement system, was intended to be included within "Any city employee", nevertheless section 172 makes provision only for city employees who became physically disabled through bodily injury received in the performance of duty. Provision is made in such case for treatment and care by the city. It is provided the employee receive full pay during the disability or until retired, but not to exceed one year. It is then provided that allowances paid through contributions of the city because of the death or retirement of the employee shall be reduced by the amount of any benefits payable to or on account of such person, under the Workmen's Compensation Insurance and Safety Laws of the State. However, the wording is as follows: "That portion of any allowance payable because of the death or retirement of any *such* employee * * shall be reduced, * * *." Clearly, *any such employee*, refers only to, "*Any city employee who shall become physically disabled by reason of any bodily injury received in the performance of his duty,* * * *"

No mention is made nor any provision expressed for a reduction of allowance in the case of the death of an employee in the performance of duty. The provision for "physical disability" can hardly be construed to cover the death of an employee during the performance of duty. The section mentions "retirement", but once again it provides for retirement of the *"injurea employee"*.

[6] The right of petitioner to recover benefits independent of any right of deduction on the part of the City of Sacramento is predicted upon the benefits granted under subsection (e) of section 173 of the charter of the City of Sacramento.

Decedent having left a widow and a minor child living, it is apparent that the widow comes within the provisions of subtitle (1) of subsection (e), and the decedent having died as a result of injuries received in the performance of his duties, no question can be raised as to the right of the widow to receive the benefits provided under this section.

Section 173 makes no provision for allowances or deductions under subsection (e) or under any other subsection, in the event of the death of the employee through injuries received in the performance of duty. No mention is made in section 173 of any benefits payable under the Workmen's Compensation Insurance and Safety Law. Section 173 appears to be an independent section setting up the provisions and benefits under the "Retirement System", and not subject to the provisions of other sections of the charter except as to the limited extent as provided for under the first paragraph of section 173. This paragraph states that members of the retirement system are subject to the provisions contained in sections 167 to 172. However, the only section which purports to affect the claim of a recovery under section 173 is section 172, and as stated, we cannot construe section 172 as giving the city of Sacramento or the retirement board the power to deduct the allowance to which petitioner is entitled under subsection (e) of section 173, which makes the specific provision for the benefit of a widow in the event of death in the performance of duty. Petitioner is entitled to this benefit independent of the award made by the Workmen's Compensation Insurance, and independent of any limitations affecting employees under the provisions of section 172.

Any right of deduction applying to members under the retirement system, intended to be effective under circumstances such as presented in this suit, should have been clearly and specifically set forth under section 173 or specifically included in some other section, the terms of which clearly gave such right of deduction. Section 172 is not only ambiguous and doubtful as to its application to petitioner but it would be a strained construction if held to give a right of reduction on the part of the city.

[7] It has been very definitely established in City of Sacramento v. I. A. C., 74 Cal.App. 386, 240 P. 792, that a city can by no act abridge the right of its employees and their dependents to compensation under the compensation laws, even though the city maintains a pension system of its own.

Even if it be conceded that the board had the power to deduct the industrial award from the widow's pension, only one-half of the award could be affected, for one-half of the award goes to the minor child (Sec. 4703, Labor Code, St.1937, p. 285), and the death allowance under the charter is solely to the wife. But we need not go into this phase of the matter, for in view of the plain provisions of section 173, supra, and in the absence in the charter of any power in the board to make any reduction because of the industrial award, the widow has a vested right to a pension of $100 a month from the date of the death of her husband until she dies or remarries.

Let the writ issue.

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41 Cal.App.2d 466

PEOPLE v. SIMMS.
Cr. 1738.

District Court of Appeal, Third District, California.

Nov. 12, 1940.

1. Criminal law 🔑1023(12)

Legislature, in enacting provision of Penal Code authorizing an appeal from an order after judgment affecting substantial rights of defendant, did not intend to give defendant right to raise any question which might have been raised under an appeal from the final judgment of conviction, and reviewing court has no jurisdiction to entertain an appeal based on such ground. Pen. Code, § 1237, subd. 3.

2. Criminal law 🔑1023(12)

An order denying motion to vacate portion of judgment finding defendant to be an habitual criminal on ground that complaint failed to state facts justifying adjudication of defendant as an habitual criminal, was not appealable as an "order after judgment affecting the substantial rights of the party", within provision of Penal Code authorizing such an appeal. Pen.Code, § 644, as amended by St.1939, p. 1443; and § 1237, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Order after Judgment Affecting the Substantial Rights of the Party".

3. Criminal law 🔑1202(6)

Even if provision of Habitual Criminals Act providing that in exceptional cases at any time not later than 60 days after actual commencement of imprisonment, the court may, in its discretion, provide that defendant is not an habitual criminal, authorized defendant to move to vacate portion of judgment finding defendant to be an habitual criminal, there was no showing of an "exceptional case" within meaning of statute, where ground for motion was that complaint failed to state facts justifying adjudication of defendant as an habitual criminal, because prior convictions for burglary in Colorado would not have constituted a felony if committed, in California. Pen.Code, § 644, as amended by St.1939, p. 1443; '35 C.S.A. c. 48, § 82.

See Words and Phrases, Permanent Edition, for all other definitions of "Exceptional Case".

4. Criminal law ⚷1202(6)

Even if provision of Habitual Criminals Act providing that in exceptional cases at any time not later than 60 days after actual commencement of imprisonment, the court may, in its discretion, provide that defendant is not an habitual criminal, authorized defendant to move to vacate portion of judgment finding defendant to be an habitual criminal, the granting or denial of motion was discretionary with trial court. Pen. Code, § 644, as amended by St.1939, p. 1443.

5. Criminal law ⚷1202(6)

Denial of motion to vacate portion of judgment finding defendant to be an habitual criminal on ground that prior convictions of burglary in Colorado as set forth in complaint would not have constituted a felony if committed in California and that therefore complaint failed to state facts justifying adjudication of defendant as an habitual criminal, was not an abuse of discretion, where defendant offered no evidence either before judgment or upon hearing of motion as to law of Colorado. Pen.Code, § 644, as amended by St.1939, p. 1443; '35 C.S.A. c. 48, § 82.

6. Criminal law ⚷320

In absence of any proof upon a subject, it is presumed that the law of a foreign state is in accordance with that of the forum.

◆

Appeal from Superior Court, Yolo County; Dal M. Lemmon, Judge.

Charles O. Simms was convicted of burglary in the second degree and of being an habitual criminal, and he appeals. On motion to dismiss appeal.

Appeal dismissed.

Charles O. Simms, in pro. per., and Richard Haley, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

Mr. Justice TUTTLE delivered the opinion of the court.

Defendant was charged in an amended complaint issued in the justice's court of Woodland township, Yolo county, California, with the crime of burglary, a felony, and with two prior convictions of burglary, both felonies, in Colorado. The prior convictions are charged as follows:

"That before the commission of the offense hereinabove set forth in this amended complaint, said defendant, Charles O. Simms, was, under the name of Charles Doody, in the District Court of the State of Colorado, in and for the County of Boulder, convicted of the crime of burglary, a felony, and the judgment of said court against said defendant in said conviction was, on or about the 21st day of April, 1930, pronounced, rendered, given and made, and has never been reversed, annulled or set aside, and on the 21st day of April, 1930, defendant, Charles O. Simms, was sentenced by said court to a term of not less than one and one-half years, and not more than three years, and said defendant served said term of imprisonment therefor in the Colorado State Penitentiary at Canon City, Colorado. That before the commission of the offense hereinabove set forth in count one of this amended complaint, said defendant, Charles O. Simms was, under the name of Charles Doody, in the District Court of the State of Colorado, in and for the County of Boulder, convicted of the crime of burglary, a felony, and the judgment of said court against said defendant in said conviction was, on or about the 24th day of September, 1932, pronounced, rendered, given and made, and has never been reversed, annulled, nor set aside, and on the 24th day of September, 1932, defendant, Charles O. Simms, was sentenced by said court to a term of not less than four years, and not more than eight years, and said defendant served said term of imprisonment therefor in the Colorado State Penitentiary, at Canon City, Colorado."

Defendant appeared with counsel in said justice's court and pleaded guilty to all the counts in the complaint. Thereafter, on April 29, 1940, and under the provisions of section 859a of the Penal Code, defendant appeared in the superior court with his counsel. It was then stipulated that the crime of burglary charged in the first count of the complaint was of the second degree. The court then adjudged defendant to be an habitual criminal, and sentenced him to be confined in Folsom prison.

No appeal was taken by defendant from this judgment, and the time for doing so elapsed. Pen. Code, sec. 1467. On June 24, 1940, fifty-six days after said judgment, defendant filed a motion to vacate that portion of the judgment finding him to be an habitual criminal. This motion was duly heard in the superior court of Yolo county, and was denied by that court. Defendant now seeks to appeal from the order denying his motion to vacate the aforesaid portion of the judgment.

Defendant contends that his motion was made within the time fixed by section 644 of the Penal Code, as amended by St.1939, p. 1443. That portion of said section upon which he relies reads as follows: "Provided, that in exceptional cases, at any time not later than sixty days after the actual commencement of imprisonment, the court may, in its discretion, provide that the defendant is not an habitual criminal, and in such case the defendant shall not be subject to the provisions of this section."

The section from which the above quotation is taken is known as the "Habitual Criminals Act", and the preceding portion provides that a defendant who has been convicted of any felony in this state, and who has previously been twice convicted of certain felonies in this state or elsewhere, and who has served separate terms therefor in any state prison, shall be adjudged an habitual criminal. Among the crimes which may be charged as prior convictions is that of burglary. Defendant sets forth in his brief the definition of "burglary" in the state of Colorado, and contends that it differs from the definition of such crime in this state, in that in Colorado, '35 C.S.A. c. 48, § 82, the crime consists of entering certain structures "* * * with intent to commit murder, robbery, rape, mayhem, larceny, or other felony or misdemeanor"; while in this State it is defined as entering certain structures "with intent to commit * * * petit larceny or any felony". Sec. 459, Pen. Code.

Defendant then refers to section 667 of the Penal Code, which is as follows: "Every person who, having been convicted of any felony, either in this state or elsewhere, and having served a term therefor in any penal institution, commits petit theft after such conviction, is punishable therefor by imprisonment in the county jail not exceeding one year or in the state prison not exceeding five years; provided, however, that any such person who has been, or who shall hereafter be, sentenced to the state prison shall be subject to parole by the State Board of Prison Directors, under the restrictions now provided by law for the parole of first term prisoners, any act to the contrary notwithstanding."

He contends that the crime of burglary as charged in the complaint is not one "which, if committed within this State, would be punishable by the laws of this State by imprisonment in the State Prison", in that the Colorado law uses the words "other misdemeanor", while in this state the entry must be accompanied by an intent to commit one misdemeanor only—petit larceny. His position is that the trial court was without jurisdiction, under the allegations of the complaint, to adjudge him an habitual criminal, and his motion to set aside such adjudication should have been granted.

[1, 2] The state moves to dismiss the appeal upon the ground that the order from which the appeal is taken is not an appealable one. The motion must be granted under the authority of People v. Carkeek, 35 Cal.App.2d 499, 96 P.2d 132, and the cases reviewed in that opinion. We held in that action that the only remedy available to the defendant was an appeal from the judgment of conviction, and that an appeal from an order denying a motion to set aside the judgment of conviction would not lie, as it would be equivalent to allowing two appeals from the judgment—something which we held was not intended by the legislature, or authorized by law. Such order is not one "made after judgment affecting the substantial rights of the party". Sec. 1237, subd. 3, Pen. Code. "The motion merely asks the court to repeat or overrule the former ruling on the same facts". People v. Brattingham, 91 Cal.App. 527, 267 P. 120, 121.

[3-6] Defendant contends that under the portion of section 644 of the Penal Code quoted above, he is expressly permitted to make the motion, and that upon a denial thereof, he is entitled to appeal. Assuming that said section authorizes a defendant to make such motion, there is no showing that this is "an exceptional case". It simply involves an error of law which might be corrected upon appeal. Furthermore, the granting or denial of the motion is entirely discretionary with the trial court, and no abuse of discretion is shown. The counts of the complaint quoted above clearly state facts which, if true, justify the court in adjudicating that defendant was an habitual criminal. If defendant wished to controvert the allegations of the complaint, he had an opportunity to do so. He offered no evidence, either before judg-

ment, or upon the hearing of the motion. "In the absence of any proof upon the subject, it is presumed that the law of a foreign state is in accordance with that of the forum." 10 Cal.Jur., p. 704, sec. 30.

Other questions raised by defendant have received our attention, but we find them so lacking in merit that they do not require discussion.

The appeal is dismissed.

We concur: PULLEN, P. J.; THOMPSON, J.

41 Cal.App.2d 490

MOORE et al. v. MARSHALL et al.

Civ. 2473.

District Court of Appeal, Fourth District, California.

Nov. 14, 1940.

As Modified on Denial of Rehearing
Dec. 3, 1940.

1. Negligence 🔑134(8)

In invitee's action for injuries sustained when invitee fell, just before noon, while descending a flight of stairs leading from second floor of building, evidence supported finding that stairway was dark and unlighted and that a landing was hidden by doors.

2. Negligence 🔑48

When a dangerous condition in a building is created by permanent improvement installed by the owner, the owner should not be permitted to maintain, in action for personal injuries caused by the dangerous condition, that she had no knowledge of that condition.

3. Appeal and error 🔑842(4)

Where invitee had only visited second floor of building once between day she fell and time doors were installed on landing creating dangerous condition because of darkness and shadow cast by doors, whether invitee took reasonably prudent precautions for her safety while descending stairs was question of fact for trial court and not one of law to be decided on appeal.

4. Negligence 🔑136(27, 31)

Where invitee reaching step immediately above stairway landing thought she had reached landing and stepped out as though she were on the level and heel of her shoe caught on outer edge of step causing her to fall, whether in the exercise of due care the invitee should have held onto handrail which ended directly above the edge of the first step above the landing, and whether if she had done so her fall might have been prevented, were questions of fact and not of law.

5. Negligence 🔑135

Where invitee reaching step immediately above stairway landing thought she had reached landing and stepped out as though she were on the level but heel of her shoe caught on outer edge of step and caused her to fall, in invitee's action for personal injuries evidence supported finding that invitee was not guilty of contributory negligence in descending the stairs.

6. Appeal and error 🔑1010(1)

Where evidence supported trial court's finding that invitee, suing for injuries sustained when she fell while descending stairway, was not guilty of contributory negligence, the finding was final and conclusive and could not be disturbed on appeal.

7. Trial 🔑56

In invitee's action for injuries sustained when invitee fell while descending stairs, sustaining invitee's objection to question, which was put to one of witnesses of building owner, as to whether during time witness was in building prior to date of accident witness ever had any knowledge of anyone else falling on stairs was not error, where a number of witnesses had been permitted to testify that they had successfully traversed the stairs many times, since excluded evidence would have been merely cumulative.

8. Negligence 🔑125

In invitee's action for injuries sustained in 1937 when invitee fell while descending stairs, evidence that in 1927, 1932, and 1935 invitee lost her footing and by virtue thereof had a fall and received some injury was properly excluded.

9. Appeal and error 🔑110

An order denying motion for new trial is not an "appealable order." Code Civ. Proc. § 963.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Personal injury action by Elizabeth C. Moore and James Moore against Harry S. Marshall and Zelma Potter Marshall. From a judgment against Zelma Potter Marshall, she appeals.

Judgment affirmed, and attempted appeal from order denying new trial dismissed.

Charles E. R. Fulcher and Syril S. Tipton, both of Los Angeles, for appellant.

Eugene Best and Mary C. McFarland, both of Riverside, for respondents.

MARKS, Justice.

Plaintiffs are husband and wife. They brought this action against defendants to recover damages for injuries suffered by Mrs. Moore when she fell while descending a flight of stairs leading from the second floor of a building owned by Mrs. Marshall. As Mrs. Marshall was the sole owner of the building, judgment was rendered against her alone and this appeal followed.

The accident happened just before noon on June 9, 1937, in Indio, in Riverside County. It is admitted that Mrs. Moore was an invitee in the building.

The building in question was built in 1935. It is two stories in height and faces north. A single stairway leads from the ground floor to the second floor. The stairs are constructed of clay-burned tile, dark maroon in color. Thirteen steps lead from the ground floor to a landing from which the second floor is reached by thirteen additional steps. The landing is several feet above the top of the ground floor entrance to the stairway. The only light in the stairway, during the daytime, comes from the ground floor entrance and that diffused through glass doors of offices opening into the hallway at the top of the stairs. There was an electric light in the ceiling over the stairs but this was never illuminated during daylight hours.

[1] During May of 1937 a cooling system was installed in the building. To make this system more effective double swinging doors were installed on the landing. The lower eighteen inches of these doors were constructed of wood. Above the wood were frosted glass panels. There is ample evidence in the record to the effect that the landing and step immediately above it were darkened by the shadow cast by the solid eighteen inches at the lower portions of the doors. This evidence supports the finding to the effect that the stairway was dark and unlighted and the landing was hidden by the doors.

On the morning of the accident Mrs. Moore had consulted her dentist who had offices on the second floor of the building. When her visit was concluded she started down the stairs. She testified that she carefully observed her progress; that when she reached the step immediately above the landing she thought she had reached the landing and stepped out as though she were on the level; that the heel of her shoe caught on the outer edge of the step; that she fell onto the landing and suffered serious injuries.

Mrs. Marshall, in her opening brief, argues the insufficiency of the evidence to support the findings and judgment in the following particulars: (1) That she had no superior knowledge of the dangerous condition of the stairway over that of Mrs. Moore; (2) that Mrs. Moore was guilty of contributory negligence as a matter of law in not taking reasonable precautions for her own safety while descending the stairway which was shadowed and darkened; (3) that she was guilty of contributory negligence as a matter of law in failing to make use of the hand rail which was provided for the safety of those persons using the stairway.

The first ground for reversal which we have stated raises the question, among others, of the negligence of appellant. Argument and citation of authorities appear in her opening brief on this question. In her closing brief we find the following: "We are not here contending that the evidence is insufficient to establish negligence on the part of this appellant, so the question of upon what basis that negligence was determined, is wholly immaterial. Our contention is (and we thought we had made it plain in our opening brief), that the respondent, Mrs. Moore, was guilty of contributory negligence as a matter of law."

[2] This concession removes the question of the negligence of appellant from consideration here. We believe this concession is made necessary by the record. There is evidence that the dangerous condition in the stairway was caused by doors installed by appellant; that these doors cast a shadow on a landing half way down the stairs; that this shadow obscured the landing and the step above it; that this

caused Mrs. Moore to stumble and fall. When a dangerous condition in a building is created by a permanent improvement installed by the owner she should not be permitted to maintain that she had no knowledge of that condition.

Appellant argues that Mrs. Moore had passed up and down the stairs many times; that she knew or should have known of their condition and their lighting; that possessing this knowledge she should have taken precautions for her own safety commensurate with the dangers confronting her; that had she done so she would not have mistakenly assumed that she had reached the landing when she was on the step above it; that this failure to take this precaution made her guilty of contributory negligence as a matter of law.

[3] This argument omits consideration of one important fact that is established by the evidence. The doors on the landing were installed about May 26 or 27, 1937. Mrs. Moore had only visited the second floor of the building once (on June 4, 1937) between the time the doors were installed and the day she fell. It is true that she testified she thought the conditions of lighting the stairs were about the same on both occasions. There is no evidence demonstrating as a matter of law that on her use of the stairs on June 4th she realized that the shadow cast by the solid portions of the doors created a dangerous condition that would have to be guarded against by a person descending the stairway. This shadow created the dangerous condition which was the cause of the accident. That she had descended the stairs on one occasion after the doors were installed is not sufficient to establish as a matter of law that she knew or should have known of such condition. Whether she knew or should have known of the danger caused by the shadow cast on the step and landing and whether she took reasonably prudent precautions for her safety while descending the stairs was a question of fact for the trial court, and not one of law, to be decided here. De Verdi v. Weiss, 16 Cal.App.2d 439, 60 P.2d 879.

[4] Appellant also argues that Mrs. Moore was guilty of contributory negligence as a matter of law because she failed to hold onto the hand rail which was provided for her assistance in descending the stairs. It should be observed that this hand rail did not extend across the landing but ended directly above the edge of the first step above the landing. The question of whether, in the exercise of due caution, Mrs. Moore should have held onto this rail and, whether, if she had done so, her fall might have been prevented, are questions of fact and not of law.

[5, 6] As the trial court found that Mrs. Moore was not guilty of contributory negligence in descending the stairs, and as the evidence, or the reasonable inferences to be drawn from that evidence, support that finding, it is final and conclusive and cannot be disturbed here.

[7] Appellant complains of the ruling of the trial court in sustaining plaintiff's objection to the following question which was put to one of appellant's witnesses: "During the time that you were in the building prior to the date of the accident, did you ever have any knowledge of anybody else falling on those stairs?"

We find no error in this ruling. See Sheehan v. Hammond, 2 Cal.App. 371, 84 P. 340; Carty v. Boeseke-Dawe Co., 2 Cal. App. 646, 84 P. 267. A number of appellant's witnesses were permitted to testify that they had successfully traversed the stairs many times. If the excluded evidence had been admitted it would have been merely cumulative.

[8] Appellant sought to introduce evidence showing that in 1927, 1932 and in 1935, Mrs. Moore "lost her footing and by virtue thereof had a fall and received some injury". The trial court properly sustained objections to this proffered evidence.

[9] Appellant has attempted to appeal from the order denying her motion for new trial. Such an order is not appealable. Sec. 963, Code Civ. Proc.

The judgment is affirmed. The attempted appeal from the order is dismissed.

We concur: BARNARD, P. J.; GRIFFIN, J.

41 Cal.App.2d 495

PEOPLE v. ROEDER.

Cr. 3389.

District Court of Appeal, Second District, Division 1, California.

Nov. 15, 1940.

Hearing Denied Dec. 13, 1940.

1. Criminal law ⚷338(2), 1159(6)

A guilty participation in a crime may be shown by circumstantial evidence, and if circumstances proved reasonably justify conclusion of jury, reviewing court cannot interfere therewith.

2. Criminal law ⚷1144(13)

In considering question of sufficiency of evidence to sustain a conviction, the reviewing court must assume in favor of the verdict the existence of every fact which jury could have reasonably drawn therefrom.

3. Burglary ⚷41(1)

Evidence sustained conviction of burglary in the second degree.

4. Criminal law ⚷1170½(5)

In prosecution for second degree burglary, questions asked by prosecution concerning whether accused had slept in jails on two occasions after the date of the alleged burglary were not prejudicial.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Herman Roeder was convicted of burglary in the second degree, and he appeals. Affirmed.

Hearing denied; CARTER, J., dissenting.

Frederic H. Vercoe, Public Defender, and William B. Neeley, Deputy Public Defender, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Lewis Drucker, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

Appellant was found guilty of the crime of burglary in the second degree by the court sitting without a jury, whereupon he made a motion for a new trial which was denied. The proceedings were then suspended and appellant was granted probation on condition that he serve one year in the county jail and pay a fine of $100. He prosecutes this appeal from said order denying his motion for new trial, relying upon the following grounds for a reversal thereof: (1) that the verdict is contrary to the evidence; (2) that the evidence, as a matter of law, is insufficient to sustain the verdict; (3) that the court erred in overruling his objections to certain questions asked by the district attorney, the "only purpose to be served" thereby being "to degrade and prejudice him in the eyes of the trial court".

Following is a brief summary of the facts upon which the instant prosecution was founded:

One Ivar L. Kennedy, a resident of the Californian Hotel in the city of Los Angeles, left his room in the hotel between the hours of 2:30 and 3 o'clock in the afternoon of December 12, 1939, and upon his return thereto between 6 and 7 o'clock that evening, he discovered that his clothes and a Gladstone bag, upon which his full name was embossed in gold letters, were missing.

F. W. Benson, ticket agent for the Santa Fe and Burlington Trailways at San Bernardino, testified that on December 13, 1939, a Gladstone bag bearing the name "I. L. Kennedy" was left with him for checking by a young man, but he could not identify the appellant as being the particular young man who left the bag with him. When the bag had remained in his custody for about a month, ticket agent Benson opened it, secured the address of the owner, and after some correspondence with him, returned the bag to the said Ivar L. Kennedy. Three months thereafter, i. e., on either March 19th or 20th, appellant called and presented to the said ticket agent at his station in San Bernardino a claim check bearing the number A-2125 and asked for the bag which had theretofore been checked under a corresponding number. To this inquiry, Benson replied that any bag left with him for more than thirty days would be sent to the claim department of the company in Los Angeles. After checking the luggage in his office, said ticket agent informed appellant that the bag had not been turned over to the claim department for the reason that it was "a stolen bag from Los Angeles", and that he had turned over to the police the matter of this particular check number; that if appellant would wait a moment, he (Benson) would call the police department, which he did, and when he told appellant that "the police would be down in a few minutes", appellant walked outside the station and Benson did not see him again until he saw him in court.

H. Burch, a member of the burglary detail of the Los Angeles police department, testified that he had a conversation with appellant in the San Bernardino jail on March 21, 1940, at which time appellant stated that he was employed in December, 1939, as a member of a magazine salescrew consisting of about fifteen persons with headquarters in Los Angeles at the Californian Hotel; that on December 12, the crew was taken to San Bernardino and rooms engaged at the Stauffer Hotel, appellant and another man occupying room 49; that on December 13, appellant checked a bag at the stage depot and after staying in San Bernardino for a couple of days, he went to Tucson, Arizona, and finally to Milwaukee, returning to San Bernardino around March 18, 1940. The officer testified that appellant stated to him that he did not burglarize a room in the Californian Hotel and did not take a bag from the room, but stated that he did present a claim check at the stage depot in San Bernardino to recover his own bag and was told that the bag was a stolen bag by the ticket agent, who requested appellant to remain while he notified the police department. Officer Burch further testified that appellant told him "he did not want to become involved in any further argument, and he walked outside and left. He was later arrested about two miles away near the railroad tracks. I asked him if the property belonged to him why he did not remain and claim his property. He stated he did not want to have any more argument about the bag. * * * I asked him why he did not remain there until the police arrived and insisted and demanded that his property be returned to him and he said he did not want to stay there and have any argument with Mr. Benson or the police either."

Appellant took the stand in his own defense and testified that on December 12, 1939, he was employed as a salesman for the Blue Ribbon Publication Company, being a member of a sales-crew managed by one Russell Poole, and named some eighteen members of the crew; that on said December 12 at about 7:30 a. m., the crew checked out of the Hotel Californian in Los Angeles and was taken to San Bernardino in three automobiles and a trailer; that each member of the crew placed his personal luggage in the lobby of the hotel and it was packed in the trailer by one Holderness. Arriving in San Bernardino at 9:30 or 10 o'clock in the morning of December 12, the members of the crew were transported to different points in the city to begin solicitation of business; that after leaving his bags in the lobby of the Californian Hotel, appellant next saw them in the lobby of the Stauffer Hotel in San Bernardino around 7:30 o'clock that evening, when he personally moved them to his room in the hotel. The crew remained at the Stauffer Hotel until December 17 when they went to San Diego. Appellant testified that on the night of December 16, he checked his own Gladstone bag at the stage depot, for the reason that "I had gotten a telegram from a previous employer in Sacramento asking me to come back to work for him and I had intended to leave this crew and come back to work in Sacramento, and the manager had already told me * * * he was going back toward Wisconsin within a month or thereabouts, and Wisconsin being my home place and I had not been home two years; I decided to stay with him until he had gotten to Milwaukee and I would spend a week or two at home and quit him and then come back to work here in Sacramento. I checked the bag with the intention of leaving it until I came back to California because I had two bags. Some of the clothes in the bag I checked at the bus depot were summer clothes that I wouldn't need in Wisconsin; rather than carry both bags there I checked one bag and took the other with the clothes I needed with me." Appellant further testified that he returned to San Bernardino on March 20, 1940, called at the stage depot and asked for a Gladstone bag, and that "he (Benson) told me if I wanted him to he would call the police and check up on my bag. I told him all right, he should call, and he took the—picked up the telephone and called the police department in San Bernardino and spoke to them over the phone and when he hung up the phone he turned around to me and said, 'There is an awful mixup here. I don't know what to tell you to do except as I told you, to go to the Los Angeles claim department and if you can identify your bag and the contents, they will give it to you.' And he turned around and walked out of the bus depot and left me there alone. I followed him, directly behind him, out of the bus depot and onto the street."

Appellant admitted on direct examination that he did not sign the register at the Hotel Stauffer in San Bernardino on the morning of December 12, and it was stipulated that if Bernice S. Adams were called as a witness she would testify that she was the manager of the Hotel Stauffer on December 12, 1939; that in the morning of that day Russell Poole registered there and engaged rooms for his crew and that later in the day "members of his party signed the register either each individually or Mr. Poole for them, she didn't know which, or some of the others signing for the ones who didn't sign personally, sometime in the afternoon of December 12, 1939, the register not showing the exact time when they registered actually". It was also stipulated that if the manager of the Californian Hotel were called as a witness, he would testify that Russell Poole, as manager of a sales-crew for a publishing company, checked his crew out of that hotel not later than eight o'clock on the morning of December 12, 1939.

Appellant urges that the evidence is wholly inadequate to establish that appellant checked the stolen bag in San Bernardino or ever had it in his possession; also that it is impossible to tell from the record what type of parcel check was used at the stage depot since neither the check alleged to have been used nor the duplicate claim check was offered in evidence.

While it is conceded that the evidence as to appellant's participation in the crime charged is wholly circumstantial, it is established law that guilty connection with the commission of the crime may be established by circumstantial evidence. People v. Latona, 2 Cal.2d 714, 43 P.2d 260. In the instant cause, the trial court had before it many circumstances from which it could draw a proper legal inference that the appellant was guilty as charged. Testimony was presented to the trial court, as hereinbefore outlined, showing that appellant and the owner of the missing bag lived at the same hotel; that appellant left the hotel the day the bag and its contents were found to be missing and went to San Bernardino. Although appellant testified that he went to San Bernardino with the publishing company crew early in the morning of the 12th, it was also shown that he neither registered in person nor arrived at the Stauffer Hotel in that city until 7:30 o'clock in the evening of that day, which would support the inference that appellant remained in Los Angeles after the crew left for San Bernardino and had the opportunity to visit the room of Mr. Kennedy during the hours of December 12 when it is alleged that his bag was taken therefrom.

[1, 2] As was very aptly stated in the case of People v. Anderson, 37 Cal.App.2d 615, at page 619, 100 P.2d 348, at page 349, and referred to in respondent's brief, "Guilty participation may be shown by circumstantial evidence as well as by direct evidence. If the circumstances proved reasonably justify the conclusion of the jury, the reviewing court has no authority to interfere therewith. The principles applicable in such a case were recently stated by this court as follows in People v. Schneider [36 Cal. App.2d 292], 98 P.2d 215, 216: '* * * appellant's main attack upon the sufficiency of the evidence is based upon the fact that there is an absence of direct evidence as to the actual delivery of the check to Weyel. It is well settled, however, that a fact relating to the guilt of an accused may be established by circumstantial as well as by direct evidence; that the right to draw proper inferences from the evidence is a function of the jury, and that as long as its conclusions do not do violence to reason, a reviewing court is not permitted to substitute its finding of the ultimate fact for that reached by the constitutional as well as the statutory arbiter thereof. People v. Latona, 2 Cal.2d 714, 43 P.2d 260; People v. Martinez, 20 Cal.App. 343, 128 P. 952. In other words, as frequently said by the courts, circumstantial evidence may be as conclusive in its convincing force as the testimony of witnesses to the overt act. (People v. Nagy, 199 Cal. 235, 248 P. 906; People v. Perkins, 8 Cal.2d 502, 66 P.2d 631), and consequently where the circumstances proved reasonably justify the conclusion of the jury expressed in its verdict, it is beyond the authority of the reviewing court to interfere therewith. People v. Latona, supra. Furthermore, in considering the question of the sufficiency of the evidence, the reviewing court must assume in favor of the verdict the existence of every fact which the jury could have reasonably drawn therefrom. People v. Perkins, supra.' "

[3] A review of the record herein reveals that the evidence was sufficient to sustain the trial court's finding of appellant's guilt.

[4] The questions asked by the prosecution as to whether or not appellant slept in jails at San Diego and at Elsinore on the two nights prior to his return to San Bernardino in March of 1940 were not of sufficient importance to prejudicially affect appellant's substantial rights.

The order appealed from is affirmed.

We concur: DORAN, J.; WHITE, J.

41 Cal.App.2d 508

SILCOTT v. CITY OF MONROVIA et al.

Civ. 12576.

District Court of Appeal, Second District, Division 2, California.

Nov. 18, 1940.

Hearing Denied Jan. 16, 1941.

1. New trial 🔑70

If there was no substantial evidence that would have supported findings necessary to sustain a judgment for plaintiff, trial court erred in setting aside verdict for defendant and granting a new trial.

2. New trial 🔑72

Where trial court is convinced that a jury's verdict is clearly against the weight of the evidence, it is court's duty to set aside such verdict.

3. Appeal and error 🔑977(3)

An order granting a motion for a new trial will not be reversed unless there has been a manifest abuse of discretion.

4. New trial 🔑68

Evidence that the death of plaintiff's daughter in automobile accident was caused by a defective condition of defendant city's street, of which condition the city's officers had both actual and constructive notice but had failed to take action reasonably necessary to protect the public, justified trial court in setting aside verdict for city and granting a new trial. St.1923, p. 675.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action by Eliza A. Silcott against the City of Monrovia and Garth H. Duell, Superintendent of Streets of the City of Monrovia, to recover for the wrongful death of plaintiff's daughter resulting from automobile accident allegedly due to defective street. Trial to jury resulted in a verdict for defendants. From an order granting a new trial, the City of Monrovia appeals.

Affirmed.

Paul F. Garber, of Monrovia, and A. G. Ritter, of Los Angeles, for appellant.

Walter F. Dunn, of Monrovia, and Jennings & Belcher, of Los Angeles, for respondent.

WOOD, Justice.

Plaintiff sued to recover damages for the death of her daughter, Elberta Silcott, a minor of the age of 18 years who was killed on March 19, 1938, in an automobile accident alleged to have been caused by the defective condition of a street in the city of Monrovia. A jury returned a verdict in favor of defendant city and thereafter the trial court granted a motion for new trial on the ground of the insufficiency of the evidence to sustain the verdict. The appeal is from the order granting a new trial.

Miss Silcott was a passenger in the automobile of Guy H. Clark, who was the only witness to tell what happened at the time of the accident. He testified that at about 9 o'clock in the evening of March 19 he was driving his car at a speed of 25 miles per hour in a westerly direction on Greystone avenue in Monrovia. His headlights were in good condition. At a distance of 8 or 10 feet in front of him he saw a "gully in the road". He testified that he observed "only a shadow thrown from my lights enough to know there was a ditch there or something anyway." He tried to apply his brakes but the car struck the ditch, and "jerked" the steering wheel out of his hand. The car "travelled forward in the neighborhood of from 150 to 75 feet" and then turned over. Miss Silcott was caught beneath the car.

Greystone avenue is an unpaved, dirt street. From March 1 to March 3, 1938, there was a great storm in the vicinity of Monrovia and the heavy rain made a gully extending diagonally across the street, which sloped from one side to the other. Various witnesses described this gully as ranging in width from 18 inches to 2½ feet and having a depth varying from five to nine inches. The edges were slightly rounded and the sides precipitous. No barricade, warning sign or light was placed at or near the gully after the storm up to the time of the accident out of which this litigation arose.

From the testimony of witnesses who drove their automobiles over the gully in question between the date of the storm and the time of the accident in question it appears that they were severely jolted and twisted; that drivers lost control of their cars; that milk bottles in a milk truck were broken on several occasions. One driver got out of his car after crossing the gully to see if he had broken his running gear. One witness stated that he had received a severe jolting, although he was driving at a speed of from five to ten miles per hour. Immediately after the storm the superintendent of streets of defendant city, G. H. Duell, saw the necessity of making many repairs in the streets of Monrovia and he instructed his foreman to drive over all of the city streets for the purpose of discovering what repairs were to be made. He testified that there were about 60 miles of streets in Monrovia and that the foreman could drive over all of them within two days. The number of employees under Mr. Duell's supervision was immediately increased from 15 or 16 men until as many as 90 men were at work during the "acute period," engaged in "cleaning up the streets, making them passable, making them safe," and in putting up warning lights at dangerous places. Mr. Duell had plenty of lanterns for this purpose. On March 18, in the daytime and more than 24 hours before Miss Silcott was killed, Mr. Duell himself rode over the gully in question but took no steps to have it repaired or to have a lantern or barricade placed near it.

Plaintiff's action is predicated upon the Public Liability Act of 1923, Stats.1923, p. 675, wherein it is provided that a city is liable for injuries to persons resulting from the dangerous or defective condition of public streets in cases where its officers had knowledge or notice of the defective or dangerous condition and failed or neglected for a reasonable time after acquiring such knowledge or notice to remedy such condition or to take reasonably necessary action to protect the public.

[1-3] It is conceded that if the jury had returned a verdict in favor of plaintiff and such verdict would not be supported by substantial evidence, the order granting a new trial should be reversed. Estate of Sexton, 199 Cal. 759, 251 P. 778. In other words, if there is no substantial evidence to support findings necessary to sustain a judgment for plaintiff the trial court unquestionably erred in granting a new trial. We must also bear in mind the well-established rule that if the trial judge is not satisfied with the verdict and is convinced that it is clearly against the weight of the evidence it is his duty to set it aside. Dickey v. Davis, 39 Cal. 565. An order granting a motion for a new trial will not be reversed by a reviewing court unless it appears that there has been a manifest abuse of discretion. Morgan v. Los Angeles Pacific Company, 13 Cal.App. 12, 108 P. 735; Whitfield v. De Brincat, 35 Cal.App.2d 476, 96 P.2d 156.

[4] Giving consideration to the evidence in the light of these rules it is at once apparent that the order of the trial court must be sustained. Plaintiff presented evidence which was ample to sustain findings if such had been made, that the death of plaintiff's daughter was caused by a dangerous and defective condition of defendant's street, that defendant's officers had both actual and constructive notice of such condition, and that they failed to take such action as was reasonably necessary to protect the public. Appellant cites the testimony of Mr. Duell, in which in answer to the question, "Did you observe on that occasion a ditch two feet wide approximately, and five inches deep, which ran diagonally across Greystone at or near its intersection with Hill street" the witness gave the answer, "Not specifically I did not notice it." Photographs of the gully were introduced in evidence by plaintiff and are now before us. From these exhibits and from the evidence introduced it is extremely difficult to see how the street superintendent could have failed to observe that the street was in a dangerous and defective condition. Counsel have filed lengthy briefs in which many cases that arose under the Public Liability Act of 1923 are discussed, some of which involve slight defects in sidewalks and have very little bearing on the case now before us. There is no occasion for a discussion of these au-

thorities in this opinion. A mere statement of the facts surrounding the accident in the case under review is sufficient to convince that the court did not err in granting a new trial.

The order is affirmed.

We concur: MOORE, P. J.; McCOMB, J.

41 Cal.App.2d 518

VAN DER VEER v. WINEGARD et al.

Civ. 12694.

District Court of Appeal, Second District, Division 2, California.

Nov. 18, 1940.

1. Fraudulent conveyances 🔑299(13), 300(1)

Evidence supported finding that conveyance of realty by parents to married daughter was without consideration and in fraud of existing creditor. Code Civ.Proc. § 2061, subds. 2, 3.

2. Appeal and error 🔑882(1)

A party cannot successfully complain on appeal of an error which he has himself invited.

3. Appeal and error 🔑882(8)

In action to set aside transfer of a part of a lot by parents to married daughter as in fraud of existing creditor, defendants could not complain of receiving evidence relative to conveyance by parents of other part of lot to daughter, where defendants' counsel expressly consented to "opening up the entire transaction."

4. New trial 🔑104(1), 108(1)

A new trial will not be granted on ground of newly discovered evidence where such evidence is merely cumulative of evidence received during the trial, nor will a new trial be granted unless it is made to appear that a different judgment would result from the new evidence, if presented.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Ethel P. Van Der Veer against O. J. Winegard and others, to set aside an alleged fraudulent transfer of real property. From a judgment for plaintiff, the defendants appeal.

Affirmed.

Merriam, Rinehart & Merriam, of Pasadena, for appellants.

Russell H. Pray, of Long Beach, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to set aside an alleged fraudulent transfer of real property, defendants appeal.

Viewing the evidence most favorable to respondent, the essential facts are:

June 24, 1937, defendants O. J. and Dollie Winegard conveyed to their daughter and codefendant Ruth W. Heaney the westerly 75 feet of lot 4, tract No. 3747 in the county of Los Angeles, as per map recorded in book 40, page 95 of maps in the office of the county recorder of said county. At the time of the conveyance plaintiff was an existing creditor of the defendant grantors. August 18, 1930, the easterly 70 feet of lot 4 was also conveyed by defendant O. J. and Dollie Winegard to their codefendant Ruth W. Heaney.

Defendants rely for reversal of the judgment on these propositions:

First: There is no substantial evidence to sustain the implied finding of fact that the conveyance in question was made without consideration.

Second: The good faith of the parties to the conveyance should be tested as of the date the contract to convey was made rather than as of the date of the conveyance.

Third: The trial court committed prejudicial error in receiving evidence relative to the transaction appertaining to the easterly 70 feet of lot 4, tract 3747.

Fourth: The trial court committed prejudicial error in denying defendants' motion for a new trial.

[1] Defendants' first proposition is untenable. The trial court found that it was untrue that prior to January 1, 1935, or at any other time defendants Winegard had

contracted to sell the westerly 75 feet of lot 4, tract 3747 to their codefendant; also that it was untrue that subsequent to January 1, 1935, or at any other time the aforementioned real property was conveyed to defendant Heaney for a good and valuable consideration paid by said defendant Heaney to her codefendants.

It is true that defendants gave testimony to the contrary and stated that in October of 1933 defendant Winegard had entered into an agreement with their codefendant to convey the lot in question to her for $1,000 to be paid in installments of $20 per month. The trial court was not obligated to believe the testimony of defendants, even though uncontradicted by other evidence, where the circumstances in evidence satisfied the trial judge of the falsity of their testimony. First Nat. Bank v. Shipley, 109 Cal.App. 194, 200, 292 P. 996; sec. 2061, subds. 2 and 3, Code Civ.Proc.

There was evidence from which the trial judge may have very properly arrived at the conclusion that the defendants' testimony on the point in question was false. For example, defendant Heaney testified that entries in her memorandum book indicating monthly payments of $20 to her codefendants for eight months immediately preceding October 3, 1933, were made by her within a day or two of the date of each alleged payment. She further testified and it was stipulated by defendants' counsel that said defendant did not have the memorandum book in her possession until October, 1933.

Another circumstance throwing doubt upon the testimony of said defendant was the fact that in her memorandum book at the top of the list of purported payments on account of the lot in question were the words in heavy pencil "to apply on note" with the word "note" stricken out and the words "for ground" added in light pencil. There were other inconsistencies in the testimony of the defendants, but it would serve no useful purpose to set them forth in extenso.

In view of our conclusion as to defendants' first proposition, defendants' second proposition is immaterial, since the trial court found that there was no agreement prior to January 1, 1935, or at any other time between the defendants Winegard and defendant Heaney relative to the sale of the property involved in the present action.

[2, 3] Defendants' third proposition is without merit. The trial judge sustained objections by plaintiff's counsel relative to the consideration paid by defendant Heaney for the easterly 70 feet of lot 4. Thereafter plaintiff's counsel made inquiry relative to the consideration for said portion of lot 4, and on redirect examination the following colloquy between the court and counsel occurred:

"Mr. Johnson: Your Honor, would we be allowed to go into the consideration (for easterly 70 feet of Lot 4) ourselves on redirect?

"The Court: Yes; I will reopen it for you.

"Mr. Rinehart: Yes. We are opening up the entire transaction, to avoid ambiguity. Counsel has now seen the four checks."

The rule is settled that a party cannot successfully complain of error which he has himself invited. 3 Am.Jur., Appeal and Error 427, sec. 876; Fintel v. Engelbrecht, 28 Cal.App.2d 23, 25, 81 P.2d 1044. Since defendants' counsel expressly consented to "opening up the entire transaction", their present objection falls within the purview of the rule just stated.

[4] Defendants' final proposition is likewise without merit. Defendants' motion for a new trial was predicated upon affidavits setting forth alleged newly discovered evidence, which was merely cumulative of evidence received during the trial, and that, in view of the fact that evidence relative to the consideration for the easterly 70 feet of lot 4 had been admitted at the trial, they were not prepared to present all of the evidence which might be available upon the issues thus raised. The law is established in California that a new trial will not be granted on the ground of newly discovered evidence where such evidence is merely cumulative of evidence received during the trial, nor will a new trial be granted unless it is made to appear that a different judgment would result from the new evidence, if presented. Monnette v. Title Ins., etc., Co., 107 Cal.App. 313, 324, 290 P. 668. In the instant case there is a total absence of showing that a different judgment would result from the alleged newly discovered evidence. On the contrary, in our view, even though the newly discovered evidence were received, the judgment would proper-

ly be the same as that heretofore entered by the trial court.

For the foregoing reasons the judgment is affirmed.

We concur: MOORE, P. J.; WOOD, J.

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41 Cal.App.2d 954

KIRKPATRICK v. McLAUGHLIN LAND & LIVESTOCK CO. et al. (two cases).

Civ. 11413, 11414.

District Court of Appeal, First District, Division 2, California.

Nov. 16, 1940.

Appeal and error 🔑1101

Where parties had stipulated that upon affirmance of judgment in another case appeal should be dismissed and that remittitur should issue as soon as affirmance of that judgment should become final, appeals would be dismissed in accordance with stipulation and issuance of remittiturs would be ordered.

◆

Appeals from Superior Court, City and County of San Francisco; Andrew R. Schottky and Everett C. McKeage, Judges.

Action by W. J. Kirkpatrick against the McLaughlin Land & Livestock Company and others to enforce a judgment, wherein defendants filed an answer and cross-complaint. From an order sustaining plaintiff's demurrer to the answer and cross-complaint and from a judgment for plaintiff, the defendants appeal.

Appeal dismissed in accordance with stipulation.

Garth V. Lacey, of Salinas, and Wyckoff, Gardner & Parker, of Watsonville, for appellant McLaughlin Land & Livestock Co.

Harry L. Noland, of Salinas, for appellant Maher.

C. H. White, D. Bianco, and Keyes & Erskine, all of San Francisco, for respondent.

PER CURIAM.

The plaintiff sued to enforce a judgment recovered by H. H. Bechtel against these defendants and assigned to this plaintiff for collection. In their answer and cross-complaint these defendants attacked the Bechtel judgment upon grounds of irregularities in proceedings under the original trust relation leading up to the foreclosure and sale, but not upon grounds of extrinsic fraud affecting the judgment.

For these reasons the trial court sustained plaintiff's demurrer to the answer and cross-complaint, and this order is the subject of the appeal in case number 11413. Pending this appeal the cause was tried on its merits, and plaintiff had judgment from which appeal number 11414 is taken.

By stipulation of the parties in these appeals and in Bank of America, etc., v. McLaughlin Land & Livestock Co., Cal.App., 105 P.2d 607, number 11350, it has been agreed that upon the affirmance of the judgment in case number 11350 these appeals numbered 11413 and 11414 shall be dismissed and that remittiturs shall issue as soon as the affirmance of that judgment shall become final.

It is therefore ordered that these appeals be dismissed in accord with said stipulation and that the remittiturs issue forthwith.

In re JANES' ESTATE.*

VROOM v. CURTISS.

Civ. 12695.

District Court of Appeal, Second District, Division 2, California.

Nov. 18, 1940.

Hearing Granted Jan. 16, 1941.

1. Wills 🔑334

Issues of fact in probate proceedings must be determined by the court, and appropriate findings respecting the issues must be filed. Probate Code, § 1230.

* Subsequent opinion 116 P.2d 438.

2. Wills ⚷98

An extraneous document cannot affect a will unless the document is in existence when will is written and is so clearly identified in will itself as to become a part of it.

3. Wills ⚷98

Where holographic will contained nothing to indicate that it was a copy of another document, and there was no proof of existence of purported original will, attachment to the will of an unsigned, undated slip of paper containing statement to effect that will was a copy and that original was in safe deposit box of the testator was not sufficient to warrant refusal of probate of will on ground that will offered for probate was only a copy and that original, which was not found, had been destroyed by decedent for purpose of revoking it, since slip of paper was not a part of the will. Probate Code, § 76.

4. Wills ⚷290

To invoke presumption that a will last seen and known to have been in possession of testator, which cannot be found after his death, has been destroyed by him with intent of revoking it, the contestant must establish that the will was seen and known to have been in the possession of the decedent before his death. Probate Code, § 76.

5. Wills ⚷300

Findings in probate proceedings cannot be based on surmise and conjecture.

◆

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge pro tem.

Proceeding in the matter of the estate of Harry C. Janes, deceased. From an order of the superior court denying the petition of Dorothy Lee Janes Curtiss for the probate of a document alleged to be the will of Harry C. Janes, Iva A. Vroom, a legatee, appeals.

Reversed.

S. S. Hahn and W. O. Graf, both of Los Angeles, for appellant.

Leo V. Youngworth, of Los Angeles, for respondent.

WOOD, Justice.

This is an appeal by Iva A. Vroom, a legatee, from the order of the superior court denying the petition of Dorothy Janes Curtiss for the probate of the document alleged to be the will of Harry C. Janes. Dorothy Janes Curtiss is named as executrix in the will, and although she presented the will for probate, at the trial she took the position that decedent, who was her father, died intestate, and appellant took the position that the will in question was in fact the last will of decedent and that the petition for probate should be granted.

[1] No findings of fact were filed by the trial court. In this the court erred. Issues of fact in probate proceedings must be determined by the court and appropriate findings respecting the issues must be filed. Prob.Code, sec. 1230; Estate of Clifford, 16 Cal.App.2d 123, 60 P.2d 302; Estate of Pendell, 216 Cal. 384, 14 P.2d 506.

The evidence presented to the trial court was not sufficient to sustain a finding upon which the order appealed from could be based. Harry C. Janes died on December 9, 1938, at the age of 66 years. During the last three days before his death he had been ill at the home of appellant, who was attending him professionally as a chiropractor. The evening before his death decedent requested appellant to go to his apartment and get his suitcase. He told appellant that she would find instructions in the suitcase and that he had left her $5,000 and two automobiles. At about the same time decedent told the witness Martha Gunter that he had left $5,000 to appellant. Mr. Janes died at about 2:15 a. m. Dr. Vroom telephoned to Clarence McKinley, an undertaker, who arrived at about 4 o'clock a. m. Dr. Vroom had opened the suitcase and found therein an insurance policy, attached to which was a draft for $250 to be filled out and sent to his daughter, Dorothy Janes Curtiss; also three pieces of paper, one containing a request that decedent's body should not go to the morgue, another giving written authority for appellant to take charge of his personal effects, and another containing written instructions concerning his funeral. She also found in the suitcase the piece of "white paper" hereinafter mentioned.

The holographic will which was denied probate by the order from which the appeal is taken was found by appellant in the evening of the same day when she again opened the suitcase. This will was entirely written, dated and signed by decedent.

Appellant is therein given the sum of $5,000 and two automobiles. The residue of the estate is given to Dorothy Janes Curtiss, who is named as executrix. Attached to the will by a clip was a small piece of paper in the handwriting of decedent, but unsigned, reading as follows: "This is a copy of my last will, the original is in my safe deposit box." The will bears the date of November 1, 1938. Testimony was presented showing that a search had been made in decedent's bank box and elsewhere and that no will could be found except the one offered for probate.

Respondent contends that the will offered for probate was only a copy and that the original had been destroyed by decedent for the purpose of revoking it. In support of this contention respondent cites the testimony of Clarence McKinley and Dr. Vroom. Mr. McKinley testified that on his arrival at Dr. Vroom's residence appellant exhibited to him a piece of white paper which was not signed; that "it was a piece of paper cut off"; that it "seemed to be about three-fourths of a paper"; that the "top was cut off"; that Dr. Vroom referred to the paper as a will but that he told her that it was not a will since it was not signed; that he did not remember anything that was on the paper except that decedent's daughter, Dorothy Janes Curtiss, was mentioned. The witness further testified: "It seems to me it was written on both sides, but I am not sure. It was a piece of paper cut off, written in a hurry or something. It seemed to be about three-quarters of a paper, I could tell the top was cut off, you know, like you cut off part of a letter at the top when you cut something off in a hurry."

Dr. Vroom testified that she opened the suitcase about one hour and a half after the death of Mr. Janes; that she found a piece of paper that looked like it might have been a will. That it was "cut off at the bottom and was not signed or dated"; that the writing was the writing of decedent; that she did not remember what was in the writing but that there was something about decedent's daughter Dorothy; that "there was nothing mentioned of any property to be given anybody in it"; that she showed the paper to Mr. McKinley who told her that it was "no good" because it wasn't even signed; that she did not remember seeing it again. Appellant had another conversation with Mr. McKinley in Mr. McKinley's office later in the same day. She testified that at that time she did not have a conversation with Mr. McKinley about decedent's will because she "was sure the will was in his safe deposit box and had no idea there was a copy in his suitcase."

[2] The document offered for probate purports to be the last will of decedent. It is complete and nothing is contained in the will itself to indicate that it is a copy of another document. The unsigned and undated slip of paper is clearly not a part of the will. An extraneous document cannot affect a will unless the document is in existence when the will is written and is so clearly identified in the will itself as to become a part of it. Garde v. Goldsmith, 204 Cal. 166, 267 P. 104.

[3-5] Respondent relies upon section 76 of the Probate Code, wherein it is provided that a will executed in duplicate is revoked if one of the duplicates is obliterated or destroyed by the testator for the purpose of revocation. To establish that the will was destroyed in the manner mentioned in the code section respondent calls to her aid the presumption that a will last seen and known to have been in the possession of a testator, which cannot be found after his death, has been destroyed by him with the intent of revoking it. Estate of Sweetman, 185 Cal. 27, 195 P. 918. In order to invoke this presumption respondent must establish that the will was seen and known to have been in the possession of decedent before his death. There is no proof in the record that anyone ever saw the purported "original" will of which the document offered for probate is claimed to be a copy. No proof was offered to show that anyone knew such a will to be in the possession of decedent. The proof presented to establish the existence of the purported "original" will does not contain the elements necessary to form a basis for a finding that such a will was executed. Neither Dr. Vroom nor Mr. McKinley testified that the "white paper" found by Dr. Vroom in the suitcase was a will. Mr. McKinley could only remember that the instrument was unsigned and that it mentioned decedent's daughter. Dr. Vroom testified that the instrument did not dispose of any property. The most that can be said is that the evidence affords ground for surmise and conjecture. Findings may not be based on such a foundation. Clapp's P. Station v. I. A. C., 51 Cal.App. 624, 627, 197 P. 369. Clearly, if there had

been no proof whatever of the existence of the will offered for probate, the court could not properly find that the "white paper" mentioned by the witnesses was the last will of decedent. Nor could it properly make a finding as to its terms.

The order is reversed, appellant to recover costs on appeal from respondent.

We concur: MOORE, P. J.; McCOMB, J.

41 Cal.App.2d 516

JOHNSTON v. STATE COMPENSATION INS. FUND.

Civ. 12737.

District Court of Appeal, Second District, Division 2, California.

Nov. 18, 1940.

1. **Mandamus** 🔑3(2)

Mandamus cannot be invoked where there is a plain, speedy and adequate remedy in the ordinary course of law. Code Civ. Proc. § 1086.

2. **Mandamus** 🔑3(6)

A writ of mandamus was not a proper remedy for recovery of sums from State Compensation Insurance Fund alleged to be due pursuant to an award of Industrial Accident Commission for injuries resulting from industrial accident, since claimant had a plain, speedy and adequate remedy at law by suing State Compensation Insurance Fund in the proper court. St.1935, pp. 717, 725, §§ 11631, 11651, 11783, subd. (a); Code Civ.Proc. § 1086.

Original proceeding by Olaf Johnston for a writ of mandamus to require the State Compensation Insurance Fund to pay petitioner a sum alleged to be due him pursuant to an award of the Industrial Accident Commission.

Alternative writ heretofore issued dismissed and application for peremptory writ denied.

Allan Macdonald Carson, of Los Angeles, for petitioner.

Donald Gallagher, of San Francisco, and Roy Weisensel, of Los Angeles, for respondent.

McCOMB, Justice.

This is an original application for a writ of mandamus to require respondent to pay petitioner a sum alleged to be due him pursuant to an award of the industrial accident commission.

The facts so far as material are:

June 28, 1937, the industrial accident commission found that petitioner was permanently and totally disabled as a result of an industrial accident and made an award against respondent predicated upon a policy of industrial accident insurance which it had issued. The award provided that respondent should pay to petitioner beginning October 25, 1934, $21.61 a week for 240 weeks, and thereafter for life $13.30 a week. Respondent complied with the aforesaid order until on or about February 23, 1938. Thereafter, respondent failed and refused to pay petitioner any additional compensation pursuant to said award.

This is the sole question necessary for us to determine:

Is a writ of mandamus a proper remedy for recovery of sums of money from the State Compensation Insurance Fund alleged to be due pursuant to an award of the industrial accident commission for injuries resulting from an industrial accident?

This question must be answered in the negative and is governed by the following established principles of law:

(1) Every contract or policy of insurance issued by respondent (State Compensation Insurance Fund) must contain a clause to the effect that respondent will be directly and primarily liable to any proper claimant for payment of any compensation for which the employer is liable (sec. 11651 and sec. 11631, Insurance Code, St. 1935, p. 717).

(2) Respondent may be sued upon an obligation arising from any contract which it has entered into in connection with its business (sec. 11783, sub. (a), Insurance Code).

[1] (3) Mandamus may not be invoked where there is a plain, speedy, and adequate remedy in the ordinary course of

law (sec. 1086, Code Civ.Proc.; Northrup v. Haynes, 15 Cal.App.2d 665, 666, 59 P.2d 1056).

[2] Applying the foregoing rules to the facts of the instant case, it is apparent that petitioner could have filed an action in the proper court against respondent to recover any sum that may be due him, pursuant to the award of the industrial accident commission and the contract of insurance issued by respondent. In such action any defense which respondent may have to petitioner's claim could be fully litigated and properly settled. Therefore, since petitioner had a plain, speedy, and adequate remedy at law by suing respondent in the proper court, which remedy was equally convenient, beneficial, and effective as a proceeding by mandamus, the later remedy is not available to him.

For the foregoing reasons the alternative writ heretofore issued is dismissed and the application for a peremptory writ of mandamus is denied.

We concur: MOORE, P. J.; WOOD, J.

16 Cal.2d 617

LAZAR v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

S. F. 16387.

Supreme Court of California.
Nov. 26, 1940.

1. Husband and wife 🔑278(1)

A husband and wife may contract with one another concerning matters of property and support. Civ.Code, §§ 158, 159.

2. Divorce 🔑236, 249(2)

Agreements between husband and wife concerning matters of property and support are subject to close scrutiny by court in subsequent divorce action, and may be approved, modified, or rejected by court in exercise of court's statutory powers. Civ.Code, §§ 139, 146.

3. Divorce 🔑269(2)

The provisions of property settlement agreement, which is complete in itself and is merely referred to in divorce decree or approved by court but not actually made a part of decree, cannot be enforced by contempt proceedings.

4. Divorce 🔑249(2)

The provisions of property settlement agreement become a part of order of court and may be enforced as such, where language of agreement discloses an intention to make agreement a part of future divorce decree, and agreement is actually incorporated in the decree.

5. Divorce 🔑243, 269(2)

An order for monthly payments to divorced wife was an order for payment of support, maintenance, or alimony which could be enforced by contempt proceedings, notwithstanding provision in divorce decree that wife was not entitled to maintenance, support, or alimony, and that no award was made therefor, where property settlement agreement providing for monthly payments and divorce decree revealed intention of the parties and trial court that such monthly payments should be made a part of divorce decree and should be made for support of wife.

6. Judgment 🔑524

Individual clauses or provisions of judgment should not be separately considered and construed, but the entire document should be taken by four corners and construed as a whole to effectuate the obvious intention.

In Bank.

Certiorari proceeding by Siegbert Lazar against the Superior Court of California in and for the City and County of San Francisco and others to review an order of such court adjudging Siegbert Lazar to be in contempt for refusing to make payments in accordance with provisions of a final decree of divorce.

Order affirmed.

Grover O'Connor, of San Francisco, for petitioner.

Eric J. Robertson, of San Francisco, for respondent.

CARTER, Justice.

A writ of certiorari was issued by this court for the purpose of reviewing an order of the Superior Court of the City and County of San Francisco adjudging petitioner to be in contempt for refusing to make certain payments to his former wife in accordance with the provisions of a final decree of divorce.

On November 30, 1936, petitioner and his wife, then living apart, entered into a property settlement agreement, the purpose of which, as stated in the agreement, was a complete settlement of all their property rights. In addition to provisions assigning certain items of personal property and bank accounts to the respective parties, there was a clause providing that the "Wife shall have and Husband agrees to pay her as part of this property settlement, the sum of One Hundred and Thirty Dollars ($130.00) on or before Dec. 31, 1936, and a like sum on or before the last day of each calendar month thereafter during the lifetime of Wife or until the remarriage of Wife, if she and Husband are divorced and she remarries." A further clause provided that the provisions of the agreement were to be incorporated in any decree or judgment rendered by any court in an action for divorce between the parties, and that neither party should have the right to apply for a modification of any judgment or decree that might be made by the proper court for the establishment of the property rights of the parties. After the execution of this agreement, and on December 18, 1936, the wife, as plaintiff, was granted an interlocutory decree of divorce from her husband, the petitioner herein. The agreement was approved by the court and made a part of the decree. Certain provisions of the agreement were set out in full in the decree under the heading, "The plaintiff shall have as her separate property the following:" Then followed an itemization of certain personal property which, in turn, was followed by a clause providing for the monthly payments from the husband to the wife of $130 until the remarriage or death of the wife. The decree further provided that the wife was not entitled to maintenance, support or alimony.

Subsequent to the entry of the final decree of divorce, which confirmed the interlocutory decree, the petitioner was cited for contempt for failing to make the monthly payments provided for in said decree. At the hearing following such citation the court ordered petitioner to pay a certain sum then in his possession to the former wife. Petitioner refused to obey such order and the court immediately adjudged him in contempt.

Petitioner argues that, aside from the power to award temporary alimony, counsel fees and support for children, which are not involved in this proceeding, the superior court has only the power to grant support to an innocent wife (Civ.Code, sec. 139) and by sections 146 and 147 of the Civil Code, to divide community property; that there was no community property at the time of the hearing of the divorce action because such had already been converted into separate property by way of the property settlement agreement; that no support was awarded because a paragraph of the decree provided that plaintiff was not entitled to maintenance, support or alimony and no award therefor was made; that therefore the court had no jurisdiction to order the petitioner to pay the plaintiff $130 per month, nor jurisdiction to hold petitioner guilty of contempt for his refusal to pay said amount pursuant to such order.

The question to be decided therefore is whether the provision for payment of $130 per month to the former wife is merely a part of an agreement between the parties under which only the usual contract remedies are available, or whether such provision is a part of the court's decree and, as such, an order for payment of support, maintenance or alimony which may be enforced by contempt proceedings.

[1-4] Preliminarily, certain general observations regarding property settlement agreements prior to divorce actions and the trial court's power in relation thereto, seem appropriate. A husband and wife may contract with one another concerning matters of property and support. Civ.Code, secs. 158, 159; Huntsberger v. Huntsberger, 2 Cal.2d 655, 43 P.2d 258. But such agreements are subject to close scrutiny by a court in a subsequent divorce action and may be approved, modified or rejected by such court in the exercise of the powers given it under sections 139 and 146 of the Civil Code. Moog v. Moog, 203 Cal. 406, 264 P. 490; Smith v. Smith, 94 Cal.App. 35, 270 P. 463. If a property settlement agreement is complete in itself and is merely referred to in a divorce decree or approved by the court but not actually made a part of the decree, then the provisions of such agreement cannot be enforced by contempt proceedings. Baxter v. Baxter, 3 Cal.App.2d 676, 40 P.2d 536; Schnerr v. Schnerr, 128 Cal.App. 363, 17 P.2d 749. On the other hand, if, by the language of the agreement itself, it is shown that the intent was to make the agreement a part of a future divorce decree and, if the agreement is actually incorporated in the decree, then such provisions become a part of the order of the court and may be enforced as such. Tripp v. Superior Court, 61 Cal.App. 64, 214 P. 252; Ex parte Weiler, 106 Cal.App. 485, 289 P. 645; Miller v. Superior Court, 9 Cal.2d 733, 72 P.2d 868.

An examination of the agreement and the decree in the instant case shows clearly that both the parties and the trial court intended the monthly payments to be made a part of the divorce decree and that such monthly payments were intended to be made for the support of the wife. Paragraph 2 of the agreement, as already shown, provides that $130 per month is to be paid by the husband to the wife during her lifetime or until her remarriage. The latter part of this provision is in the form usually employed for an award of support, alimony or maintenance and unquestionably the parties considered it to be such. A further indication that the monthly payments were so considered is found in paragraph 9 of the agreement wherein it is stated, "Each party hereto waives and relinquishes all rights, claims and demands of every nature and description which he or she has against the other for maintenance, support and alimony, and except as hereinbefore expressly provided, Wife hereby waives any and all claims and demands which she has or may have against Husband for counsel fees."

That the parties contemplated obtaining a divorce immediately following the agreement is shown by paragraph 8, which provides for attorney's fees. That the agreement was intended to be a part of any future divorce decree, if acceptable to the court, is shown by paragraph 11 which declares that: "It is agreed between the parties hereto that the Court, at any hearing, at any time, of the matters dealt with in this agreement shall take cognizance thereof, and shall, in any judgment or decree that may be rendered by said Court, incorporate therein the essential provisions of this agreement. Further, neither party hereto shall have the right to make application to the Court for the modification hereafter of any judgment or decree that may be made by the proper Court for the establishment of the property rights of the parties hereto as hereinafter set forth."

That such agreement was acceptable to the trial court is evidenced by the second paragraph of the decree to the effect that "It is further ordered, adjudged and decreed that that certain agreement in writing, dated Nov. 30, 1936, by and between the plaintiff and defendant be and it is hereby approved and made a part of this Decree, and the property rights of the parties as set forth in said agreement be, and they are hereby approved, and the community property of said parties is hereby distributed to them in accordance with the terms of said agreement to-wit:

"The plaintiff shall have as her separate property the following:" (Then follows an itemization of certain personal property.) In a separate paragraph the decree reads: "In addition, plaintiff shall have, and defendant shall pay to her, the sum of One Hundred and Thirty Dollars ($130.00) on or before December 31, 1936, and a like sum on or before the last day of each calendar month thereafter during the lifetime of plaintiff, or until the remarriage of plaintiff; said monthly installments of One Hundred Thirty Dollars ($130.00) shall be deposited by defendant to plaintiff's account in the San Francisco Bank—526 California Street, San Francisco, California." There can be no question but that the court thereby made the substance or contents of the agreement part and parcel of its decree. This was done, not merely by incorporation of parts of the agreement but, at least as regards the monthly payment provision, by an actual change of verbiage, i. e., instead of the words "wife" and "husband" the words "plaintiff" and "defendant" were used.

[5, 6] Under all the circumstances, it may not be successfully contended now that the order for payment of $130 to the wife was not an order by the court for payment of alimony, support or maintenance. The obvious intention of the parties and the trial court would appear to be that such payments were contemplated as support money.

Nor do we think this conclusion is disturbed by the presence of that paragraph in the decree declaring that "the plaintiff is not entitled to maintenance, support or alimony, and no award therefor is made to her". The only reasonable construction attributable to the latter provision is that the wife "is not entitled to maintenance, support or alimony" other than that theretofore agreed to by the parties and approved and adopted by the court. Individual clauses or provisions of a judgment, just as in a contract or any other document, are not to be separately considered and construed but, on the contrary, the entire document is to be taken by its four corners and construed as a whole to effectuate the obvious intention. Ex parte Ambrose, 72 Cal. 398, 14 P. 33; Watson v. Lawson, 166 Cal. 235, 135 P. 961; Boyer v. Crichton, 100 Cal.App. 24, 279 P. 677; Rinaldo v. Board of Medical Examiners, 123 Cal.App. 712, 12 P.2d 32; Security Trust & Savings Bank v. Southern Pac. R. Co., 6 Cal.App.2d 585, 45 P.2d 268. As we have already indicated, reading the agreement and the decree together and in their entirety, but one conclusion is possible, viz., that the parties and the court intended the monthly instalments to be support payments for the wife. This being true, it was within the jurisdiction of the superior court to adjudge petitioner guilty of contempt for refusing to make the payments ordered.

From what we have said in the foregoing opinion, it must necessarily follow that the order should be affirmed, and it is so ordered.

We concur: GIBSON, C. J.; SHENK, J.; CURTIS, J.; EDMONDS, J.

16 Cal.2d 626

GLICKMAN v. NEW YORK LIFE INS. CO.

L. A. 16078.

Supreme Court of California.

Nov. 26, 1940.

Rehearing Denied Dec. 23, 1940.

1. Evidence 🔑66

Generally, one is chargeable with knowledge of terms of a written contract including an insurance contract to which he has become a party.

2. Insurance 🔑241

On the issue of validity of surrender of policy, where insured approaches insurer's agent with request for advice concerning insured's rights under policy, the agent, if he undertakes to advise insured, has duty at least to make no false or misleading statements concerning insured's rights, especially if the information sought and given might have a direct and material bearing on continuance of life of policy.

3. Insurance 🔑241

Where insured, who obtained endowment policy at a time when he had but scant knowledge of English language and soon after he arrived in United States from Russia, paid policy premiums for ten years without knowledge that policy contained provisions for disability benefits and waiver of premiums, incorrect statement of insurer's agent, made two days before policy became delinquent and on direct inquiry of insured who disclosed that he was disabled, that only thing insured could do was to surrender the policy, constituted "constructive fraud" on the insured who surrendered policy in reliance on the agent's statement, and surrender of policy was without "consideration" and subject to rescission. Civ.Code, § 1573.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration" and "Constructive Fraud".

4. Insurance 🔑146(1)

Insurance contracts should be viewed in the light of their general objects and purposes, including the legitimate conditions prescribed by the insurer.

5. Insurance 🔑146(3)

Generally, object and purpose of "insurance" is to indemnify the insured in case of loss, and ordinarily such indemnity should be effectuated rather than defeated and to that end the law makes every rational intendment in order to give full protection to the interests of the insured.

See Words and Phrases, Permanent Edition, for all other definitions of "Insurance".

6. Insurance 🔑241

On the issue of validity of surrender of policy, insurance policies create reciprocal rights and obligations, and the relationship created between the contracting parties should be characterized by the exercise of mutual good faith.

7. Insurance 🔑241

Where release of right under insurance contract is improperly obtained, a court of equity will restore the injured party to his rights.

Appeal from Superior Court, Los Angeles County; Georgia P. Bullock, Judge.

Suit by Sol Glickman against the New York Life Insurance Company for rescission of written surrender of endowment insurance policy on ground that surrender was procured by mistake and fraud. From an adverse judgment, the plaintiff appeals.

Reversed.

For prior opinion, see 100 P.2d 1100.

Irving S. Baltimore, of Los Angeles (Abe Feldman, of Los Angeles, of counsel), for appellant.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (E. Avery Crary, of Los Angeles, of counsel), for respondent.

PER CURIAM.

This is an appeal by Sol Glickman from a judgment which was rendered against him as plaintiff in an action against the New York Life Insurance Company for rescission of a written surrender of a twenty-year endowment insurance policy, on the ground that the said surrender was procured by mistake and fraud.

In 1923, appellant, who was a native of Russia, resided in the city of New York. He was then twenty-one years of age. He had but a slight knowledge of the English language, although he later learned to read it. On February 23, 1923, at the instance of an insurance agent who was a friend of a member or members of his family, appellant purchased from the respondent company a $3,000 life insurance policy. By the provisions of that policy, semi-annual premiums of $78.48 became due on February 23rd and August 23rd of each succeeding year, and a thirty days' grace period was allowed in which to pay such respective premiums. The policy also contained a clause which provided that monthly disability benefits would be paid to the insured in the amount of one per cent of the principal sum named in the policy, which benefits would become effective upon receipt at the company's home office, before default in the payment of premium, of due proof of total and permanent disability of the insured. The section of the policy which related to disability benefits also provided that all premiums falling due after approval of such proof of disability and during such disability would be waived. For ten years thereafter and until the spring of 1933 appellant paid all accruing premiums on the policy.

Several years after the policy was issued, appellant, who followed the upholstery trade, developed a serious physical affliction, and on that account moved from New York to the city of Los Angeles. Thereafter and for the period of a year or more prior to February, 1933, he was unable to work due to a condition of chronic arthritis, and he possessed no means with which to meet the insurance premium on his policy which would become due in that month. He had never read the policy and was not aware of the fact that it contained the disability clause, by the provisions of which he was entitled to receive $30 per month during such period as he might be wholly disabled, or that a further clause provided that payment of premiums would be waived while he suffered that incapacity. Also, due to his disability during 1932, appellant had been unable to pay property taxes and other obligations which he had incurred.

[1] In January, 1933, appellant visited the office of the respondent insurance company in Los Angeles in connection with the negotiation of a loan on his $3,000 policy as well as on a $12,000 policy (which had been issued to him by the same company in 1926, and which contained a disability clause similar to the one contained in the $3,000 policy) in order that he might pay the premium then due on the larger policy. On that occasion he talked with a Miss Bush, an employee of the company, and informed her of his physical disability. In March of 1933, while appellant was still disabled, the premium on his $3,000 policy was delinquent, and due to the fact that the national bank moratorium was in effect he was unable to borrow money from any of the banks. On March 22, a day or two before his $3,000 policy would have lapsed because of nonpayment of premium, appellant again went to the insurance company's office. On that occasion he was introduced to Mr. Eagan Brantigan, who was a clerk in the employ of the company, whose duties included the collection of premiums and the acceptance of surrenders of policies. Appellant explained his physical and financial condition to Mr. Brantigan, and asked the latter whether he could raise some money on the two policies with which to pay the premium as well as other pressing obligations. According to appellant's testimony, he said: "*I am disabled,* not feeling well and I can't do anything, I am not working and I simply haven't got any money. Now, can you figure out a way I can borrow some money here to pay my premium up? * * * I have no means any more to borrow, * * * the banks are closed, * * * scarcely can't get enough to get by to eat on; * * * I don't know where I am going to borrow it." (Emphasis added.) Appellant testified that Mr. Brantigan replied: "The only thing you can do, I guess, is to give the policy up"; that Mr. Brantigan told him if he would surrender the policy he would "get a few dollars out of it", and added: "You can't get cash unless you sign certain papers, because we are not allowed to pay out cash." Appellant testified that he replied: "If that is the only thing I can do, I guess I have to"; and that Mr. Brantigan then wrote out a request on the part of appellant for the surrender of the policy, and prepared a statement in which were set forth reasons for the making of that request, both of which papers were signed by appellant. The $3,000 policy was thereupon surrendered to the company. The surrender value of the policy was calculated to be about $80,—of which amount the sum of approximately $50 was applied by the insurance company to the reduction of a loan which appellant theretofore had negotiated on the $12,000 policy,—and on April 7, 1933, a check for the balance of $30 was sent to him. At the trial Mr. Brantigan testified that on the occasion hereinbefore mentioned he had talked with appellant at the insurance company's office and had accepted his written surrender of the $3,000 policy, but that he had no recollection of the conversation which had

occurred between them at that time. Appellant's testimony in that respect, as hereinbefore quoted, is therefore uncontradicted except for the implication that might be said to arise by reason of the general rule to the effect that, ordinarily, appellant would be chargeable with knowledge of the contents of his policy.

It may be assumed that as a representative of the insurer Mr. Brantigan was familiar with the disability clause contained in the policy—yet it appears that at the time he talked with appellant he failed to make the suggestion that appellant might file proof of his disability with the insurance company and thereby procure monthly benefits in the sum of $30, or to apprise him of the fact that during the continuance of such disability all premiums falling due on the policy would be waived. To the contrary, according to appellant's testimony, Mr. Brantigan advised appellant that the only thing he could do was to *surrender his policy*.

There was testimony by a physician, who had treated appellant prior to 1933, to the effect that appellant was physically disabled and thereby prevented from performing any work after May, 1931; and the respondent insurance company stipulated at the trial that appellant was totally disabled during the entire period following October 1, 1932. Six months after appellant was induced by the insurer's representative to surrender his $3,000 policy, his physical condition became worse, and on October 9, 1933, he consulted with another physician, who advised appellant that he should undergo a series of diathermic treatments. Appellant responded that due to his straitened financial circumstances he would be unable to pay for such treatments. The physician then asked appellant if he did not have a life or health insurance policy which contained a disability provision. Appellant replied that he did not know, whereupon, at the request of the doctor, appellant brought to him the $12,000 insurance policy. After he had examined the policy the doctor advised appellant that it provided for monthly disability payments in the amount of one per cent of the principal sum thereof, and for a waiver by the insurer of all premium payments during the period of such disability. Appellant then consulted an attorney with respect to his rights under the policies, and thereafter he instituted a separate action in connection with each of the two policies. The action to secure disability benefits under the provisions of the $12,000 policy was subsequently compromised. In the instant action to rescind the surrender and cancellation of the $3,000 policy, trial was had and judgment was rendered against the insured on basic findings which, in effect, were: That the policy was voluntarily surrendered in consideration of a cash payment, with knowledge on the part of the insured that it contained the disability clause; that appellant did not surrender it in reliance on the advice of the insurer's representative to the effect that there was no other course for him to pursue; and that the insurer was not guilty of fraud or concealment with respect to procuring the surrender of the policy.

An examination of the record discloses no evidence to substantiate any of those findings—and they are without support except for the implication, hereinbefore mentioned, which might be said to arise by reason of the general rule that, ordinarily, one would be chargeable with knowledge of the terms of a written contract to which he has become a party. And, principally in reliance on the case of Rice v. California Western States Life Ins. Co., 21 Cal.App.2d 660, 665, 70 P.2d 516, the respondent insurer contends that in view of the fact that appellant had the policy in his possession up to the time the representations were made to him, he must be presumed to have known its contents and, therefore, that he could not have been deceived by the representations of the insurer's clerk.

However, appellant urges that on consideration of all the circumstances hereinbefore set forth, judgment should have been rendered in his favor, on the basis that lack of due care on his part, if any, in not having read the policy should not be deemed a sufficient defense to the present action, which is predicated on the charge that appellant was wrongfully misled into surrendering his policy by reason of false and fraudulent representations of the insurer's representative with respect to appellant's rights thereunder. In that regard appellant relies on the cases entitled Raulet v. Northwestern, etc., Ins. Co., 157 Cal. 213, 107 P. 292, and Golden Gate Motor Transport Co. v. Great American Indemnity Co., 6 Cal.2d 439, 444, 58 P.2d 374, 376, as authority for the proposition that the failure of an assured to read his insurance policy is not always to be deemed a defense to an action based on an assured's rights under the policy, particularly where, as here, the action is grounded on a charge of fraud on the part of the insurance company, by which the assured has been misled with respect to his said rights.

In the Golden Gate Motor Transport Company case, this court quoted with approval the following language which is set forth in the Raulet case: "'It must be presumed, ordinarily, that persons are familiar with the terms of written contracts to which they are parties, and in the absence of fraud they are justly bound by the provisions therein, but the rule should not be strictly applied to insurance policies. It is a matter almost of common knowledge that a very small percentage of policyholders are actually cognizant of the provisions of their policies and many of them are ignorant of the names of the companies issuing the said policies. The policies are prepared by the experts of the companies, they are highly technical in their phraseology, they are complicated and voluminous * * * and in their numerous conditions and stipulations furnishing what sometimes may be veritable traps for the unwary. The insured usually confides implicitly in the agent securing the insurance, and it is only just and equitable that the company should be required to call specifically to the attention of the policyholder such provisions as the one before us. The courts, while zealous to uphold legal contracts, should not sacrifice the spirit to the letter nor should they be slow to aid the confiding and innocent.'" To the same effect, see, also, Kavanaugh v. Franklin Fire Ins. Co., 185 Cal. 307, 197 P. 99, 102.

In the Kavanaugh case last cited, where attention was directed to the foregoing language from the Raulet case, in making the observation that insurance policies are "usually very lengthy and contain a great many conditions in language which is somewhat obscure to the layman", the court further remarked that the tenor of the decisions bearing upon the responsibility of the insurer in connection with the issuance of an insurance policy was to treat the policy more as a commodity than as a contract, and that to that end rules had been evolved which were not applicable to ordinary contracts.

Also, in the case of Pearson v. Mutual Life Ins. Co. of New York, 17 Tenn.App. 503, 68 S.W.2d 963, 966, the facts closely coincide with those now before this court. There it appeared that the insured and his mother were misled by the insurer's agents who demanded payment of insurance premiums notwithstanding the fact that the insurance company had notice and proof of a mental disability which the insured had developed; and that, under the belief that the policy would lapse for nonpayment of premiums, the insured had requested the insurer to cancel the policy and pay to him its cash surrender value. Subsequently, the insured brought an action against the insurer in an effort to have the policy reinstated, and in ruling that he was entitled to have the cancellation rescinded, the court said: "But it is shown by the record that neither Pearson nor his mother knew what his rights under the policies were, and there is no evidence to the contrary. They were misled by the company's agents in November, 1926, when they were required to pay premiums. When the premiums fell due in 1927 they were threatened with the lapse of the policies unless the premiums were paid. The company had the information that Pearson was totally incapacitated and knew that he was entitled to draw a monthly payment of $15 a month for the rest of his life without further payment of premiums, yet it canceled the policy, paying Pearson about $36 in full. * * * The only part the insurance company played in bringing about this cancellation was in demanding premiums when it knew he was totally incapacitated and in failing to inform him that premiums were waived under such circumstances. This suppression of material facts was a virtual fraud upon him. Story's Equity Jurisprudence, (14th Ed.) 488, § 512. The oppressive bargain made by the insurance company was a constructive fraud. 1 Story's Equity Jurisprudence, 434, § 452. 'Relief from a settlement and compromise of a claim for insurance will be granted, where insured acted without any real consideration, in ignorance of the rights and obligations of the parties, while insurer had full knowledge thereof, and of his ignorance, and induced him to act by false and fraudulent misrepresentations, although the mistake was in respect to his legal rights. Where it sufficiently appears that through fraud and mistake a person has made a written surrender of a valuable right, or has released a subsisting cause of action, he may repudiate the same, even if the demands so released are disputed or unliquidated, and notwithstanding the mistake was not merely one of fact, but one of law as to the legal effect of a written instrument which operates as a gross injustice to one party and gives to the other an unconscionable advantage.' 6 Couch's Cyc. of Insurance Law, 5126, 5127, § 1448."

[2, 3] As was stated in the Raulet case, hereinbefore cited, it is perhaps generally known that but a comparatively small number of policyholders read such a contract in its entirety,—that it is rarely understood by the person who pays the premiums (Coniglio v. Connecticut Fire Ins. Co., 180 Cal. 596, 599, 182 P. 275, 5 A.L.R. 805) due to the reasons heretofore mentioned, and that ordinarily the policyholder makes little more than a superficial examination of the document at the time the policy is issued. In the present case, as hereinbefore has been indicated, the insured had been in this country but a short time before he obtained the policy, at which time he had but a scant knowledge of the English language. Under such circumstances, it is doubtful whether he would have understood the phraseology employed therein had he then been able to read the policy. However, he paid the premiums on the policy for a period of ten years thereafter and until February, 1933, when, due to his physical disability he had no funds with which to pay the premium then about to become due. The evidence shows that at no time prior to his conversation with Mr. Brantigan in March, 1933, and not until some months later, was he aware of the fact that his policy contained a provision for monthly disability payments, and that it also provided for a waiver of premium payments during the period that such disability benefits were being received by him. It therefore would be manifestly unjust, in this equitable action, to rule that the representations of the insurer's agent,—by which the insured was misinformed and misled with regard to his rights,—should operate to the prejudice of the insured. And where, as here, a policyholder has approached his insurer with a request for advice concerning his rights under the policy,—if the agent of the insurer *undertakes to advise him,*—at least it should be the duty of such representative to make no false or misleading statement in that respect. Particularly should that be a requirement on the part of the insurer, or its agents, where, as in the present case, the information sought and given might have a direct and material bearing on the continuance of the life of the policy. In the instant case, the false and misleading statements of the insurer's representative as to the asserted rights of the insured under the policy not only operated to deprive the insured of one of the principal benefits accorded him by his contract, but they also resulted in a substantial gain to the insurer. In legal effect, such representations amounted to constructive fraud. Sec. 1573, Civ. Code; Hargrove v. Henderson, 108 Cal. App. 667, 673, 292 P. 148; 12 Cal.Jur., p. 710, and cases there cited.

[4-7] Contracts of insurance should be viewed in the light of their general objects and purposes, including the legitimate conditions prescribed by the insurer. Raulet v. Northwestern, etc., Ins. Co., 157 Cal. 213, 107 P. 292. In general, the object and purpose of insurance is to indemnify the insured in case of loss, and ordinarily such indemnity should be effectuated rather than defeated. To that end the law makes every rational intendment in order to give full protection to the interests of the insured. Couch, Cyc. of Ins.Law, vol. 1, p. 402 et seq. Policies of insurance create reciprocal rights and obligations, and the relationship created between the contracting parties should be characterized by the exercise of mutual good faith. Couch, Cyc. of Ins. Law, vol. 1, p. 408; see, also, McElroy v. British America Assur. Co., 9 Cir., 94 F. 990, 1000. An insured is entitled to the protection which he buys and for which he pays substantial premiums. Wade v. Mutual Ben. Health & Accident Ass'n, 115 W. Va. 694, 177 S.E. 611, 614. And where a release of a contract right is improperly obtained, a court of equity will restore the injured party to his rights. 1 Story's Equity Juris., 14th Ed., p. 543; Pearson v. Mutual Life Ins. Co. of New York, 17 Tenn.App. 503, 68 S.W.2d 963.

From the foregoing, it follows that since the surrender of appellant's policy was without virtual consideration, due to his reliance on the false and misleading representations of the insurer's agent, the judgment by which appellant was denied a rescission of his agreement of surrender should be and it hereby is reversed.

SHENK and EDMONDS, JJ., did not participate in the consideration and decision of this case.

ROBBINS INV. CO., Inc., v. ANNANDALE INCORPORATED et al.

L. A. 17584.

Supreme Court of California.

Nov. 26, 1940.

As Modified Dec. 26, 1940.

Appeal and error 🔑161

Where plaintiff, when it redeemed from execution sale realty which it had purchased from husband and wife who were joint tenants, was faced with requirement that it pay $22,000 unsatisfied judgment against husband before determination of its appeal from judgment adjudging that plaintiff owned one-half interest and that other one-half interest, subject to statutory right of redemption, was owned by assignee of judgment against husband which had levied execution and bought husband's interest at execution sale was possible and with certainty that if it did not do so and judgment was affirmed, right to redeem would be lost, appeal was not dismissible on grounds that case had become "moot" and that by exercising right of redemption, plaintiff had elected to accept benefits of part of judgment, and thus had "waived" any right to continue prosecution of appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot" and "Waived".

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action to quiet title by the Robbins Investment Company, Inc., against Annandale Incorporated and others, wherein defendants filed a cross-complaint. From an adverse judgment, plaintiff appeals, and defendants move to dismiss the appeal.

Motion denied.

Neil S. McCarthy, Earl Banta, and Howard P. Hall, all of Los Angeles, for appellant.

M. J. Rankin, Milo V. Olson, and Zuckerman & Stein, all of Los Angeles, for respondent.

EDMONDS, Justice.

The respondent has moved to dismiss the plaintiff's appeal from the judgment rendered against it in an action to quiet title, upon the ground that the issues have become moot and that the corporation waived the right to continue the prosecution of its appeal by accepting benefits under the judgment.

The controversy concerns title to certain real property which in 1932 was acquired by A. C. Robbins and Anne Fulton Robbins, his wife, as joint tenants. In 1935, judgment was rendered against Mr. Robbins for some $22,000, and two years later he and his wife conveyed the property to Robbins Investment Co., the plaintiff corporation. Subsequently, the defendant, who had become the assignee of the unsatisfied judgment, levied execution upon this property, and at an execution sale purchased all of the interest of A. C. Robbins therein.

Robbins Investment Co. then sued to quiet title. The defendant not only denied the plaintiff's allegations, but by a cross-complaint alleged that it is the owner of the property. Upon these issues, the trial court adjudged that the defendant is the owner of an undivided one-half interest in the land, subject to the statutory right of redemption from the execution sale, and that the other one-half interest is owned by the plaintiff.

In an affidavit submitted in opposition to the defendant's motion to dismiss, its counsel states that after the entry of the judgment, the plaintiff attempted to secure an agreement that the period of redemption be extended until its appeal was determined. As a part of the proposed agreement, the plaintiff offered to place the amount required for redemption in escrow, under instructions that payment should abide the final judgment. The defendant declined to enter into any agreement whatever and the plaintiff then notified the defendant in writing that it would redeem the property. Its letter reads: "This redemption is made under protest and only by reason of the fact that unless the same is made before the expiration of the period of redemption, Robbins Investment Co., Inc., may lose property of a value greatly in excess of the amount required to redeem the same."

On the same day that this letter was written the plaintiff filed its notice of appeal. The redemption was made two days later.

The defendant contends that the plaintiff has now acquired clear title to the property by redemption made within the statutory period. Under these circumstances, it argues, the defendant now has no interest in the undivided one-half of the property which may be determined upon the appeal, and all questions before this court have become moot. Secondly, says the defendant, the plaintiff has renounced and waived any right to continue the prosecution of an appeal for the reason that it elected to accept the benefit of a part of the judgment appealed from by exercising the right of redemption.

At the time the redemption was made, the plaintiff was faced with a requirement that it pay $22,000 before its appeal could be determined and the certainty that if it did not do so, and the judgment was affirmed, the right to redeem would then have been lost by the passage of time. This situation is substantially the same as that of the defendant in the case of Alamitos Land Co. v. Shell Oil Co., 217 Cal. 213, 17 P.2d 998. The judgment from which that appeal was taken provided in part, that the defendant had forfeited its lease, but that it should be relieved of such forfeiture if it paid a stated amount prior to a certain date, which was before the judgment could be reviewed upon appeal. The defendant paid the amount in full, but upon written notice that such payment was made under protest and to prevent the forfeiture of its lease. Later it appealed and the respondent's motion to dismiss was denied upon the ground that payment of the required amount was made under such compulsion as not to bar a review of the judgment upon appeal. In reaching this conclusion the court declined to hold that by payment the defendant had accepted a benefit given by the judgment which was inconsistent with the appeal.

The decision in Burgess v. California Mutual B. & L. Ass'n, 210 Cal. 180, 290 P. 1029, was based upon the same principle. In that case the court pointed out that where the amount of a judgment is paid in order to prevent an execution sale, the payor is not deprived of his right to appeal unless the payment was made by way of compromise or settlement or under agreement that the appeal will not be prosecuted. No such circumstances are shown in the present case.

The motion is denied.

We concur: GIBSON, C. J.; TRAYNOR, J; CARTER, J.; SHENK, J.; CURTIS, J.

I concur in this judgment: HOUSER, J.

16 Cal.2d 610

In re McKENNA.

Bar Misc. 1642.

Supreme Court of California.

Nov. 15, 1940.

1. Attorney and client ⚷1

The membership, character, and conduct of those engaging in legal profession are proper subjects of legislative regulation.

2. Attorney and client ⚷57

Where petition for review of decision of the board of governors of the State Bar of California which recommended suspension of attorney for six months was not filed within 60 days after filing of transcript and decision of the board, an order imposing the recommended discipline was required to be made by the Supreme Court. St.1939, p. 356, §§ 6081, 6083, 6084.

3. Attorney and client ⚷58

Where attorney accepted fee for filing answer in case but failed to file the answer and default judgment was entered and execution was levied and satisfied, the action of the attorney warranted his suspension from practice for six months.

CARTER and HOUSER, JJ., dissenting.

In Bank.

Proceeding in the matter of the suspension of Theodore C. McKenna, an attorney at law, wherein the Board of Governors of the State Bar of California filed in the Supreme Court transcript of evidence and proceedings together with its findings of fact and decision resulting in recommendation of six months' suspension.

Attorney suspended for six months.

No representation by attorneys.

PER CURIAM.

On July 26, 1940, the board of governors of The State Bar of California filed in this court, pursuant to the provisions of section 6081 of the State Bar Act, chap. 4, Business and Professions Code, St.1939, p. 356, a transcript of evidence and proceedings, together with its findings of fact and decision thereon, resulting in a recommendation of suspension for six months in the case of the above-named attorney at law. No application was made by the attorney within sixty days after the filing of the transcript and decision to review or reverse or modify the same, as provided in section 6083 of the cited act. Normally, under such circumstances, and without additional comment, we enter an order, pursuant to the provisions of section 6084 of the act, imposing the recommended discipline. However, because of the position taken by Mr. Justice Carter, it appears proper to state the view of the court with respect to matters of this character.

[1] From the inception of the integrated bar, an attorney recommended by the board of governors for disbarment, suspension or discipline has been accorded a remedy by way of review upon petition filed in this court within sixty days after the filing herein of the certified record. Stats.1927, p. 41, sec. 26; sec. 6083, supra. The statute always has provided that when such sixty-day period is permitted to elapse without the filing of a petition for review "the Supreme Court *shall* make its order" either "striking the name of the person from the roll of attorneys" or "suspending him for a period mentioned in the decision." Secs. 26 and 6084, supra. In the absence of other regulation on the subject, the latter is determinative of this proceeding. It always has been recognized "that the membership, character and conduct of those entering and engaging in the legal profession have long been regarded as the proper subject of legislative regulation and control; and it has never heretofore been considered, so far as we have been made aware, that, at least in this commonwealth, the exercise of a reasonable degree of regulation and control over the profession and practice of the law, constituted an intrusion into the domain of our state organization constitutionally assigned to the judicial department thereof". State Bar v. Superior Court, 207 Cal. 323, 331, 278 P. 432, 435.

[2] Repeated application has been given by this court to that provision of our law (secs. 26 and 6084, supra) requiring the entry of an order of disbarment or suspension when a petition for review has not been filed within the sixty-day period. At least one such application has reached the official reports. In Bordner v. State Bar, 218 Cal. 580, 581, 24 P.2d 459, it is declared that "In this matter, the petition to review the order of the board of governors of the state bar, recommending that the petitioner be suspended from the practice of law, was not filed in this court within sixty days after the filing of the certified copy of the decision of said board of governors with the clerk of this court. Petitioner has therefore failed to comply with section 26 of the State Bar Act (Stats.1927, p. 41) fixing the time within which petitions for the review of orders of the board of governors must be filed. For this reason the petition is dismissed."

[3] In fixing the degree of punishment herein the board of governors took into consideration a private reproval administered by it to petitioner on May 4, 1937. That petitioner's conduct warrants discipline under the statute we need only refer to our recent decision in Trusty v. State Bar, 107 P.2d 10.

In view of the foregoing, it is hereby ordered that Theodore C. McKenna must be and he hereby is suspended from the rights and privileges of an attorney at law for the period of six months from and after the date of the filing of this order.

CURTIS, Justice (concurring).

I concur in the order of suspension on the ground that the evidence against petitioner, as shown by the record before us, supports the finding of the board of governors of The State Bar and justifies the suspension of petitioner for the period prescribed by said order.

CARTER, Justice (dissenting).

I dissent from the order of this court approving the recommendation of the board of governors of The State Bar of California that the above-named attorney (herein designated as respondent) be suspended from the rights and privileges of an attorney at law for the period of six months. In my opinion there is no legal or factual basis for the recommendation made by the board of governors or for the order of this court approving same.

The undisputed evidence in the record shows, and the local administrative committee found, that on the 10th day of February, 1939, one Laurino employed respondent to file an answer in a case entitled Smith v. Laurino, pending in the municipal court of the city of Los Angeles; that respondent and Laurino agreed upon a fee of fifty dollars for the performance of such service and said fee was thereupon paid; that respondent thereafter prepared an answer on behalf of Laurino and served a copy upon plaintiff's counsel but through inadvertence failed to file said answer in the court in which said action was pending; that thereafter counsel for plaintiff discovered that said answer had not been filed, and without notifying respondent, had the default of the defendant entered, and a judgment entered thereon for a sum in excess of eight hundred dollars; that execution was thereupon issued and levied against property owned by defendant and fully satisfied; that Laurino thereupon advised respondent as to what had occurred, and upon examining the file, respondent for the first time ascertained that the answer prepared and served by him had not been filed; that respondent thereupon agreed to reimburse Laurino for the full amount recovered by plaintiff in said action, but at the time of the institution of this proceeding before The State Bar had failed to do so.

The local administrative committee found "that respondent had not violated his oath and duties as an attorney within the meaning of section 6103 of the State Bar Act, and that he had not violated section 6106 of said Act". Said committee recommended a dismissal of the proceeding against respondent.

A record of the proceedings taken before the local administrative committee was submitted to the board of governors of The State Bar of California, and without receiving any additional evidence whatever, said board amended the findings of the local administrative committee by inserting therein, "that respondent has violated his oath and duties as an attorney within the meaning of section 6103 of the State Bar Act", and recommended that respondent be suspended from the practice of the law in the state of California for a period of six months.

Respondent has not petitioned this court for a review of the findings and recommendation of the board of governors, but in my opinion the evidence in the record is so devoid of any suggestion of professional misconduct on respondent's part that there is no legal basis for the recommendation of the board of governors that respondent be suspended for the period of six months from the practice of law, and the proceeding should therefore be dismissed.

The authority of The State Bar of California to institute a disciplinary proceeding against a member of the bar is derived exclusively from legislative enactment now embraced in the so-called Business and Professions Code. As I read the provisions of said code, they cannot be interpreted or construed as authorizing the infliction of discipline upon an attorney for mere acts of negligence. In order to justify the infliction of discipline upon an attorney there must be some showing of bad faith, moral turpitude, dishonesty or corruption on his part.

In the record before us in the case at bar there is not even a suggestion of bad faith or dishonesty on the part of respondent. He did what many other attorneys have done through inadvertence, oversight, or neglect, and it is safe to say that if he had been financially able to reimburse his client for the loss which the latter had suffered as a result of such neglect, it is obvious that this proceeding would never have been instituted.

Having followed the active practice of the law for over twenty-six years, I think I am in a position to state that any attorney who has actually devoted himself to the active practice of the law has from time to time been guilty of some act of negligence which was detrimental to his client's interests, and if The State Bar of California is permitted to embark upon the stupendous undertaking of disciplining all the attorneys of California who through inadvertence or oversight commit some act of negligence detrimental to the interests of their clients, their task will be limitless and far-reaching, probably overtaking some of the members of the board of governors who sat in judgment in this case.

A client who suffers a financial loss as a result of the negligence of his attorney has the right to seek redress by civil action for damages against his attorney. This same right now exists in favor of a patient against a physician and surgeon or a dentist. In my opinion the remedy afforded by a civil action is ample to protect the interests of the members of the public against negligent conduct of attorneys, and that disciplinary action, which is quasi-criminal, should not be permitted at least until the legislature amends the State Bar Act and includes in its provisions negligence or incompetence as a ground of discipline which may be administered to a member of the bar. Until the legislature has thus spoken, neither the board of governors of The State Bar of California nor this court should attempt to inflict discipline upon an attorney who has not been guilty of any act involving bad faith or dishonesty but whose only dereliction has been unintentional acts of negligence due to lapse of memory or ignorance.

I think it must be conceded that as a general rule any loss suffered by a client as a result of the negligence of his attorney can be compensated in damages, and that if the attorney reimburses his client for any pecuniary loss suffered by him as a result of the negligence of the attorney, no disciplinary action will be instituted against the attorney. Such being the case, the only attorney who will suffer the ignominy of having discipline administered against him because of his negligence will be the attorney who, because of his financial circumstances, is unable to restore to his client the loss which he has sustained as a result of such negligent conduct.

In my opinion it is contrary to any concept of legal ethics to inflict discipline upon an attorney for a wholly unintentional act regardless of the ills which might flow therefrom. This is not the proper way to rid the profession of attorneys who are incompetent or incapable of complying with the requirements of the profession. The loss of business resulting from inattention thereto or negligence in the handling thereof usually inflicts a sufficient economic loss upon the attorney to deter him from a repetition of such negligent conduct, or ultimately eliminates him from the practice of the law.

While the legislature has conferred upon The State Bar the power to investigate complaints against attorneys involving moral turpitude, dishonesty and corruption, and The State Bar since its organization has performed a very laudable service both to the bar and the public in ridding the profession of many who were morally unfit to continue in the practice of the law, it cannot be said that it was the intention of those who framed the State Bar Act, or of the legislature which enacted it, to commit to the board of governors of The State Bar the administration of the practice of law in California in the sense that members of the bar should be held accountable to said board for their conduct in the ordinary pursuits of the practice of law which do not involve any question of bad faith or dishonesty.

The reasons advanced and the authorities cited in the dissenting opinion prepared by me in the case of Trusty v. State Bar, 107 P.2d 10, decided by this court on November 12th, 1940, are equally applicable to the case at bar and the same are referred to in support of the position which I have taken in this case.

The majority opinion approving the recommendation of the board of governors in this matter is based upon the proposition that this court has no power to review a disciplinary proceeding heard before The State Bar of California where no petition for such review is filed on behalf of the person against whom the discipline has been administered within 60 days after the filing of the certified copy of the decision of the board of governors with the clerk of this court in accordance with section 26 of the State Bar Act, St.1927, p. 41. In other words, it appears to be the opinion of the majority of this court that we are required to place our stamp of approval on every recommendation of the board of governors for discipline of a member of the bar where the attorney against whom the recommendation is made, has failed to petition this court for a review of the disciplinary proceeding against him.

I cannot yield to this suggestion of impotency on the part of this court, and I refuse to allow myself to become a rubber stamp and give my approval to a recommendation or decision which is not only shocking to my sense of justice but constitutes an encroachment upon the judicial power vested in this court by the Constitution of California.

This court has held that the exercise of the power to discipline an attorney by disbarment or suspension is wholly a judicial function, and one with which the legislature may not interfere. Barton v. State Bar, 209 Cal. 677, 289 P. 818.

It has also been held by this court that notwithstanding the language of the State Bar Act, the only orders contemplated by the act which were intended to have, or which have, the effect of disciplining attorneys are the final orders of this court following a review of the disciplinary proceeding had before The State Bar of California. In re Shattuck, 208 Cal. 6, 279 P. 998.

In view of the settled rule that the recommendation of the board of governors for the discipline of a member of the bar is recommendatory only, and that this court is not bound either by the facts found by said board or its recommendation as to discipline, it seems absurd to me to conclude that this court must approve a recommendation made by said board for the discipline of an attorney, when, in the exercise of the judicial discretion reposed in this court by the Constitution, it is obvious that such recommendation should not be approved even though no petition for review has been filed.

In view of the undisputed evidence in the record presented to this court in the above-entitled matter, and the findings of the local administrative committee which negative any suggestion of bad faith or dishonesty in the conduct of the respondent in connection with the handling of the case on behalf of Laurino, it must necessarily follow that the only basis for the punishment of six months' suspension from practice inflicted upon respondent is that he was guilty of negligence. From what I have said in the foregoing opinion, it is obvious that there is no basis in the law of this state for the infliction of punishment or discipline upon an attorney for mere negligence in the conduct of his practice, and therefore the proceeding against respondent should be dismissed.

I concur in the foregoing conclusion: HOUSER, J.

41 Cal.App.2d 526

PEOPLE v. SIMPSON.

Cr. 1741.

District Court of Appeal, Third District, California.

Nov. 18, 1940.

1. Criminal law 🔑1023(12)

An order denying defendant's motion to vacate and set aside judgment convicting accused of robbery, from which no appeal was taken, was not appealable.

2. Criminal law 🔑977(3)

Where accused was in hospital recovering from an attempted suicide on date set for pronouncing sentence, and the matter of sentencing accused was continued one week, and, on the date to which the matter was continued, accused filed motion for new trial and consented that the matter be continued for a six-day period, the sentence of the accused on the date to which the matter was continued was within the time prescribed by law. Pen.Code, §§ 1191, 1202.

Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

Mel Simpson was convicted of robbery, and, from an order denying his motion to vacate and set aside the judgment, he appeals. On motion to dismiss appeal.

Motion granted and appeal dismissed.

Mel Simpson in pro. per.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

PER CURIAM.

This is a motion to dismiss an attempted appeal. Defendant was convicted of robbery. Upon the date set for pronouncing sentence the defendant was in the hospital recovering from an attempted suicide, and the matter of sentencing defendant was continued one week. On that day the defendant appeared in court and moved for a new trial, and consented that the matter be continued to a time some six days later. On that day the motion for a new trial was heard and denied, and the defendant sentenced to the state prison. No appeal was taken from the judgment, nor motion made in arrest thereof. Some seven or eight months thereafter, however, defendant moved to vacate, annul and set aside the judgment. This motion was promptly heard and denied.

[1] Defendant now attempts to appeal from that order denying his motion to vacate and set aside the judgment. This precise question was before this court in People v. Carkeek, 35 Cal.App.2d 499, 96 P.2d 132, wherein a motion such as this to dismiss an attempted appeal was granted.

The matter there having been fully considered it is not necessary here to discuss this question further. See, also, People v. Birdsell, 21 Cal.App.2d 682, 70 P.2d 231, and People v. Smith, 217 Cal. 267, 18 P.2d 329.

[2] A second objection urged by defendant is that the court failed to pronounce judgment within the time prescribed by law. (Sections 1191 and 1202 of the Penal Code.) This point also is decided against

the contention of defendant in People v. Pollock, 31 Cal.App.2d 747, 89 P.2d 128.

For the foregoing reasons the motion to dismiss the appeal is granted, and the appeal dismissed. It is so ordered.

41 Cal.App.2d 664

WILMOT v. GOLDEN GATE INV. CO. et al.

Civ. 11493.

District Court of Appeal, First District, Division 2, California.

Nov. 26, 1940.

Rehearing Denied Dec. 26, 1940.

1. **Evidence** 🔑590

In action against corporate building contractor for injuries sustained by roofer when struck by rafter which fell from house under construction, where president of corporation testified that he alone was contractor and that contract was executed by corporation because president was personally unable to furnish bond for faithful performance, and that contract was assigned to him soon after it was executed, testimony indicated that "fraud" was perpetrated on owner and bonding company and jury was warranted in rejecting such testimony and in finding that corporation was liable.

See Words and Phrases, Permanent Edition, for all other definitions of "Fraud".

2. **Master and servant** 🔑330(3)

In action against corporate building contractor for injuries sustained by roofer when struck by rafter which fell from house under construction, evidence of an employer and employee-relation between corporation and boss carpenter's helper who permitted rafter to drop, was sufficient to support verdict against the corporation as against contention that helper was an employee of boss carpenter who in turn was an independent contractor who was liable for the negligence of the helper.

3. **Appeal and error** 🔑1004(1)

Where there is no evidence that verdict was the result of passion or prejudice, and no evidence that the award was so grossly out of proportion to injury suffered that the reviewing court should assume that it was due to passion or prejudice, verdict cannot be disturbed upon the ground that damages awarded are excessive.

4. **Damages** 🔑130(3)

$4,500 as reduced by trial court for injuries sustained by roofer consisting of injuries to back and kidney was not excessive.

5. **Trial** 🔑89, 208

In action against corporate building contractor for injuries sustained when struck by rafter which fell from house under construction, where plaintiff's counsel in opening stated in effect that boss carpenter had been requested to perjure himself and to assume all responsibility for the injuries, and objection was sustained on ground that matter went to motive of corporation, testimony tending to prove charges was properly stricken and jury properly instructed to disregard it.

6. **Appeal and error** 🔑232, 719(1)

In action against corporate building contractor for injuries sustained when struck by rafter which fell from house under construction, statement of plaintiff's counsel that corporation sent its president to boss contractor to request him to perjure himself and to assume all responsibility for the injuries, was not prejudicial "misconduct", where similar expressions were used in opening statement and only objection made was that counsel stated something which he could not prove and no assignment of misconduct was made.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

7. **Negligence** 🔑105

Where one enters premises of another during construction activities, and knowingly encounters obvious dangers, there may arise a situation for the application of the "assumption of risk" doctrine if injuries are sustained.

See Words and Phrases, Permanent Edition, for all other definitions of "Assumption of Risk".

8. **Appeal and error** 🔑996

"Contributory negligence" may be charged as a matter of law only where reviewing court can say that there is no substantial conflict on the facts, and that from the facts reasonable men can draw but one inference which points unerringly to the negligence of the plaintiff proximately contributing to his own injury.

See Words and Phrases, Permanent Edition, for all other definitions of "Contributory Negligence".

9. Appeal and error ⚷1011(1)

Before reviewing court can say that party has assumed risk from which injury occurred, evidence must be without substantial conflict in reference to matter of knowledge or means of knowledge of the existing danger, or that such danger was obvious.

10. Evidence ⚷20(1)

It is a matter of common knowledge that all construction activities are surrounded by some element of risk of injury.

11. Negligence ⚷136(1, 26)

In action against corporate building contractor for injuries by roofer when struck by rafter which fell from house under construction, where evidence did not show that there was any unusual risk which plaintiff assumed in standing beside building while discussing selection of tile to be used for roof or that his conduct was any different from what other reasonable men under the same circumstances would have followed, whether plaintiff was guilty of contributory negligence or assumed the risk was for the jury.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Walter Wilmot against the Golden Gate Investment Company and others, for injuries sustained when struck by rafter which fell from a building being constructed by the named defendant. From a judgment for the plaintiff, the named defendant appeals.

Affirmed.

James L. Feely, of San Francisco, for appellant.

Hubbard & Hubbard, of San Francisco, for respondent.

NOURSE, Presiding Justice.

In an action for damages for personal injuries tried before a jury plaintiff had a verdict for $6,000 against the defendant corporation and Louis Travis. The trial court reduced the verdict to $4,500. The defendant corporation alone appeals.

Edward Cornblum, as president, and Heim Goldman, as secretary, entered into a written contract with a landowner to construct a house on the owner's premises. At the request of the corporation a bond was executed in its name for the faithful performance of the contract. The president, Cornblum, was unable to procure such a bond. The contract was negotiated for and on behalf of the corporation by Cornblum. The owner financed the building through the Palo Alto Mutual Building and Loan Association. Payments on the contract were made by this association to the corporation and receipted for by it. During the course of construction Fegan was employed as boss carpenter. At the instance of Cornblum, Travis was employed to help him. Wilmot had been employed to do the roofing. As Wilmot stood alongside of the structure discussing the selection of tile to be used on the roof, Travis sawed a "2x4" rafter in two. One end slipped from the roof and struck plaintiff, causing the injuries complained of. Travis testified that, as the piece of rafter fell, he called out "look out below". Plaintiff testified that he did not hear the warning. The defendant Cornblum testified that he alone was the building contractor. That he procured the execution of the contract in the name of the corporation because he was unable to furnish a personal bond. That soon after the contract was executed he had the corporation assign it to him.

[1] The main contention of the corporation on this appeal is that, based on the testimony which it introduced on this issue, the evidence as a whole was insufficient to sustain the verdict against the corporation. The argument is based on the supposition that the jury must have believed this testimony. By its verdict the jury plainly indicated that it did not believe it. The testimony of the palpable fraud which the corporation and its president engaged in to deceive the owner, the bonding company, and all those employed under the contract, was sufficient to warrant the rejection by the jury of the testimony above referred to. In our statement of facts we have recited the evidence in the light most favorable to respondent and in the light which the jury by its verdict indicated that the evidence had been weighed and found true. This evidence is sufficient to support the finding on the issue of the corporation's liability.

[2] In the same connection, the appellant argues that Travis was an employee

of Fegan, who, in turn, was an independent contractor who alone would be liable for the negligence of Travis. There was some testimony offered to prove this relation, but there was ample evidence to the contrary. The evidence of an employer-employee relation between the corporation and Travis was sufficient to support the verdict against the corporation.

[3, 4] The appellant contends that the damages awarded are excessive. The respondent points out that he suffered a dislocation of the fourth and fifth vertebrae, that any motion of the back was painful, that the abdomen was extended causing difficulty in breathing, that he had a subcapsular hemorrhage of the kidney. The record presents nothing more than a conflict of evidence as to the extent of the injuries and that the jury might have been liberal in its assessment of the damages. There is no evidence that the verdict was the result of passion or prejudice; there is no evidence that the award was so grossly out of proportion to the injuries suffered that we should assume that it was due to passion or prejudice. This being so the verdict cannot be disturbed upon the ground that it is excessive. 8 Cal.Jur. p. 834.

[5, 6] It is argued that respondent's counsel was guilty of prejudicial misconduct in stating before the jury that the defendant had sent Cornblum to his codefendant Fegan to request the latter to perjure himself and to assume all responsibility for the injuries, and that he promised Fegan that if he would do so and thereafter go through bankruptcy the appellant would pay the cost of such proceedings. Expressions somewhat similar to these were used in the opening statement of counsel for respondent. The only objection made was that he was stating something which he could not prove. No assignment of misconduct was made, and no charge that counsel was acting in bad faith in an attempt to prejudice appellant. The objection was sustained on the ground that the matter went to the motive of the defendant. Thereafter the respondent attempted to prove the charges, and some testimony was received tending to prove them in part. But this testimony was stricken out, and the jury was properly instructed to disregard it. Appellant has not made a case of prejudicial misconduct.

[7, 8] Finally it is argued that the respondent was guilty of contributory negligence as a matter of law. The argument is a little confusing in that it fails to hold to the line of distinction between the two separate doctrines of contributory negligence and assumption of risk. Where one enters the premises of another during construction activities and knowingly encounters obvious dangers there may arise a situation for the application of the doctrine of assumption of risk. Contributory negligence may be charged as a matter of law only when "The appellate court can say that there is no substantial conflict on the facts, and that from the facts reasonable men can draw but one inference, which inference points unerringly to the negligence of the plaintiff proximately contributing to his own injury. Green v. Southern Pac. Co., 53 Cal.App. 194, 199 P. 1059; Carey v. Pacific Gas & Elec. Co., 75 Cal.App. 129, 242 P. 97; Wing v. Western Pacific R. R. Co., 41 Cal.App. 251, 182 P. 969." Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183, 184.

[9-11] The doctrine of assumption of risk is surrounded by the equally stringent boundaries that, before the appellate court can say that a party assumed the risk from which the injury occurred, the evidence must be without substantial conflict in reference to the matter of knowledge or means of knowledge of the existing danger or that such danger was obvious. It is a matter of common knowledge that all construction activities are surrounded by some element of risk of injury, but it is a question of fact in each case whether the conduct of the injured party was in accord with the custom and habits of reasonable men under similar circumstances. The evidence here does not show that there was any unusual risk which the respondent assumed or that his conduct was any different from what other reasonable men under the same circumstances would have followed. These questions all depend upon the facts and circumstances which the jury was required to decide.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

41 Cal.App.2d 559

PEOPLE v. ONE 1939 PLYMOUTH 6 COUPE.

Civ. 11206.

District Court of Appeal, First District, Division 1, California.

Nov. 20, 1940.

Rehearing Denied Dec. 20, 1940.

Hearing Denied Jan. 16, 1941.

1. Statutes ⚿241(1)

A statute imposing a forfeiture should be construed strictly and in a manner as favorable to the person whose property is to be seized as is consistent with fair principles of interpretation.

2. Statutes ⚿241(1)

Usually, courts will give to statutes providing for forfeiture such a construction as will be consistent with justice and the dictates of natural reason.

3. Forfeitures ⚿5

In proceeding for forfeiture of automobile for alleged violation of narcotic law, whether bank asserting lien upon automobile as assignee of conditional sales contract made reasonable investigation of purchaser's moral responsibility, character, and reputation, so as to avoid forfeiture of bank's interest, was question of fact for trial court's determination. St.1935, p. 2210, § 15.

4. Forfeitures ⚿5

On state's appeal from judgment in proceeding for forfeiture of automobile for alleged violation of narcotic law, trial court's finding of fact, that bank asserting lien on automobile had made reasonable investigation of purchaser's moral responsibility, character, and reputation, could not be interfered with if finding was supported by evidence. St.1935, p. 2210, § 15.

5. Forfeitures ⚿5

In proceeding for forfeiture of automobile for violation of narcotic law wherein bank asserted lien on automobile as assignee of conditional sales contract, evidence concerning bank manager's personal knowledge of purchaser, personal interview of purchaser by another bank official, and references furnished by third parties, sustained finding that bank made reasonable investigation of purchaser's moral responsibility, character, and reputation so as to avoid forfeiture of bank's interest, notwithstanding evidence to the effect that purchaser was a card dealer, since use of term "card dealer" did not imply that purchaser was a "drug addict". St.1935, p. 2210, § 15.

See Words and Phrases, Permanent Edition, for all other definitions of "Card Dealer" and "Drug Addict".

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Proceeding by the People against One 1939 Plymouth 6 Coupe for forfeiture of an automobile under the State Narcotic Act, St.1929, p. 380, as amended. From an adverse portion of the judgment, the People appeal.

Affirmed.

Earl Warren, Atty. Gen., and J. Albert Hutchison, Deputy Atty. Gen., for appellant.

Louis Ferrari, G. D. Schilling, and D. Bianco, all of San Francisco, for claimant Bank of America.

KNIGHT, Justice.

The state appeals from a portion of a judgment entered in a proceeding brought by the state under the authority of the State Narcotic Act, St.1929, p. 380, as amended, for the forfeiture of a 1939 Plymouth coupe automobile, sold under a conditional sales contract and seized for an alleged violation of the provisions of said act. The principal contention made by the state is that the evidence is insufficient to sustain the findings and the judgment.

The coupe was sold in Oroville, Butte county, on November 15, 1938, by W. C. Lortz, a local dealer, to Austin L. Abbott, a resident of that city for many years. A used car was turned in as a down payment at an agreed valuation of $372, and the balance of the purchase price was made payable in twenty-four successive monthly installments of $27.26 each. The Oroville branch of the Bank of America National Trust and Savings Association financed the sale, drew the conditional sales contract, took an assignment thereof from Lortz, and was named as the legal owner in the certificate of registration. The coupe was seized on December 12, 1938, in Alameda county by a local deputy sheriff shortly after midnight, while it was parked along side of the main Hayward-Niles highway just outside of Hayward. All of the lights of the coupe, including the interior dome light, were lit, and Abbott was the sole occupant thereof. He was preparing a solution of morphine, and was apparently about to inject it into his arm with a hypodermic needle attached to an improvised "dripper" when the officer, whose presence was unobserved by Abbott, opened the door of the coupe and placed him under arrest. A small quantity of powdered morphine was exposed on the seat of the coupe, and a little later, when Abbott was searched in Hayward, a small portion of opium was found on his person. He told the officers he had purchased the drugs in Oakland. A more thorough search of the coupe revealed nothing incriminating therein.

The State Narcotic Act, St.1929, p. 388, § 15, as amended by St.1935, p. 2210, provides that *"Any automobile or other vehicle used or intended to be used to conceal, convey, carry, or transport any of the drugs mentioned in section 1 of this act,* and any automobile or vehicle in which any of the drugs mentioned in section 1 of this act are unlawfully possessed by an occupant thereof, shall be forfeited to the State of California * * *" (Italics ours); and as shown by the notice of seizure filed by the state, the present forfeiture proceeding was based on the clause of the act above italicized. Abbott did not appear, and his interest was declared forfeited. The bank, however, filed a verified answer, and as a result of the hearing the trial court found in conformity with the denials and allegations of the answer, first, that at the time of the seizure the coupe was not being used for the particular unlawful purpose specified in the notice of seizure; and secondly, that in any event the rights of the bank were created after a reasonable investigation of the moral responsibility, character and reputation of Abbott. Therefore, in accordance with the provisions of the act the judgment decreed that the interests of the bank were not forfeited, and directed a sale of the coupe in the manner provided by the statute, and that from the proceeds of the sale the state first pay to the bank the amount due under its conditional sales contract. Sec. 15, State Narcotic Act.

Much of the argument on appeal has been devoted to the question of whether at the time of the seizure the coupe was being used for the particular unlawful purpose charged in the notice of seizure. It is evident, however, that even though the state's contention in this regard be sustained and it be held as a matter of law and contrary to the trial court's findings that the coupe was being so used, the judgment must nevertheless be affirmed for the reason that the factual showing made by the bank amply supports the inference drawn therefrom by the trial court that the bank's investigation of Abbott prior to the creation of its interest in the coupe was legally sufficient to meet the requirements of the statute.

[1-4] As stated in Corpus Juris (vol. 25, p. 1172), a statute imposing a forfeiture should be construed strictly, and in a manner as favorable to the person whose property is to be seized as is consistent with the fair principles of interpretation. The courts will usually give such a construction to statutes providing for forfeiture as will be consistent with justice and the dictates of natural reason. Here the legislature in framing the forfeiture statute made no attempt to prescribe how or to what extent the "moral responsibility, character and reputation" of a purchaser shall be investigated. All that is required is a "reasonable" investigation; and manifestly the question as to whether the investigation has been reasonable is one of fact for the trial court's determination. For obvious reasons no fixed rule can be adopted for the measurement of all cases. The decision in each must depend necessarily upon its own peculiar circumstances; and as in all other cases wherein an issue of fact is controlling, it is beyond the power of the reviewing courts to interfere with the trial court's decision if the record discloses any evidentiary support therefor.

[5] In the present case the record discloses three main factors upon which the trial court apparently founded its conclusion on this issue: first, personal knowledge on the part of Floyd L. Humphreys, the manager of the bank who authorized the financing of the sale, of the character and reputation of Abbott, acquired through a personal and business acquaintanceship with Abbott and the members of his immediate family which fully justified the conviction that Abbott was a person of moral responsibility. In this regard Humphreys testified in part that he had lived in Oroville, which has a population of about 6,000, for upwards of thirty-five years; that for thirty years he had been employed in the same bank, and for the last twelve years as manager; that the Abbott family was one of the old, well known and highly respected families of that community; that

one of the brothers was a doctor, another a deputy sheriff and the night jailor of Butte county, and the third an employee in another branch of the Bank of America; that Abbott also had a sister whose daughter was the wife of a former sheriff of the county. Continuing, Humphreys testified that his acquaintanceship with Austin L. Abbott extended over a period of ten years, and with other members of his family more than twenty years; that all members of the family carried substantial bank deposits, and that up to two years ago Abbott also carried an account with the bank; that he knew that Abbott had worked for a lumber company in that vicinity; that he had never heard anything derogatory of his character, nor that he had ever been in any kind of trouble. Secondly, in conformity with the business rule of the bank, Abbott as the prospective purchaser was interrogated personally by an official of the bank having charge of that department of the bank's business, and pertinent information was obtained bearing upon Abbott's moral responsibility, character and reputation, which was reduced to writing by said official in the form of a "purchaser's statement", and signed by Abbott. Third, certain persons named in said statement as references were "contacted" and "they all gave him a good send-off".

As opposed to the above showing the state offered no contra evidence whatever to prove that Abbott's reputation or character were not good or that he was not a person of moral responsibility. On cross-examination Humphreys testified that he "had heard" that Abbott was a "card dealer", and Lortz testified that Abbott had told him he was a "card dealer", but just what was meant by the use of that term was not shown; much less was it established, as asserted in appellant's brief, that Abbott was a "professional gambler" or that he was connected with any unlawful gambling enterprises. Moreover, it can hardly be said that the use of the term "card dealer" would imply that such a person was a drug addict.

Appellant claims that Abbott gave false answers to the questions in the "purchaser's statement" relating to his employment with the Swayne Lumber Company. All of the answers therein were typed in by the bank official, and the trial court evidently construed the answers to mean that Abbott had worked for said lumber company for the period therein stated; and when the statement is read as a whole it cannot be said that such construction is not justified. As so construed, the statement was not shown to be false.

The factual situations of the two cases strongly relied upon by appellant in support of its position are entirely different from the one here involved. In People v. One Harley Davidson Motorcycle, 5 Cal.2d 188, 53 P.2d 970, the vendor sold a motorcycle to a Chinese boy named Lee, who gave as references a seventeen year old Chinese boy and the name of a Chinese firm by whom Lee was employed. The transaction took place in San Francisco. As to the facts, the court said: "The claimant sent an assistant to the place of business of this firm, and ascertained (so far as the record shows) only the fact that Lee was there employed. *No other inquiries were made or information sought. * * * It does not appear that the claimant knew or had any knowledge of Lee before he appeared at claimant's place of business and sought to buy the motorcycle.*" (Italics ours). Contrary to the view taken by the trial court, it was held that under the circumstances stated it could not be said that one inquiry at Lee's place of employment to ascertain if he was there employed measures up to the reasonable investigation of the responsibility, character and reputation of the offender required by the act. In the second case, People v. One 1938 Buick Sedan, Cal.App., 102 P.2d 447, 450, the appellant bank in making its investigation obtained reports from a credit association relating to the purchaser, and in connection therewith the opinion states: "The branch manager [of the bank] was questioned as to whether or not the credit association reports would show any arrest or conviction for crimes. His answer was that he had obtained these reports for the past fourteen years and that 'plenty' of the reports did show arrests and criminal convictions for crimes which came to the attention of the association through its members. * * * Respondent [the state] then showed by the evidence that Speed [the purchaser] had, prior to the sale of the car in question, been convicted of the crime of grand larceny and served a term in the United States prison at Leavenworth upon such conviction; that he was a panderer and his wife was a prostitute; that he had had numerous arrests for vagrancy, the particular acts of vagrancy being that he was a panderer and a lewd and dissolute person; that he was reputed to have been engaged in the narcotic traffic prior to the time of his arrest and the seizure of the instant automobile." The trial court held that the appellant bank was not entitled to priority under its conditional sales contract, and the judgment was affirmed. It would seem to require no discussion to differentiate either of those cases from the present one. Other cases are to be found wherein it is held that the statutory requirement is not met where, the purchaser being unknown to the vendor, the inquiry is extended only as to the financial responsibility of the purchaser to pay, and no effort is made to investigate his moral responsibility, character and reputation. But clearly this is not such a case.

As already stated, the question involved is one of fact, and therefore, since the trial court's finding is not without evidentiary support, the judgment is affirmed.

We concur: PETERS, P. J.; WARD, J.

41 Cal.App.2d 527

BARR v. FERRIS et al.

Civ. 2709.

District Court of Appeal, Fourth District, California.

Nov. 18, 1940.

Hearing Denied Jan. 16, 1941.

1. Alteration of Instruments 🔑29

In action wherein, upon basis of property settlement contract providing that if wife should die before husband all property in her possession should be returned to husband, husband sought, in legal effect, to impress trust upon property held by wife at time of her death, evidence that such provision was contained in the contract at time it was signed and acknowledged by wife and that it was not added thereafter sustained judgment for husband.

2. Alteration of Instruments 🔑9

Under statute, where property settlement contract provided for a subsequent payment by husband and separate receipt therefor which was to be part of contract, and wife received money and sent copy of receipt to husband who allegedly erased a statement written thereon by wife and added statement that all bonds and money received by wife under the contract were to remain property of husband, such statement was not a "material alteration" of, so as to void, the original contract. Civ.Code, § 1700.

See Words and Phrases, Permanent Edition, for all other definitions of "Material Alteration".

3. Alteration of Instruments 🔑9

Under statute, where husband allegedly altered copy of receipt executed by wife in acknowledgment of payment by husband under property settlement contract which provided that the receipt should be part of the contract, but receipt had been executed in duplicate and other copy was retained by wife, the alteration, if any, of the copy was not a "material alteration" of, so as to void, the receipt or the original contract of which receipt was a part. Civ.Code, §§ 1700, 1701.

4. Alteration of Instruments 🔑29

In action wherein, upon basis of property settlement contract providing that if wife should die before husband all property in her possession should be returned to husband, husband sought, in legal effect, to impress trust upon property held by wife at time of her death, evidence that before signing contract wife had contract corrected by adding such provision and that contract was immediately delivered to husband, whose attention was called to the addition, and that he retained contract and acted upon it, sustained judgment for husband on ground that such provision was added with "mutual consent" of parties and that there was good "consideration" therefor.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration" and "Mutual Consent".

5. Wills 🔑58(1)

Property settlement contract providing that if wife should die before husband all property in her possession should be returned to husband was a valid contract to make a will, since that was only practicable method for property to be returned after wife's death, and, where wife accepted consideration paid in reliance upon the contract but her will did not provide for return of property to husband, wife's executors were "estopped" to deny binding effect of the contract.

See Words and Phrases, Permanent Edition, for all other definitions of "Estopped".

6. Trusts ⚷359(1)

Action wherein, upon basis of property settlement contract providing that if wife should die before husband all property in her possession, real, personal, and mixed, should be returned to husband, husband sought adjudication that he was owner and entitled to possession of all property left at time of wife's death, was in legal effect an action to impress a "trust" upon property left by wife, and effect of judgment that husband was entitled to recover all property in wife's possession at time of her death and that the property be turned over to him by wife's executors was to uphold and enforce such a trust.

See Words and Phrases, Permanent Edition, for all other definitions of "Trust".

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by C. M. Barr against Dorothy Louise Ferris and another, individually and as executors of the last will and testament of Virginia Kennedy Barr, also known as Virginia K. Barr, deceased, for an adjudication that plaintiff is the owner and entitled to possession of all property held by deceased, plaintiff's wife, at time of her death. From judgment for plaintiff, defendants appeal.

Affirmed.

Arthur F. H. Wright, of San Diego, for appellants.

Gray, Cary, Ames & Driscoll and John M. Cranston, all of San Diego, for respondent.

BARNARD, Presiding Justice.

In this action the plaintiff sought to have it adjudged that he is the owner and entitled to possession of all property held by his wife at the time of her death.

The plaintiff and Virginia K. Barr were married in 1905 and lived in Pittsburgh, Pa., until September, 1929, when they separated. They then agreed upon a property settlement and Mrs. Barr signed and acknowledged a writing which is dated September 24, 1929. In this instrument, parts of which are in the usual language of a quitclaim deed, she acknowledges receipt of $1,000 and certain bonds with a par value of $35,000, in full satisfaction and payment of all sums due or to become due to her from the plaintiff or his estate, subject, however, to the further payment to her of $15,000 on or before January 1, 1930, "receipt whereof is to be acknowledged on a separate paper, but which is to be made part of this release." The instrument then provides that she releases, quitclaims and discharges the plaintiff from any further payments to her and that she releases and quitclaims any and all dower rights which she has or may have in his property or in his estate. Following that is this provision: *"Should I die before C. M. Barr all property in my possession, real, personal and mixed, shall be returned to C. M. Barr."*

Mrs. Barr signed and acknowledged this instrument on September 27, 1929, after which it was delivered to the plaintiff. Shortly thereafter Mrs. Barr came to California and the cash and bonds listed in the instrument were sent to her here by a trust company, with whom they had been deposited by Mr. Barr for that purpose. Early in December, 1929, the plaintiff sent Mrs. Barr the $15,000 which remained to be paid, with a receipt therefor and a carbon copy of that receipt. After signing these Mrs. Barr placed one of them in her lock box and sent the other to the plaintiff. Mrs. Barr remained in California until she died in 1937, leaving a will in which all of her property was left to persons other than the plaintiff and in which the defendants were named as executors and residuary legatees.

Among other things, the court found that at the time of their separation the plaintiff and his wife entered into an agreement respecting their property rights, which agreement was evidenced by and embodied in the instrument dated September 24, 1929; that by the terms of this agreement and as a part thereof Mrs. Barr covenanted and agreed with plaintiff that if she should die first all property in her possession should belong to and be returned to him; that the receipt for the remaining $15,000 later given by Mrs. Barr did not modify or form any part of this agreement except in so far as said receipt evidenced the payment of that sum; that it is not true that the portion of the agreement which we have italicized was added thereto without the knowledge or consent of the plaintiff or without the knowledge or consent of Mrs. Barr; that said words were a portion of said agreement at the time of its execution; and that there was consideration for the agreement and for each and every portion thereof. Judgment was entered decreeing that the plaintiff was entitled to recover all of the property which was in the possession of Mrs. Barr at the time of her death and which is now in the possession of the defendants, and that the same be turned over to him. From this judgment the defendants have appealed.

[1] Appellants' first question is thus stated by them: "Is plaintiff's evidence not so incredible and improbable as to deny belief?" It is contended that the portion of the instrument which we have italicized was not contained therein at the time the instrument was signed and acknowledged by Mrs. Barr on September 27, 1929. However, no evidence is cited to support this contention other than to point out that the typist who typed this document was at the time the respondent's secretary, that the notary who took Mrs. Barr's acknowledgment was an employee of the bank with which the respondent did business and was well acquainted with him, and to refer to certain evidence to the effect that the respondent altered the duplicate receipt for $15,000 which Mrs. Barr sent to him in December, 1929. It is argued that these circumstances constitute "a bewildering array of suspicions as to the genuineness of plaintiff's claim."

Beyond question the evidence supports the court's findings to the effect that this instrument contained the clause which we have italicized at the time it was signed and acknowledged by Mrs. Barr. The typist testified that the instrument, with the exception of the clause in question, was dictated to her by the respondent and that she then typed the same; that several days later Mrs. Barr came in and she accompanied her to the office of the notary; that after they arrived there Mrs. Barr requested her to add the italicized clause to the agreement; that she did this on the notary's typewriter before the instrument was signed; that Mrs. Barr then signed it and she signed as a witness; that thereafter the notary put on the acknowledgment certificate; that when she went back she handed the instrument to Mr. Barr; and that she did not know whether or not Mr. Barr knew that this insertion was going to be made but that she called it to his attention when she returned. The notary testified that Mrs. Barr and the typist came to his office; that Mrs. Barr was reading this document and stated in his presence that she wanted to make a "correction" and asked if the typist could use his typewriter; that the italicized clause was added to the document before it was signed; that Mrs. Barr signed first and the typist then signed as a witness; and that, thereafter, he placed on the document a certificate of acknowledgment. This evidence supports the court's finding as to the contents of the document at the time it was signed, and is unaffected by any question or suspicion arising in connection with the claimed alteration of one copy of the receipt for $15,000 which Mrs. Barr later signed.

[2, 3] Appellants' next contention is that the evidence shows that the respondent altered the copy of the receipt for $15,000 which Mrs. Barr later sent to him, and that this was a material alteration which voided any rights the respondent may have had under the original agreement. After signing both copies of this receipt Mrs. Barr sent one copy to the respondent and placed the other in her safety deposit box where it was found after her death. It is admitted that in both copies the blanks of a printed form were filled out in the handwriting of the respondent to the extent of acknowledging the receipt of $15,000. While both copies were signed by Mrs. Barr, the one retained by her had upon it, in her handwriting, these additional words: "$24,900 being the personal property of V. K. Barr prior to September 24, 1929." The other copy, which was sent to the respondent, is very much blurred and contains, in the handwriting of the respondent, the following words: "filed herewith and made part of the original receipt making total of $51,000 bonds and cash—all of which are and are to remain the property of C. M. Barr." There is evidence that at the time Mrs. Barr signed the two copies of this receipt she wrote upon each the above quoted words which now appear only on the copy she retained. There is also evidence that at that time the additional words now appearing on the respondent's copy of this receipt, to which we have referred, were not upon either copy thereof. It is argued that the only reasonable inference is that the respondent erased from his copy the words placed thereon by his wife and in lieu thereof wrote thereon the other words above quoted. It is further argued that this alteration of the receipt for $15,000 was a material alteration of the agree-

ment dated September 24, 1929, since the latter instrument, in providing for the subsequent payment of $15,000, provides that receipt thereof "is to be acknowledged on a separate paper, but which is to be made part of this release", and it follows, under the provisions of section 1700 of the Civil Code, that this alteration has extinguished the original contract.

While the respondent's explanation of the blurred condition of his copy of the receipt for $15,000 is unsatisfactory in the extreme, he testified that he added nothing to that copy which was not thereon when it was returned to him by Mrs. Barr. In any event, the most that appears is that after the respondent prepared this receipt in duplicate his wife added a statement to the effect that a portion of the money and property delivered to her had been her personal property, and that, thereafter, the respondent changed his copy by erasing what she had written and inserting a statement to the effect that the $51,000 bonds and cash which he had turned over to her "are and are to remain the property of C. M. Barr". He did not alter any portion of the receipt which was required or contemplated by the original agreement dated September 24, 1929. Nothing that either of these parties could write upon the respective copies of the receipt could, without the consent of the other, alter or change the provisions of the original contract, the terms of which had then been fully complied with by the respondent. No contention is made that the $15,000 was not paid by the respondent and the court correctly held that this receipt did not modify or form any part of the original agreement except as it evidenced the final payment of $15,000 which was required thereby. Not only was any possible alteration of this copy of the receipt not a material alteration of the original contract, but section 1701 of the Civil Code provides that where a contract is executed in duplicate an alteration of one copy while the other exists is not within the provisions of the preceding section. It appears, without conflict, that this receipt for $15,000 was executed in duplicate and that one copy which had never been in the hands of the respondent still existed and was produced at the trial.

[4] It is next urged that there was no mutual consent between the respondent and Mrs. Barr with respect to the addition of the clause which we have italicized to the original agreement, and that there was no consideration whatever for that portion of that agreement. The addition of the clause in question was not an amendment to the original agreement, as contended by appellants, but the same was added to the instrument before it was executed. While there is no evidence before us of the preliminary negotiations of these parties the only reasonable inference is that they had arrived at some sort of an agreement, with respect to a property settlement, before the respondent called up the notary and arranged for the taking of Mrs. Barr's acknowledgment. There is no evidence that the matter which Mrs. Barr asked to have inserted in the instrument before she signed it was not a provision upon which the parties had theretofore agreed. However that may be, Mrs. Barr asked to have this clause inserted in the instrument before she would sign it and referred to it as a "correction". The instrument was immediately delivered to the respondent, his attention was called to the insertion, and he retained the writing and acted upon it. Thereafter, bonds and cash to the amount of $36,000 which respondent had placed with a trust company for that purpose, were forwarded to Mrs. Barr in California and a few months later, in further and complete compliance with his duty under the instrument, the respondent paid Mrs. Barr the remaining $15,000. A mutual consent sufficiently appears and the court's findings to the effect that there was a good consideration for the execution of the agreement and for each and every portion thereof, and that the clause in question was added with the knowledge and consent of both parties, are sustained by the evidence.

[5] Appellants' final contention is that these words which were thus added to this instrument are not sufficient to constitute a deed, that they constitute only a promise to make a gift, and that the entire instrument is merely a void attempt to make a will. The respondent argues that the judgment may be sustained either on the theory that the language of the instrument is sufficient to give him an immediate interest in the property, although the right of possession is deferred until the death of Mrs. Barr, or on the theory that the instrument is a valid and legally binding contract to make a will. In some respects the situation here existing is somewhat similar to that found in some of the cases in

which the instrument in question has been held sufficient to constitute a deed, and given that effect. Hughes v. Scott, 47 Cal.App. 264, 190 P. 643; Jacobs v. All Persons, 12 Cal.App. 163, 106 P. 896; Burnett v. Piercy, 149 Cal. 178, 86 P. 603. We think, however, that the court correctly interpreted this instrument as an agreement whereby Mrs. Barr agreed to return all property in her possession to the respondent in the event she died first. The agreement and all parts thereof were founded upon an adequate consideration and it is not even suggested that the respondent has not fully complied with his part thereof. Mrs. Barr having accepted the consideration paid and delivered in reliance upon the agreement, her representatives should be estopped to deny the binding effect of that part of the agreement which was to be performed by her. The property was not to be returned until the death of Mrs. Barr and the only practicable way for her to return it at that precise time would be by making a will to that effect. We think the agreement should be interpreted as one to make a will, giving to the respondent such property as Mrs. Barr possessed at her death. This case, therefore, falls within the rules laid down in Davis v. Jacoby, 1 Cal.2d 370, 34 P.2d 1026; Keefe v. Keefe, 19 Cal.App. 310, 125 P. 929; and Wolf v. Donahue, 206 Cal. 213, 273 P. 547.

[6] Some suggestion is made in appellants' reply brief that the respondent might have brought a different form of action, but no argument is presented which attacks the form of the action as actually brought. The agreement, as made, contemplated that Mrs. Barr might convert some of the property turned over to her into real estate and the agreement provides that in case she died first all property in her possession, real, personal and mixed, should be returned to the respondent. As a matter of fact, as shown by the judgment, the property left by Mrs. Barr, and which was in the possession of the defendants as executors of her will, included some real estate located in San Diego. In legal effect this action was one to impress a trust upon the property in question, and the effect of the judgment is to uphold such a trust and to order the property delivered to the respondent. Since this point has not been definitely raised it would serve no useful purpose to analyze the authorities which support this procedure and this result. See Trower v. Young, Cal.App., 105 P.2d 160, and cases there cited.

For the reasons given the judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

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41 Cal.App.2d 535

MURPHY v. ST. CLAIRE BREWING CO.

Civ. 11185.

District Court of Appeal, First District, Division 1, California.

Nov. 19, 1940.

Hearing Denied Jan. 16, 1941.

1. Negligence 🔑136(25)

Issue of proximate cause is a question of fact for jury except in a very limited number of cases.

2. Appeal and error 🔑1001(1)

The District Court of Appeal had no power to disturb jury's implied finding that defendant's negligence was sole and proximate cause of accident, which was amply supported by the record.

3. Automobiles 🔑12

A purpose of traffic ordinance requiring a vehicle to park parallel with curb, which permits police department to authorize diagonal parking on certain streets under certain conditions, but expressly prohibits diagonal parking on streets where streetcars operate, unless there is a distance of 30 feet or more from curb to nearest rail, is to afford the public traveling on the street, including those riding on streetcars, the maximum possible degree of safety.

4. Automobiles 🔑245(62)

Where truck was parked diagonally to curb in violation of ordinance and at an angle which caused one corner of the truck to project over metal safety tabs which marked streetcar overhang, whether violation of the ordinance was the sole "proximate cause" of injuries to streetcar passenger who, in preparing to alight from car, inclined his head beyond side of car in order to observe traffic conditions, and was knocked from the car when corner of truck struck his head, was for jury.

5. Automobiles ⚿245(86)

Where truck was parked diagonally to curb in violation of ordinance and at an angle which caused one corner of the truck to project over metal safety tabs which marked streetcar overhang, whether the danger resulting from manner in which truck was parked was apparent, whether streetcar passenger acted as a reasonable man in placing his head outside the car to observe traffic conditions in preparing to alight from car, and whether the truck could have been seen easily by the passenger, whose head was struck by corner of truck, without placing his head outside, were questions for jury.

6. Automobiles ⚿206

Streetcar passenger who in preparing to alight from car inclined his head beyond side of streetcar in order to observe traffic conditions was entitled to assume that others would obey the law.

7. Automobiles ⚿245(86)

Where truck was parked diagonally to curb in violation of ordinance and at an angle which caused one corner of truck to project over metal safety tabs which marked streetcar overhang, contributory negligence of streetcar passenger who inclined his head beyond side of streetcar in order to observe traffic conditions in preparing to alight from car, and was knocked from the car when corner of truck struck his head, was for jury.

8. Negligence ⚿141(3)

Instruction that one has a right to assume that every other person will perform his duty to obey the law, and in absence of reasonable grounds to think otherwise it is not negligence to assume that he is not exposed to danger which will come to him only through violation of law or duty by another, provided that such person himself uses reasonable care to protect his own safety, sufficiently referred to contributory negligence and was not erroneous.

9. Trial ⚿296(4)

An instruction that one has a right to assume that every other person will perform his duty and obey the law, and in absence of reasonable grounds to think otherwise it is not negligence to assume that he is not exposed to danger which will come to him only through violation of law or duty by another, is not prejudicially erroneous, even if it omits contributory negligence factor, if the trial court gives complete and detailed instructions on contributory negligence.

◆

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Joseph M. Murphy against the St. Claire Brewing Company for injuries sustained by the plaintiff when, in preparing to alight from car, he inclined his head beyond side of a streetcar in order to observe traffic conditions, and was knocked from the car when corner of defendant's parked truck struck plaintiff's head. From an adverse judgment, the defendant appeals.

Affirmed.

Bronson, Bronson & McKinnon, of San Francisco, for appellant.

James Martin MacInnis, of San Francisco, for respondent.

PETERS, Presiding Justice.

Defendant appeals from a judgment based upon a jury verdict awarding plaintiff damages for personal injuries in the sum of $3,000 general damages, and $458.50 special damages.

On this appeal the defendant contends that under the evidence the defendant was not negligent, that, as a matter of law, plaintiff was guilty of contributory negligence, and that the trial court erred in giving a certain instruction to which reference will hereafter be made.

[1, 2] A reading of the transcript and briefs demonstrates that, other than the question of the propriety of the challenged instruction, fundamentally the sole issue involved is that of proximate cause—an issue which, except in a very limited number of cases, is a question of fact for the determination of the jury. The jury having impliedly found that defendant's negligence was the sole and proximate cause of the accident, and that finding being amply supported by the record, this court has no power to disturb the judgment.

Respondent is a motorman employed by the Municipal Railway Company of San Francisco. Early in the afternoon of May 19, 1937, he was off duty, and was riding as a passenger on a "D" streetcar, which operates on Geary street, on his way to the car barn where he was due to go on duty. He had boarded that car at Geary and

Larkin streets. The "B" and "C" cars also pass that intersection on Geary street. The "D" car turns northerly on Van Ness avenue, but the "B" and "C" streetcars cross Van Ness avenue and continue out Geary to the car barn. Respondent had boarded the "D" car because he had observed that the conductor was a friend of his to whom he wished to deliver a message. He intended to leave the car at Geary and Van Ness, and to then board a "B" or "C" car, one of which was following the "D" car. At Van Ness avenue the "D" car, if traffic permits, does not stop even when the traffic light is red, but makes the turn and stops on Van Ness avenue. However, there is evidence that about eight out of ten times the "D" car stops at the corner before making the turn because of automobile traffic which must obey the traffic signals.

As already stated, respondent boarded the streetcar at Geary and Larkin. The next cross-street is Polk, and the next is Van Ness. Between Polk and Van Ness the sidewalk on the north side of the street is twelve feet wide. From the curb to the nearest streetcar track is thirteen feet eleven inches. Running parallel to this rail, and a distance of two feet seven and one-half inches northerly therefrom, there is a line of metal staples or tabs driven into the pavement to mark the overhang of the streetcar. Actually, the overhang of the streetcar is but two feet and one-quarter inch, so that there is a seven and one-quarter inch safety factor. At about the middle of the block between Polk and Van Ness, on the northerly side of Geary, along the curb is a loading zone, the curb there being painted the usual yellow. On the day in question a beer truck of appellant, about twenty or twenty-one feet long, desired to make a delivery to a grocery store adjoining the loading zone. Certain automobiles were partially parked in the loading zone so that there was not sufficient room to park the truck parallel to the curb. The driver proceeded to park the truck diagonally to the curb at an angle variously estimated at from forty to seventy degrees. He drove the truck partially up on the sidewalk, the exact distance being a matter of dispute. While the truck was so parked it so projected out into Geary street that, according to the testimony most favorable to respondent, one corner of the truck projected over the metal safety tabs so that the clearance between a passing streetcar and the rear corner of the truck was but several inches. At the time of the accident, section 41 of the Traffic Ordinance of San Francisco required all vehicles to park parallel with the curb at the place in question. Admittedly, appellant's truck was parked in direct violation of this ordinance.

After boarding the "D" car at Larkin street, respondent remained on the rear platform of that car and conversed with the conductor. By the time respondent had delivered his message to the conductor, the streetcar was between Polk and Van Ness running at about ten to fifteen miles per hour. The respondent, as already indicated, was intending to alight at Van Ness. He said goodby to the conductor and moved over to the exit side of the rear platform. He grasped the stanchion that bisects the rear platform with his right hand, and with his left hand grasped the side of a folding bench that is normally raised to a vertical position on the rear of such streetcars. He and his witnesses testified that at no time did his feet go down below the platform level—in other words, that he did not step down on the step. He further testified that when the car was about the middle of the block, and without attempting to alight prematurely, he inclined his head beyond the streetcar's side in order to observe traffic conditions in preparation to alight at Van Ness. Immediately upon extending his head beyond the car he was struck by the rear corner of the truck, was knocked from the car, and suffered the serious injuries for which this action was brought.

[3, 4] On this appeal it is urged that, although appellant admittedly was parked in violation of the provisions of the traffic ordinance, such violation was not a proximate cause of the accident, for the reason that the ordinance was not intended to protect streetcar riders. This argument is so obviously without merit that it deserves but little consideration. Obviously, one of the purposes of such ordinances is to afford the public traveling on the road, including those riding on streetcars, the maximum possible degree of safety. Flynn v. Bledsoe Co., 92 Cal.App. 145, 267 P. 887. That this is one of the purposes of the ordinance is demonstrated by the fact that the ordinance permits the police department to permit diagonal parking on certain streets under certain conditions not here present, but expressly prohibits diagonal parking on streets where streetcars operate unless there is a distance of thirty feet or more

from the curb to the nearest rail. Under such circumstances, whether the violation of the ordinance was the sole proximate cause of the injury was a question of fact for the jury. This is illustrated by many cases. Kingston v. Hardt, 18 Cal.App.2d 61, 62 P.2d 1376; Scalf v. Eicher, 11 Cal. App.2d 44, 53 P.2d 368; McKay v. Hedger, 139 Cal.App. 266, 34 P.2d 221; see, also, Mecchi v. Lyon Van & Storage Co., 38 Cal. App.2d 674, 102 P.2d 422, 104 P.2d 26, which involved a violation of the identical ordinance here involved.

[5-7] Appellant's main contention is that respondent was guilty of contributory negligence as a matter of law. This contention is partially predicated on the theory that respondent was violating an ordinance in attempting to alight from a moving streetcar. In support of this theory appellant offered evidence to the effect that respondent had in fact stepped down on the lower step before he was hit. That question of fact was resolved against appellant, on conflicting evidence, by the verdict of the jury. But appellant also contends that the danger was obvious and apparent, citing such cases as Shanley v. American Olive Co., 185 Cal. 552, 197 P. 793; Mautino v. Sutter Hospital Ass'n, 211 Cal. 556, 296 P. 76, and Blodgett v. B. H. Dyas Co., 4 Cal.2d 511, 50 P.2d 801. No useful purpose would be served by discussing these cases. Each case must turn upon its own facts. Whether the danger was obvious and apparent, whether respondent acted as a reasonable man in placing his head outside the car to observe traffic, and whether the truck could have been seen easily without placing his head outside, were all questions of fact for the jury. It must be kept in mind that respondent was violating no law and was entitled to assume that others would obey the law. Kingston v. Hardt, 18 Cal.App.2d 61, 62 P.2d 1376; Lucke v. Pacific Elec. Ry. Co., 129 Cal.App. 707, 19 P.2d 263. The presence or absence of negligence on the part of respondent, and the question of proximate cause, were fact questions for the jury. Under the facts of this case its determination is conclusive.

[8] The only other contention of appellant is that the trial court erred in giving the following instruction: "You are instructed that under the law of this state every person has a right to assume that every other person will perform his duty and obey the law, and in the absence of reasonable grounds to think otherwise, it is not negligence to assume that he is not exposed to danger which will come to him only through violation of law or duty by such other person, provided that such person himself uses reasonable care to protect his own safety." Appellant contends that this instruction is prejudicially erroneous for the alleged reason that it fails to mention contributory negligence. It is urged that the first part of the instruction should have contained the words that a "person who is himself free from negligence" has the right to expect that the defendant will exercise due care. In this connection appellant places its greatest reliance on the case of McPherson v. Walling, 58 Cal.App. 563, 209 P. 209. In that case the court held an instruction on this subject to be prejudicially erroneous that failed, except in a very indirect fashion, to refer to contributory negligence. In the present case, as part of the very sentence that informed the jury that plaintiff was entitled to assume that others would obey the law, the jury was also told that this rule only applied "provided that such person himself uses reasonable care to protect his own safety." In other words, the very element omitted in the instruction in the McPherson case, supra, was supplied in this case.

[9] Another answer to this contention, if one were needed, is that there are several recent cases holding that an entire omission of the contributory negligence factor in such an instruction is not prejudicial error if the trial court gives, as it did in the case at bar, complete and detailed instructions on contributory negligence. Angel v. Los Angeles Gas & Electric Corp., 5 Cal.App.2d 270, 42 P.2d 690; Passarelli v. Souza, 37 Cal.App.2d 1, 98 P.2d 809.

The judgment appealed from is affirmed.

We concur: KNIGHT, J.; WARD, J.

41 Cal.App.2d 522

CITY OF TULELAKE v. ROATH, City Clerk.

Civ. 6547.

District Court of Appeal, Third District, California.

Nov. 18, 1940.

1. Municipal corporations 🔑**918(2)**

Even if statute concerning publication of ordinance ordering submission to voters of question of issuance of bonds for public improvement made it the duty of city council to designate newspaper in which such an ordinance should appear, failure of council to designate newspaper in ordinance was not sufficient to invalidate entire proceedings concerning proposed bond issue, and was not fatal to validity of bonds. Gen.Laws 1937, Act 5178, § 3.

2. Municipal corporations 🔑**918(3)**

Statutory directions as to time and manner of giving notice of elections, such as city elections concerning issuance of bonds, are "mandatory" upon officers charged with duty of calling election and will be upheld strictly in a direct action instituted before an election, but after an election has been held such statutory requirements are "directory" unless it appears that failure to give notice for full time specified by statute has prevented electors from giving a full and free expression of their will at election, or unless statute contains a further provision, the necessary effect of which is that failure to give notice for statutory time will render election void. Gen.Laws 1937, Act 5178, § 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Directory" and "Mandatory".

3. Municipal corporations 🔑**918(3)**

Where ordinance of sixth-class city, calling a special election concerning issuance of city bonds, was published at times and in manner and form prescribed by law in a newspaper of general circulation published in the city, and newspaper was official newspaper of city, and election, which was held upon day set in ordinance, resulted in 199 out of 203 votes being cast in favor of issuing bonds, proposed bonds were valid, notwithstanding failure of city council to designate in ordinance the newspaper in which ordinance should be published. Gen.Laws 1937, Act 5178, § 3.

Mandamus proceeding by the City of Tulelake, a municipal corporation, against Harold Roath, as City Clerk of the City of Tulelake, to compel respondent to sign, as city clerk, certain bonds issued by the city council under General Laws 1937, Act 5178, section 3.

Writ issued.

H. A. Postlethwaite, of Oakland, and Charles Lederer, City Atty., of Alturas, for petitioner.

Charles Baldwin, of Alturas, for respondent.

Mr. Presiding Justice PULLEN, delivered the opinion of the court.

This is a proceeding in mandate to compel the respondent to sign as City Clerk of the City of Tulelake, a city of the sixth class, certain bonds issued by the city council of that city, under the Bond Act of 1901, Stats.1901, p. 27, Deering's General Laws 1937, page 2246, Act 5178.

The refusal of respondent is based upon the failure of the city council to designate in the ordinance calling the special election the newspaper in which such ordinance should be published. No other objections are urged against the validity of the proposed bonds.

That portion of the statute pertaining to publication is as follows: "§ 3. Publication of ordinance: Vote necessary to carry. Such ordinance shall be published once a day for at least seven days in some newspaper published at least six days a week in such municipality, or once a week for two weeks in some newspaper published less than six days a week in such municipality, and one insertion each week for two succeeding weeks shall be a sufficient publication in such newspaper published less than six days per week. * * *"

The ordinance was in fact actually published at the times and in the manner and form prescribed by law in the Tulelake Reporter, a newspaper of general circulation published in the City of Tulelake, which was then the official newspaper of Tulelake, having been previously so designated the official newspaper in which all official notices of the city should be published. Upon the day set in the ordinance the election was held, and upon the canvassing of the returns it was found that there was cast a total of 203 votes, of which 199 were cast in favor of the proposition and 1 against.

[1] Even if it can be said that the statute makes it the duty of the council to designate the particular newspaper in which the ordinance shall appear it cannot be said the failure to do so was sufficient to invalidate the entire proceedings.

In the early case of People v. Hoge, 55 Cal. 612, a special election to choose a board of freeholders was called by the board of election commissioners of the city and county of San Francisco. It was contended the authority to call such an election was vested in the board of supervisors and not in the board of election commissioners. There, as here, the honesty and fairness of the election was conceded, and the only claim was lack of authority. The court, after holding the board of election commissioners was authorized to act as it did, quoted with approval from Dishon v. Smith, 10 Iowa 212, 218: "Upon considerations like this, the courts have held that the voice of the people is not to be rejected for a defect, or even a want of notice, if they have in truth been called upon and have spoken. In the present case, whether there was notice or not, there was an election, and the people of the county voted, and it is not alleged that any portion of them failed in knowledge of the pendency of the question, or to exercise their franchise."

This court, in County of Sacramento v. Stephens, 11 Cal.App.2d 110, 53 P.2d 197, 200, adopted a similar view. There a joint school district, lying partially in Sacramento county and partially in Placer county, called an election to authorize the issuance of improvement bonds. In attacking the validity of the bonds voted it was claimed the district failed to publish notice of the election as required by section 4.961 of the School Code, such notice having been published only in Placer county and not in Sacramento county also. In answer thereto it was held that such publication was a harmless irregularity where the election was otherwise conducted according to law, and the notice of the time, place and purpose of the election had been published as a matter of news in papers published in Sacramento county, and substantially all of the qualified voters in the latter county voted at the election. The rule there laid down is thus expressed: "The test for determining whether a bond election is rendered invalid for failure to strictly comply with the statute with relation to the giving of notice thereof is to ascertain whether the voters of the district generally have had knowledge of the time, place, and purpose of the election so as to give them full opportunity to attend the poles and express their will regarding the incurring of the obligation, or, upon the other hand, whether the omission has resulted in depriving a sufficient number of the qualified electors therein of the opportunity of exercising their franchise so as to change the result of the election. County of Sonoma v. Sanborn, 1 Cal.App.2d 26, 34, 36 P.(2d) 419; 20 C.J. p. 96, § 80; In re East Bay Municipal Utility District Bonds of 1925, 196 Cal. 725, 239 P. 38; Weisgerber v. Nez Perce County, 33 Idaho 670, 197 P. 562."

In re East Bay Municipal Utility District Bonds of 1925, supra [196 Cal. 725, 239 P. 43], the rather pessimistic view is there expressed that: "It is a well known fact that the ordinary newspaper notice of a forthcoming election does not, in fact, have the desired effect of notifying the electors thereof. The ordinary qualified voter is so busy attending to his private affairs, and is so apathetic regarding matters touching the public welfare, that a printed newspaper notice of an election to be held, whether in the near or the distant future, even if seen by such voter excites in him no particular interest." In the case just cited there are collected many cases from this and other jurisdictions as well as quotations from text writers to the effect an omission such as is before us here is not fatal to the validity of the bonds.

[2, 3] The rule as expressed in Weisgerber v. Nez Perce County, supra, and quoted in the East Bay case, supra, is undoubtedly the rule in this jurisdiction, that is, that "statutory directions as to the time and manner of giving notice of elections are mandatory upon the officers charged with the duty of calling the election, and will be upheld strictly in a direct action instituted before an election; but after an election has been held, such statutory requirements are directory, unless it appears that the failure to give notice for the full time specified by the statute has prevented electors from giving a full and free expression of their will at the election, or unless the statute contains a further provision, the necessary effect of which is that failure to give notice for the statutory time will render the election void."

Let the writ issue.

We concur: THOMPSON, J.; TUTTLE, J.

41 Cal.App.2d 541

COLBURN v. SCHILLING.

Civ. 2197.

District Court of Appeal, Fourth District, California.

Nov. 19, 1940.

Hearing Denied Jan. 16, 1941.

1. Automobiles 🔑217(2), 246(58)

Where there was evidence that at time pedestrian was struck by automobile it was dark, that there was but one 60 candle power light above center of intersection a short distance away, that pedestrian was dressed in gray suit and that pedestrian wore same suit on witness stand, instruction that pedestrian crossing public highway was under duty to exercise reasonable care for his own safety and such duty was greater when pedestrian should have known by virtue of darkness, color of clothes, or presence of light upon highway that it would become difficult for operator of motor vehicle to observe him, stated correct rules of law and was based on facts in evidence.

2. Automobiles 🔑160(4)

"Sidewalk", within statute defining an unmarked crosswalk as that portion of a roadway ordinarily included within the prolongation of boundary lines of sidewalks at intersections of streets which meet at approximately right angles, refers to the space between the property line and the curb, and not merely that portion thereof which happens to be covered with cement or other material making an improved walk. Vehicle Code, § 85, St.1935, p. 99.

See Words and Phrases, Permanent Edition, for all other definitions of "Sidewalk".

3. Automobiles 🔑160(4)

The statute defining an unmarked crosswalk as that portion of a roadway ordinarily included within prolongation of the boundary lines of sidewalks at intersections of streets which meet at approximately right angles applies to prolongation of boundary lines of extended sidewalks whether or not the improved part thereof extends clear to the curb or stops a few feet short thereof. Vehicle Code, § 85, St.1935, p. 99.

4. Automobiles 🔑160(4)

The statute defining unmarked crosswalk as that portion of roadway ordinarily included within prolongation of boundary lines of sidewalks at intersections of streets which meet at approximately right angles applies to the space that would ordinarily be traversed by pedestrians proceeding along such a sidewalk and crossing the adjoining street. Vehicle Code, § 85, St.1935, p. 99.

5. Trial 🔑252(8)

In pedestrian's action for injuries sustained when struck by motorist, instruction that if pedestrian attempted to cross avenue from private walk which was not within the prolongation of boundary line of sidewalk on north side of street, it was pedestrian's duty to yield right of way to motorist, was not objectionable on ground that it told jury that there was an unmarked crosswalk when there was no such unmarked crosswalk because cement sidewalk did not continue to the curb. Vehicle Code, §§ 85, 562, St.1935, pp. 99, 188.

6. Appeal and error 🔑1064(1)

In pedestrian's action for injuries sustained when struck by motorist, instruction that if pedestrian was crossing avenue other than at unmarked crosswalk, it was his duty to yield right of way to motorist, and if he failed to do so, such conduct constituted negligence as matter of law, was not prejudicially erroneous, since jury could not have been misled in view of fact that court left it to jury as to what the facts were. Vehicle Code, §§ 85, 562, St.1935, pp. 99, 188.

7. Automobiles 🔑246(58)
Trial 🔑191(7)

Where evidence indicated that pedestrian looked to right on reaching curb and observed motorist approaching from that direction, that pedestrian then started across street and did not again look to right, instructions regarding pedestrian's duty to look and take precautions for his own safety were based upon the evidence and were not objectionable on ground that they assumed that pedestrian walked directly into path of danger without taking precaution. Vehicle Code, § 562, St.1935, p. 188.

* * *

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Personal injury action by Thomas C. Colburn against Robert B. Schilling. Judgment for defendant, and plaintiff appeals. Affirmed.

Hearing denied; CARTER, J., dissenting.

Head, Wellington & Jacobs, of Santa Ana, for appellant.

Forgy, Reinhaus & Forgy, of Santa Ana (A. M. Bradley, of Santa Ana, of counsel), for respondent.

BARNARD, Presiding Justice.

This is an action for damages, the plaintiff having been struck by an automobile driven by the defendant. A jury returned a verdict in favor of the defendant and the plaintiff has appealed from the judgment.

The accident happened in the evening as the appellant was walking across Orange avenue in Santa Ana, at a point near the intersection of that street with Camille street. Orange avenue runs north and south and Camille street east and west. The appellant walked in an easterly direction on the sidewalk on the northerly side of Camille street. On reaching the right-angle intersection of that street and Orange avenue he turned north and walked along the sidewalk on the westerly side of Orange avenue. After proceeding a short distance he turned to his right on a private walk which extended from a residence across the parkway to the west curb of Orange avenue. When he reached that curb he looked to the south and saw the headlights of the respondent's car, which was approaching from that direction on the easterly side of Orange avenue. He testified that he could not see whether this automobile was a block or two blocks away at that time. He then looked to the north and stood there on the curb "fifteen, twenty, maybe thirty seconds". He then started across the street, angling in a northerly direction toward a private driveway which was farther north on the easterly side of Orange avenue. He did not again look to the south and did not again see the respondent's approaching car, even when it struck him. The respondent, who was traveling at a speed of twenty-five miles an hour, saw the appellant when he was some twenty-five or thirty feet away. He applied his brakes and swerved to the left, but his right front fender struck the appellant.

[1] The appellant first complains of an instruction in which the jury was told that the duty of a pedestrian in crossing a public highway is to exercise reasonable care for his own safety and that "this duty becomes greater when the pedestrian knew or as a reasonably prudent person should have known that by virtue of darkness, the color of clothes, or the absence of light upon the highway it would become difficult for the operator of a motor vehicle to observe him". It is contended that there were no facts justifying the giving of this instruction and that the instruction directed the jury to find the appellant guilty of negligence as a matter of law by assuming that there was "intense darkness" and that the appellant had on dark clothing. There was evidence that it was dark at the time and place, that there were trees around the point in question and that there was but one 60 candle power light above the center of the intersection, a short distance away. The appellant was dressed in a gray suit at the time of the accident and wore the same suit while on the witness stand. The jury not only saw this suit but was taken to the scene of the accident to view the conditions there. The instruction not only stated the correct rules of law but was based upon facts which appeared in evidence, and the court assumed no facts but properly submitted to the jury the question of fact as to whether the appellant had exercised reasonable care under the circumstances existing at the time in question.

The appellant next complains of two instructions relating to a crosswalk at this intersection:

"I instruct you, ladies and gentlemen of the jury, that if you find from the evidence in this case that the plaintiff attempted to cross the intersection of Camille and Orange Avenue from the private walk in front of the house on the Northwest corner of the intersection and not from a point within the prolongation of the boundary line of the sidewalk on the North side of Camille Street, then I instruct you that the plaintiff was not crossing Orange Avenue within a marked or unmarked crosswalk and it was his duty to yield the right-of-way to the defendant herein and if you find that he failed so to do, I instruct you that his conduct was negligence as a matter of law, and if it contributed directly or proximately in any degree, no matter how slightly, to the accident, the plaintiff is not entitled to recover and your verdict shall be against the plaintiff and in favor of the defendant Robert Schilling."

"I instruct you, ladies and gentlemen of the jury, that if you find from the evidence that the plaintiff was crossing Orange Avenue other than at the unmarked crosswalk at an intersection that it was his duty to yield the right-of-way to the defendant and in the event that you find from the evidence that he failed so to do, then I instruct you that such conduct on his part constituted negligence as a matter of law, and if you further find from the evidence that such conduct contributed in any degree, no matter how slightly to the accident, then I instruct you that your verdict shall be against the plaintiff and in favor of the defendant, Robert B. Schilling."

It is here contended that the first of these instructions erroneously told the jury that there was an unmarked crosswalk at this intersection; that there was no such unmarked crosswalk here because the four-foot cement sidewalk along the north side of Camille street did not continue to the curb on the westerly side of Orange avenue but stopped three feet short of that curb, the intervening space being a parkway; and that the question of whether or not an unmarked crosswalk existed at that point should have been left to the jury.

[2-5] Section 562 of the Vehicle Code, St.1935, p. 188, provides that a pedestrian crossing a roadway at any point other than within a crosswalk (marked or unmarked) at an intersection shall yield the right of way to approaching vehicles. Section 85 defines an unmarked crosswalk as that portion of a roadway ordinarily included within the prolongation of the boundary lines of sidewalks at intersections of streets which meet at approximately right angles. We think the latter section, in referring to sidewalks, was intended to refer to the space between the property line and the curb and not merely that portion thereof which happens to be covered with cement or other material making an improved walk. Whether or not this be true, the section certainly was intended to refer and apply to the prolongation of the boundary lines of existing sidewalks whether or not the improved part thereof extends clear to the curb or stops a few feet short thereof. The section was meant to apply to the space that would ordinarily be traversed by pedestrians proceeding along such a sidewalk and across the adjoining street. While we think the court could have properly instructed the jury that a crosswalk existed at the point here in question it did not do so but merely instructed the jury that if the appellant attempted to cross Orange avenue from a private walk which was not within the prolongation of the boundary line of the sidewalk on the north side of Camille street it was his duty to yield the right of way to the respondent.

[6] It is further contended that in these two instructions the jury was told that the appellant did not yield the right of way and that he was guilty of negligence as a matter of law and regardless of surrounding circumstances. Whether or not the appellant had yielded the right of way was left for the jury to decide, and this called for a consideration of the surrounding circumstances. The question of contributory negligence was also left to the jury. While in these and the two instructions hereinafter considered the court stated that certain conduct would constitute negligence "as a matter of law", it is clear that the court intended to say that certain facts, if they were found to exist, would constitute negligence "under the law". While the language used was improper and unfortunate, the court left it to the jury as to what the facts were, and the jury could not have been misled by the technical error in the wording of this part of these instructions. Under the circumstances here appearing, we see no prejudicial error in this instruction.

[7] Finally, error is assigned in the giving of two other instructions, as follows:

"I furthermore instruct you, ladies and gentlemen of the jury, that the duty of a pedestrian to look does not mean that it is his duty to look one way and to continue to so look, but it is his duty to look in the direction of anticipated danger and to continue to be alert to safeguard himself against injury and in the event that you find from the evidence in this case that the plaintiff either by virtue of failing to look or by virtue of the manner in which he was crossing Orange Avenue was not continually alert to safeguard himself against injury, then I instruct you that as a matter of law the plaintiff was negligent, and if you further find from the evidence that his negligence contributed in any degree, no matter how slightly, to the accident, the plaintiff cannot recover and your verdict shall be in favor of the defendant, Robert B. Schilling."

"I instruct you, ladies and gentlemen of the jury, that if you find from the evidence that the plaintiff walked directly into a path of danger without taking any precautions for his own safety, such conduct on his part constituted negligence as a matter of law, and if you find that such conduct contributed in any degree, no matter how slightly, to the injury complained of, then I instruct you that the plaintiff is not entitled to recover and your verdict shall be against the plaintiff and in favor of the defendant, Robert Schilling."

It is argued that these instructions assume that the appellant walked directly into the path of danger without taking precautions for his own safety, that they were not justified by the evidence, and that they directed the jury to find the appellant guilty of negligence as a matter of law upon assumed facts. These contentions are without merit, the instructions were based upon evidence which was received, and the question of appellant's contributory negligence was left to the jury as a matter of fact and not passed upon by the court as a matter of law. Taken in connection with other instructions which were given, the jury was fully and fairly instructed upon the rules of law applicable to the questions presented by the evidence.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

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41 Cal.App.2d 549

CUMMINGS v. KENDALL et al.

Civ. 6252.

District Court of Appeal, Third District, California.

Nov. 20, 1940.

Hearing Denied Jan. 16, 1941.

1. **Appeal and error** 🔑786

A motion to dismiss appeal on ground that issues were unsubstantial and that appeal was taken merely for delay raised questions whether issues were worthy of consideration, and whether appeal was prosecuted in good faith, and opinion denying motion was merely a holding that appeal should be heard upon its merits, rather than a statement of the "law of the case."

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case".

2. **Appeal and error** 🔑893(1)

An appeal from judgment in action tried to the court without a jury did not require a trial de novo but merely required determination whether facts supported court's conclusion that negligence of defendants contributed to injuries sustained by plaintiff.

3. **Appeal and error** 🔑1010(1)

On appeal from judgment for plaintiff in action for injuries tried to court without a jury, District Court of Appeal was required to affirm the judgment if facts considered in all their inference-bearing strength supported the trial court's conclusion, irrespective of whether Court of Appeal with the same state of facts before it would have reached a different conclusion.

4. **Appeal and error** 🔑996

Where all of the facts are admitted, or uncontradicted, but either one of two inferences may fairly and reasonably be deduced from such facts, the determination of a jury or trial judge may not be interfered with by an appellate court, and a finding of the trial judge on the issue cannot be set aside on ground that it is not sustained by the evidence.

5. **Trial** 🔑396(4)

In personal injury action tried to the court without a jury, the trial court may make findings based upon reasonable inferences supported by the evidence.

6. **Automobiles** 🔑244(36)

In action for injuries sustained in collision which involved automobile in which plaintiff was riding, pursuing automobile, and approaching automobile, evidence supported recovery on ground that negligence of driver of pursuing automobile operated concurrently with negligence of the driver of approaching automobile and was a "proximate cause" of the injuries.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

7. **Automobiles** 🔑242(7)

In action for injuries sustained in collision which involved automobile in which plaintiff was riding, pursuing automobile and approaching automobile, where owners of pursuing automobile admitted their negligence, but alleged that such negligence was not a proximate cause of the injuries, the owners of pursuing automobile had burden of showing that no injuries resulted from their wrong.

8. **Appeal and error** 🔑757(1), 760(2)

Where error was suggested, but District Court of Appeal was cited to no evidence, none of testimony on that phase of case was indicated, and point was not urged or mentioned in statement of the questions presented upon appeal, suggestion would not be considered.

* * *

Appeal from Superior Court, Del Norte County; Warren V. Tryon, Judge.

Action by Norman M. Cummings against William Kendall and others, individually and as copartners doing business under the name and style of Kendall Bros., a copartnership, for injuries sustained in an automobile accident. Judgment for plaintiff, and defendants appeal.

Affirmed.

Bronson, Bronson & McKinnon, of San Francisco, for appellants.

Charles Reagh, of San Francisco, and T. F. Peterson, of Eureka, for respondent.

PARKER, Justice pro tem. delivered the opinion of the Court.

Defendants appeal from the judgment rendered in favor of plaintiff. The case involves an automobile accident and was tried by the court, sitting without a jury.

Heretofore respondent moved to dismiss the appeal and the opinion of this court in denying the motion is found in 34 Cal.App. 2d 379, 93 P.2d 633.

[1] Appellant at this stage of the appeal places much reliance on the language of the court in denying the motion to dismiss and inclines to the contention that the law of the case was therein announced. We are not in accord with this view. The sole question before the court on the motion to dismiss the appeal was whether or not the issues were substantial and worthy of consideration; likewise was the question presented as to the good faith of the appeal as distinguished from a proceeding adopted merely for purposes of delay and harassment. Whatever construction might be placed upon portions of the opinion, the net result would be merely a holding that the appeal should be heard upon its merits. However, we may refer to the previous record to obviate a detailed statement of the case and avoid unnecessary repetition of the facts.

The sole question before the court for present determination is whether or not the admitted negligence of defendants did in any manner contribute to the injuries sustained by plaintiff. Stating it in another way, appellants admit negligence on their part and do not question the injuries sustained by plaintiff; but, they contend, the injuries were inflicted by causes remote and separate from the negligence of appellants.

Inasmuch as any discussion of the points presented must eventually disclose the facts, we relate, supplementing the previous recital as found in the previous opinion of this court, sufficient of the evidence to elucidate the arguments and the holding. It seems that the plaintiff was a passenger in what is referred to as the Russell car; with him were four other young men who were out on a little pleasure ride in the evening. There is no suggestion of intoxication or impropriety. In their travels they came upon the Kendall car, which is the car of the defendants and appellants. The Kendall car was parked and no one was occupying the same. The young men in the Russell car in what is conceded to have been a joking mood, took from the Kendall car one of the seat cushions and started off. When Kendall returned to his car, with his companions, the absence of the cushion was noted and they seemed to know that the boys from the Russell car had taken it. The pursuit then began. The Russell car wandered in and out of streets and by-ways, closely followed by the Kendall car. This pursuit covered some distance and lasted some time; the Russell car eventually reached the open road with the other car following it. At a point some 3 or more miles out the driver of the front car decided to turn around and retrace his course, or at least to return to Crescent City. The Kendall car did likewise and the chase continued. When they reached a point near the city limits there suddenly appeared on the highway a third car driven by one Gorbet, who, all seem to concede, was operating his vehicle under the combined influence of alcohol and gasoline. The collision occurred, though it is not clear whether Gorbet ran into the Russell car or whether the Russell car struck the Gorbet car. As far as the present controversy is concerned, it makes little difference. When the impact took place the Kendall car was approximately 60 feet behind and it was speeding along at the rate of from 55 to 60 miles per hour. The Russell car, which was the one in which plaintiff rode as a passenger, was thrown across the highway, having veered somewhat to the driver's left, in an attempt to reach safety. It might be here noted that both of the cars involved in the chase were traveling on the right-hand side of the highway.

The evidence shows it was a clear night; that the roadbed was dry and that both cars were equipped with sufficient headlights.

The driver of the Kendall car noted the accident ahead, as stated, when he was about 60 feet away. When he arrived at a point between 60 and 40 feet from the Russell car he started to put on his brake and swerved to the left. The highway contained a gravel shoulder 8 feet in width. On the edge of the shoulder there was a ditch. The highway was constructed with a crown in the center, sloping on each side of the center to the shoulders. The ditch was about 3 feet lower than the crown of the highway. The Gorbet car appeared on the highway suddenly. Apparently, as far as the record discloses, it just came from nowhere. The Russell car was thrown upon its right side, the left side being in the air. The car lay on the left-hand side of the road, with the front almost at right angles with the center line of the highway.

The Kendall car, after the brake was applied, swerved to the left, running down into the ditch and continued on its course to a point some 60 feet beyond the Russell car.

All parties are in accord that the Kendall car in passing struck the Russell car. But there is no evidence indicating just when or where or how this last impact took place. The occupants of the Kendall car testified that the only way they knew that their machine struck the Russell car was that the Kendall car had a dent or mark along the right top. The appellants venture the opinion, from that fact, that the Kendall car struck the bumper of the Russell car. Plaintiff and respondent argue that since the bumper is only about 18 inches above the ground, the impact of the Kendall car must have occurred while the Russell car was still in the air. But there is one other fact connected with the impact which would seem to overthrow the theory that the bumper was struck, and that is the fact that there were found on the Kendall car traces of paint from the Russell car, and it may well be assumed this paint did not come from the bumper. There was testimony from the occupants of the Kendall car that no one in that car felt any distinct shock from contact with the Russell car, and that no one in the Kendall car was injured.

The foregoing resume of facts seems somewhat sketchy, but this cannot be avoided for the reason that no person seemed to know exactly what did happen. None of the witnesses for plaintiff remembered anything after the first impact, due to the fact that the shock left each of them either dazed or unconscious.

It was stated by some of the witnesses that the whole thing happened so suddenly that there was no time to observe or recollect the rapidly occurring circumstances.

The court below found negligence on the part of the appellants and it is not necessary to discuss that finding. Appellants admit the finding has support in the evidence. The court further found as follows: "the same instant following the collision first aforesaid [being the collision with the Gorbet car] said truck ran violently upon, against and into the automobile wherein plaintiff was riding as a passenger and by and through the joint co-operative force of said collisions which were then and there virtually simultaneous, plaintiff was thrown with great force and violence into, upon and against certain portions of the automobile wherein he was riding", as a result of which he, plaintiff, sustained the injuries complained of. It may be noted that what we have referred to as the Kendall car was a light delivery truck. Throughout the trial that machine was referred to interchangeably as the Kendall car or Kendall truck.

The appellants here maintain that from such a state of facts as is here disclosed there is not the slightest support of any finding that appellants inflicted injury upon the plaintiff. The claim is urged that, whatever injuries plaintiff sustained, the proximate and sole cause thereof was the collision with the Gorbet car and that no further injury followed the mere brushing of the Kendall car against the already overturned Russell car in which plaintiff rode as a passenger.

In presenting their appeal the question is thus stated: "Where the evidence that defendant inflicted injuries upon plaintiff is based upon conjecture and speculation, must not the judgment against defendant be reversed?"

[2, 3] In approaching a determination of the question here presented it must be borne in mind that the proceeding is in no sense a trial de novo. We are confronted

with a situation in which a court of competent jurisdiction has made a finding. Our only concern is to ascertain whether the facts support the conclusion of the court. It is in no wise determinative of the question to say that with the same state of facts before us we would reach a different conclusion. If we find that the facts will support the conclusion reached by the trial court, the judgment must be affirmed. And when we speak of the factual support we must consider the facts in all of their inference-bearing strength. Almost any set of facts, properly arranged, would support a variety of conclusions, reasonable, possible or purely speculative. It is conceded that we deal with the first assumption only.

[4] Attention is called to the recent case of Hamilton v. Pacific Electric R. Co., 12 Cal.2d 598, 86 P.2d 829, 831. In this case the subject of inferences is discussed at length and many authorities are cited. Without analyzing the cited case, it will suffice to say that it reaffirms the rule in this jurisdiction that where all of the facts are admitted or uncontradicted, nevertheless, if it appears that either one of two inferences may be fairly and reasonably deduced from those facts, the determination of a jury or the trial judge may not be interfered with by an appellate court. The finding of the trial judge on that issue cannot be set aside on the ground that it is not sustained by the evidence. The court further states: "The fact that some inference other than that which has been drawn by a jury may appear to an appellate tribunal to be the more reasonable, affords no sufficient reason for disturbing the inference in question. * * * It also appears to be well-established law that notwithstanding the fact that the evidence upon which the inference is founded is undisputed or without conflict, an appellate court has not the power to draw an inference different from that which the jury has deduced."

And likewise in the case of Crawford v. Southern Pacific Co., 3 Cal.2d 427, 45 P.2d 183, 184, we find it stated: "When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court."

[5] The trial court may make findings based upon reasonable inferences supported by the evidence. Rideout v. City of Los Angeles, 185 Cal. 426, 197 P. 74.

While these settled principles serve as guides, we still are confronted with the task of drawing a definite line between reasonable deductions and those which might be classed as arbitrary or unreasonable, with no guide other than the individual opinion of one called upon to consider the facts. There are many factors aiding in a reasonable conclusion which are presented to the trier of facts in the first instance and not available to one going over the cold record. There is what might be called the "feel" of the case. This embraces a consideration of the witnesses, the manner in which they testify and their general attitude in the courtroom. It embraces likewise the conduct of counsel. It is well known that in the trial of a cause all counsel may tacitly concede certain things and yet the record may not disclose this result. The cases sometimes speak of facts in an apparently meaningless sense. Facts are merely portions of the framework of conclusions. A fact that will support no conclusion is a negative quantity and it may be stated that the conclusion makes the fact, rather than that the fact supports the conclusion.

Without getting too far into the field of metaphysics or losing ourselves in the domain of psychiatry we may return to the instant case and see what, if anything, supports the trial court's finding.

[6] The trial court was justified in inferring that the Kendall car was in pursuit of the Russell car. While the witnesses stated that they were just following the car awaiting the time when it would stop and then get the cushion. The undisputed fact was that all of the parties considered the taking of the cushion to have been just a prank and in no sense a theft, so that there was no thought of losing any property. Particularly was this true in view of the fact that all of the parties lived in the same town and were well acquainted. The court then might have inferred that a chase through the streets of a town or city was in itself a reckless thing and manifested a lack of any care or thought of what might happen. On a clear night and a dry highway there was no reason why those in the Kendall car could not see exactly what was happening 100 yards ahead of them. With the eyes of the driver of the Kendall car focused upon the object of his chase the law itself steps in and draws the inference that "to look is to see". When such a driver states that he could not see what hap-

pened the court might well infer that he was so close on top of the occurrence that the whole thing became a jumble.

The evidence further showed that the trailing car was traveling at a speed of 60 miles per hour; this equals 88 feet per second. There was, as is usual, considerable questioning by all counsel in an effort to establish distances. Finally, the court took the witness Kendall, the driver of the Kendall car, and we quote from the record:

"The Court: Q. About how many feet did you drive in your car from the time you heard the impact until the time you came in contact with the Russell car? Approximately how many feet did you drive? * * * A. When I heard the impact I was about sixty feet, I imagine.

"Q. You traveled a distance of approximately sixty feet after you heard the impact until you came in contact with Russell's car? A. Yes.

"Q. At the time you heard this noise you describe, did you see Russell's car at that particular moment? A. At the same time as the impact?

"Q. Yes, at the time you heard it. You heard a crash; did you see the car at that time? A. No.

"Q Did you see any tail light? A. No.

"Q. Which way were you looking at that time, do you remember? Straight ahead, or can you recall? A. Naturally straight ahead, driving.

"Q. About how many miles an hour were you going at the time you heard the impact? A. Fifty to fifty-five, something like that.

"Q. At the time you heard the impact did you apply your brakes? A. Yes.

"Q. Immediately. A. No.

"Q. How many feet did you travel before you applied your brakes after you heard the impact? I am referring now to this crash you heard, or whatever noise it was? A. How many feet did I travel?

"Q. After you heard the impact, then you traveled along, when did you put on your brakes after that? How many feet did you travel before you put on your brakes? A. Applied my brakes about fifty or sixty feet from the scene of the wreck, point of the wreck.

"Q. At the time you applied your brakes did you see the other cars ahead of you? A. No, I couldn't distinguish anything; dark blot.

"Q. What made you put your brakes on? A. Natural reaction I guess.

"Q. To the crash you heard? A. Yes."

Thereafter counsel again took the witness and while there was elicited from the witness different distances and different points we are not to decide which version the court accepted, though we might reasonably conclude that the court accepted the answers given in direct answer to the court's questions. Therefore, the court might reasonably conclude that the Kendall car was 50 feet or even a fraction less when the brakes were applied and it might also conclude that there was some small fraction of time before the application could be effective. Going 55 miles per hour the car would travel more than 80 feet per second. Therefore, it could be most reasonably inferred, if, indeed, the conclusion were not compulsory, that the three cars came together within a fraction of a second. If the Russell car, which was proceeding at a speed of 50 miles per hour, struck the Gorbet car head-on it would not stop immediately upon impact and turn over on its side. Similarly, if the Gorbet car struck the Russell car from the side it would not turn it over abruptly at the point of impact. To conclude that it would be wholly at variance with every known rule of physics, gravity or the laws of motion.

When the Russell car came to repose it was on the left side of the highway, whereas in its course it was traversing the right side; its front end faced the east, while in traveling that end faced north. When we consider that the Russell car and the Gorbet car were of approximately equal weight it must be apparent that the greater momentum would be with the car which had the greater speed at the time of impact. And it was a reasonable conclusion that a car just coming into the highway at right angles would have been compelled to negotiate some sort of an abrupt turn which would preclude any unusual high speed.

The Gorbet car came to rest across the highway almost directly opposite the Russell car and rested off the highway and in the ditch, which would be some 15 or 20 feet from the center of the highway.

The Kendall car swerved to the left across the gravel shoulder and into the ditch and then continued on some 60 feet beyond the point of impact. While the occupants of this car did not recall striking any object, the court could and did properly consider that with a car going through a 3 foot ditch, while attempting to apply the brakes and control the car the journey must have been fraught with so many thrills that the striking of any one particular object would not stand out very clearly, even if the witnesses were attempting to adhere closely to the truth. And the deep dent in the steel body of the Kendall car, in which dent there were found evidences of the paint finish of the Russell car, would leave no doubt of the impact between the Kendall car and the one in which plaintiff was riding.

Considering the situation at the time of the first danger as between the Russell and the Gorbet cars there was some opportunity presented to the Russell car to avoid or at least to minimize the effect of the collision. There were 8 feet of gravel shoulder and a clear road ahead. But from all of the facts the trial court was justified in believing that the Kendall car smashed into the jumble before time was afforded for anyone to act.

We hold there is sufficient in the record to support the finding that the negligence of the driver of the Kendall car operated concurrently and practically simultaneous with the negligence of the driver of the Gorbet car to produce the injuries complained of. This being true, it follows that on this ground of appeal the judgment should be affirmed. Sawdey v. Producers' Milk Co., 107 Cal.App. 467, 290 P. 684.

We meet the claim of appellant that all of the injuries sustained by plaintiff were inflicted at the time of the first impact. In reply to this we find most fitting language in a Federal decision cited as Navigazione Libera T. S. A. v. Newtown Creek T. Co., 2 Cir., 98 F.2d 694, 697, wherein is found the following: "Nobody doubts that if two tortfeasors contribute to a single loss, each is liable in solido. * * * This result is however scarcely logical so long as the injured person has the burden of showing that the tortfeasor whom he pursues caused the damage and how much he caused. On the other hand, since it is impossible to prove what share the act of either of the tortfeasors contributed, or whether it contributed any at all, if this prevailed, each would escape—an absurd result. To overcome this difficulty, the law imposes upon each tortfeasor the impossible burden of proof, contenting itself with limiting the injured person's total recovery to one indemnity. The situation is the same when one of the two contributing factors is not the result of actionable fault; again, the single tortfeasor cannot be allowed to escape through the meshes of a logical net. He is a wrongdoer; let him unravel the casuistries resulting from his wrong."

[7] And so here. The appellants, wrongdoers, carry the burden of showing that no injuries resulted from their wrong and their task is to unravel the casuistries. In arguing the impossibility of doing this they concede their failure.

[8] Appellants suggest, and merely suggest, "an additional point may be noted that the judgment runs against all of the Kendalls individually and the partnership of Kendall Bros."

We are cited to no evidence and none of the testimony on that phase of the case is indicated. The point is not urged nor is it mentioned in the statement of the questions presented upon the appeal.

The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

41 Cal.App.2d 660

LAUINGER et al. v. CARRILLO BLDG. CO. et al.

Civ. 11543.

District Court of Appeal, First District, Division 2, California.

Nov. 26, 1940.

Rehearing Denied Dec. 26, 1940.

Hearing Denied Jan. 23, 1941.

1. Mortgages 🔑335

Provisions in bond indenture requiring notice of default and written request upon trustee by holders of 25 per cent. of the bonds, as conditions precedent to foreclosure, were valid.

2. Corporations 🔑482(2)

In action by holders of 10 per cent. of corporate bonds for foreclosure of bond indenture and removal of trustee, allegations showing only that minority disagreed with economic policy of majority in administra-

tion of the indenture, and especially with deferment contract waiving payment of interest, reducing interest, and requesting trustee to refrain from declaring forfeiture, did not show right to sue under bond indenture permitting less than 25 per cent. of bondholders to sue where right of action arose out of collusion, fraud, gross negligence, or willful misconduct, and complaint failed to state cause for equitable relief.

◆

Appeal from Superior Court, Santa Barbara County; Atwell Westwick, Judge.

Suit by George P. Lauinger and others against the Carrillo Building Company and others, for foreclosure of bond indenture and removal of trustee. From a judgment sustaining a demurrer to complaint without leave to amend, plaintiffs appeal.

Affirmed.

Byrne, Lamson & Jordan, of San Francisco, for appellants.

Heaney, Price, Postel & Parma and Kenneth W. Watters, Jr., all of Santa Barbara, for respondent.

NOURSE, P. J.

The plaintiffs sued to procure the foreclosure of a certain bond indenture and for the removal of the trustee acting thereunder. The defendants' demurrer to the complaint was sustained without leave to amend.

The gist of the complaint is that the defendant company issued its bonds amounting to $300,000 in 1924 for the purpose of erecting a hotel building in the city of Santa Barbara and executed a certain bond indenture to secure them. Default was made in the payment of bonds maturing after September, 1931, and, in April, 1933, the company induced the owners of more than seventy-five per cent of the outstanding bonds to execute a "deferment contract" under which they waived payment of certain interest then due and agreed to reduce the rate of interest thereafter to be paid. The bondholders signing this contract agreed not to institute any legal proceedings because of the failure of the company to live up to the terms of the bond indenture, and requested the trustee to refrain from declaring a forfeiture because of failure to meet those terms. It is alleged that the security is not adequate for the outstanding bonds, that the security is steadily diminishing, that the plaintiffs will be injured if the bond indenture is not foreclosed, and that the income from the property is insufficient to pay the bonds as they mature. Plaintiffs did not sign the "deferment contract", and in August, 1936, made demand upon the trustees to foreclose the bond indenture, or sell the property to satisfy the indebtedness of the company. This demand was refused by the trustee because of the "deferment contract" and "solely upon the request of the bondholders signing said document".

The plaintiffs represent less than ten percent of the bondholders. More than ninety per cent signed the "deferment contract" requesting that no foreclosure proceedings be instituted. The bond indenture is the contract under which all the rights and the liabilities of the parties arise. The controversy rests on the provisions of section 2 of article X of the bond indenture reading: "No holder of any bond or coupon secured hereby shall have any right to institute any suit, action or proceeding at law or in equity for the foreclosure of this indenture or for the execution of any trust or power hereof, or for the appointment of a receiver or for any other remedy under or upon this indenture, unless such holder previously shall have given to the Trustee written notice of an event of default; and unless also the holders of twenty-five percent (25%) in amount of the bonds secured hereby then outstanding shall have made written request upon the Trustee and shall have afforded to it a reasonable opportunity either to proceed to exercise the power hereinbefore granted, or to institute such action, suit or proceedings in its own name; and such notification and request hereby are declared in every such case, at the option of the Trustee, to be conditions precedent to the execution of the powers and trusts of this indenture, and to any action or cause of action for foreclosure, or for the appointment of a receiver, or for any other remedy hereunder; it being understood, intended and hereby provided that no one or more holders of bonds or coupons secured hereby shall have any right in any manner whatever by his or their action to affect, disturb, or prejudice the lien of this indenture, or to enforce any right hereunder, except in the manner herein provided, and that all proceedings hereunder shall be instituted, had and maintained in the manner herein provided, for the equal benefit of all holders of such outstanding bonds and coupons; provided, however, that nothing herein contained shall defeat the right of an individual bondholder or of individual bondholders to pursue his or their legal or equitable remedy where his or their right of action arises out of collusion, fraud, gross negligence, or wilful misconduct."

[1] The validity of such provisions in a bond indenture can no longer be questioned. We had occasion to so hold regarding similar provisions in Pacific States Savings & Loan Company v. Hollywood Knickerbocker, Inc., 11 Cal.App.2d 56, 52 P.2d 1014. We there cited Rodman v. Richfield Oil Co. of California et al., 9 Cir., 66 F.2d 244, 249. Because of the almost identical terms of the contract the Rodman case is even more applicable here. As to the validity of these terms of the contract the Circuit Court quoted from Chicago, D. & Vincennes Railroad Company v. Fosdick, 106 U.S. 47, 77, 1 S.Ct. 10, 27 L.Ed. 47, as follows: "It is an agreement which the parties were at liberty to make. There is nothing in it illegal or contrary to public policy. And while it is in the nature of a forfeiture, it is one against which, when it has taken place according to the fair meaning of the parties, courts of equity will not relieve. It was so held in Noyes v. Clark, 7 Paige (N.Y.) 179 (32 Am.Dec. 620); Noonan v. Lee, 2 Black, 499 (17 L.Ed. 278); Olcott v. Bynum, 17 Wall. 44 (21 L.Ed. 570)." As to the propriety of such a limitation upon the rights of the minority the Circuit Court in the Rodman case, supra, 66 F.2d at page 250, said: "We have already quoted Supreme Court decisions on the injustice of permitting one or a few bondholders from circumventing the wishes of the majority, by instituting proceedings for foreclosure when the majority are in favor of deferring such suit. If the indenture gives a minority a right thus to act—as does the indenture in the instant case—the provisions of that document must be strictly adhered to; for, as we have seen, a stipulation for foreclosure proceedings, even at the will of the *majority*, are 'in the nature of a penalty.' *A fortiori*, a stipulation giving a *minority* the right to authorize foreclosure may, in the language of the Vincennes case, be regarded as 'stricti juris.'"

[2] It would serve no purpose to discuss the cases cited by appellant because they are but generalizations of the accepted rule that equity will relieve a party from his contract where fraud or bad faith is shown. Here the bond indenture permitted less than twenty-five per cent of the bondholders to sue where the right of action arose out of "collusion, fraud, gross negligence or wilful misconduct." The allegations of the complaint do not state such a case. They merely disclose a disagreement on the part of a small minority with the economic policies of the majority. The allegations which might be said to hint at collusion between the trustee and the majority show nothing more than that the trustee has followed the demands of the majority in strict accord with the terms of the bond indenture. There are no allegations which sound in fraud, gross negligence, or wilful misconduct. What is pleaded in reference to the "interest" of the trustee, and the purported hostile attitude adverse to the plaintiffs, does not come within any of the terms of the contract. Rodman v. Richfield Oil Co. of California, supra, 66 F.2d at page 251. The cases holding that a court of equity may supervise the conduct of and remove a derelict trustee have no bearing on the issue here for the same reasons.

This case rests squarely upon the contract of the parties. They agreed that when those holding more than twenty-five per cent in amount should request a foreclosure the trustee should take the necessary and proper proceedings, that when those holding more than twenty-five per cent requested the trustee not to foreclose, he should refrain. The trustee has followed these terms of the contract, and the complaint pleads a case of performance of the duties of the trusteeship and no case of dereliction. For these reasons it fails to state a cause for any equitable relief.

The judgment is affirmed.

We concur: STURTEVANT, J. SPENCE, J.

41 Cal.App.2d 547

BURDGE v. SUPERIOR COURT et al.

Civ. 12875.

District Court of Appeal, Second District, Division 2, California.
Nov. 20, 1940.

1. Mandamus ⟹31

Where it was apparent that parties to action did not at any time reach a complete agreement for settlement of litigation, that those terms which had been agreed upon were not reduced to writing, and that the Superior Court was not informed of their nature when the trial was continued, the plaintiff was entitled to the issuance of a peremptory writ of mandate compelling the court to proceed with the trial of the action.

2. Mandamus ⟹31

Efforts to agree on a settlement of litigation out of court are to be commended, but where such efforts fail of fruition, the litigants can rightfully demand that the trial proceed to judgment.

◆

Petition by Alonzo Burdge for a writ of mandate compelling the Superior Court of Ventura county and others to proceed with the trial of an action to quiet title to realty pending in that court.

Writ granted.

A. W. Brunton, of Los Angeles, for petitioner.

B. W. Kemper and S. J. Silverman, both of Los Angeles, for respondents.

WOOD, Justice.

The action was commenced by petition against a number of defendants to quiet title to real estate. The trial of the action was commenced on January 12, 1940, and evidence was introduced. Before the conclusion of the trial it was stipulated by the parties that "the matter would go off calendar to be re-set upon motion". Thereafter, with the consent of the court, petitioner filed a supplemental complaint. The action was subsequently placed on the calendar for trial on September 14, 1940. At that time the case was called and the judge refused to take any action towards disposing of the matter by trial or otherwise. Attached to the petition is a transcript of the proceedings of September 14, 1940. These are the last items appearing in the transcript:

"Mr. Brunton: As I understand it, we had a verbal agreement and that verbal agreement was not completed.

"The Court: You told me you had settled the case. The question is, how you settled it, by verbal agreement or otherwise. (Reading) 'We have agreed upon the terms and conditions of settlement, and we have only one thing that we cannot agree on, and that was the amount which would be fixed for costs.' We will just leave it where we find it. The court is not going to exist to be trifled and monkeyed with. There are other things to be done, and there is no use wasting the time of our courts in trying a situation like this. There is no evidence in any event to show that statement isn't just as good today as when it was made here.

"Mr. Brunton: May I be permitted to testify on it instead of a statement?

"The Court: I am not in position to advise you what to do about it.

"Mr. Brunton: Is the matter—(The court adjourns and leaves the Bench)."

The proceedings of January 12, 1940, were taken down by the court reporter and a transcript of the reporter's notes is attached to the petition. From this transcript it appears that the parties had orally agreed upon all the terms of settlement of the litigation except that they had not agreed upon the amount to be paid for costs as a condition of the continuance. There was a wide difference between the contentions of the parties on this point, varying from $25 to $600. The parties so informed the court but did not inform the court as to the terms of the settlement. When the matter was again called by the court on September 14, counsel for petitioner informed the court that notwithstanding the efforts which had been made a settlement had never been concluded and that serious differences had arisen concerning the terms of the settlement in addition to the differences concerning the matter of costs.

[1, 2] It is apparent that the parties did not at any time reach a complete agreement for the settlement of the litigation. Those terms which had been agreed upon were not reduced to writing and the court was not informed of their nature when the trial was continued. Efforts to agree up-

on a settlement of litigation out of court are to be commended, but where such efforts fail of fruition the litigants can rightfully demand that the trial proceed to judgment. Times-Mirror Co. v. Superior Court, 3 Cal.2d 309, 327, 44 P.2d 547.

Petitioner is entitled to the issuance of a peremptory writ of mandate compelling respondents to proceed with the trial of the action hereinabove referred to. It is so ordered.

We concur: MOORE, P. J., McCOMB, J.

41 Cal.App.2d 574

PEOPLE v. MONTGOMERY.

Cr. 536.

District Court of Appeal, Fourth District, California.

Nov. 20, 1940.

Rehearing Denied Dec. 5, 1940.

Hearing Denied Dec. 19, 1940.

1. Criminal law 🔑1028

A defense which had not been urged by defendant in trial court in criminal case could not aid defendant on appeal.

2. Factors 🔑4

In prosecution for acting as a commission merchant, in soliciting sale of grower's crop of grapes on commission, without having secured a license as required by statute, excluding defendant's evidence that grapes were shipped through or by a fruit distributing corporation which was licensed as a commission merchant was not error, where defendant did not claim in trial court that he had acted as agent for corporation in his transactions with grower, since such evidence had no bearing on issues. St.1937, pp. 716, 720, §§ 1263, 1273.

3. Factors 🔑4

In prosecution for acting as a commission merchant in soliciting sale of grower's crop of grapes on commission, without having secured a license as required by statute, necessary elements of offense charged were solicitation of grapes from grower for sale on commission, and failure of defendant to have a license at that time to act as a commission merchant. St.1937, pp. 716, 720, §§ 1263, 1273.

4. Factors 🔑4

Evidence justified conviction for acting as a commission merchant in soliciting sale of grower's crop of grapes on commission, without having secured a license as required by statute, as against contention that defendant acted as agent for a disclosed principal which was licensed as a commission merchant when defendant solicited grapes. St.1937, pp. 716, 720, §§ 1263, 1273.

5. Criminal law 🔑670

Sustaining objections to questions asked of a witness is not error, where there is nothing to indicate to trial judge that expected answers might have a material bearing on the issues.

6. Factors 🔑4

In prosecution for acting as a commission merchant in soliciting sale of grower's crop of grapes on commission, without having secured a license as required by statute, sustaining objections to defendant's questions of grower regarding whether grower knew that grapes were being shipped by a fruit distributing corporation was not error, where it was not suggested during trial that defendant was acting as agent for corporation in his transactions with grower. St. 1937, pp. 716, 720, §§ 1263, 1273.

7. Factors 🔑4

That some of grapes delivered by grower were below specified grade was not a defense in prosecution for acting as commission merchant in soliciting sale of grower's crop of grapes on commission without having secured a license as required by statute. St. 1937, pp. 716, 720, §§ 1263, 1273.

8. Criminal law 🔑1186(4)

In prosecution for acting as a commission merchant without a license, where evidence offered by defendant and excluded showed that defendant acted for himself as principal at time of offense, and such evidence, if conviction were reversed, would be admissible against defendant, and, with that in record, would negative any defense of agency, conviction would not be reversed on ground that exclusion of defendant's evidence that he acted as agent resulted in a "miscarriage of justice" within the constitutional provision. St.1937, p. 715, § 1261, subd.

e; pp. 716, 720, §§ 1263, 1273; Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

C. R. Montgomery was convicted of acting as a commission merchant without having secured a license as required by St.1937, p. 716, § 1263, and he appeals.

Affirmed.

Hearing denied; HOUSER, J., dissenting.

Harold A. McCabe, of Fullerton, for appellant.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

MARKS, Justice.

Defendant was charged, under the provisions of section 1273 of the Agricultural Code, St.1937, p. 720, with the crime of acting as a commission merchant on September 27, 1939, without having first secured a license as required by the provisions of section 1263 of the same Code. He was found guilty and has appealed from the judgment and from the order denying his motion for new trial.

Miss Ruth Jenkins was a grower of grapes in Kings county, California. She entered into the following contract with defendant:

"Shipping Agreement

"This Agreement, entered into this 27th day of September, 1939, by and between C. R. Montgomery, hereinafter called the shipper; and, Ruth Jenkins, hereinafter called the grower:

"The shipper guarantees an advance of Twenty Dollars ($20.00) per ton roadside, on minimum of One Hundred Tons (100) and maximum Two Hundred Fifty Tons (250) of muscat grapes—U. S. No. 1 Juice.

"The shipper agrees to haul and enclose said grapes in car at a cost of not more than $10.50 per ton. Above $30.50 per ton, shipper and grower agree for a fifty-fifty division on net profit.

"Signed this 27th day of September, 1939:

"Ruth Jenkins
Grower
"C. R. Montgomery
Shipper."
"(9/27/39)

It is admitted that the contract was actually signed on October 2 or 3, 1939, and that at least two cars of grapes had been delivered and shipped before either of those dates. It is also admitted that defendant had no license to act as a commission merchant, although he had a dealer's license effective September 1, 1939, and a broker's license effective November 5, 1939. About 131½ tons of grapes were shipped for Miss Jenkins.

It was the theory of the People during the trial, and it is now their theory, that the defendant, on or about September 27, 1939, solicited from Miss Jenkins, the producer, her crop of muscat grapes for sale on commission; that he was not then licensed as a commission merchant; that his crime was complete when he solicited the grapes. Subd. e, sec. 1261, and subd. g, sec. 1273, Agricultural Code.

A careful study of the record discloses that the defenses urged during the trial were: That the grapes were shipped and marketed through and by Pacific Coast Fruit Distributors, which corporation was licensed as a commission merchant; that they were to be so shipped was known to Miss Jenkins at the time defendant solicited the grapes from her; that most of the grapes delivered after the contract was signed were graded U. S. No. 2 Juice instead of U. S. No. 1 Juice as provided in the contract so that the contract was in reality abandoned and nothing was actually done under it.

Defendant now argues that he was in fact acting as agent for Pacific Coast Fruit Distributors; that this was known to Miss Jenkins at all times material here; that he neither solicited the grapes nor contracted for them for himself but for his disclosed principal; that as his principal was licensed and as this was disclosed to Miss Jenkins the solicitation was in law by the principal and delivery was made to it; that, therefore, defendant did not act as a commission merchant.

Defendant urges that he was deprived of this, his only defense, by rulings of the trial court on objections to questions put by him, and in the refusal of the trial court to grant a continuance to enable him to secure the presence of two witnesses by whom he expected to establish it.

[1] Whether or not the defense now sought to be urged would have been legally sufficient need not be decided here. Our study of the record has convinced us that

it was not urged in the trial court and cannot, under the record, now aid defendant.

When the contract we have quoted was offered in evidence, counsel for defendant made the following objection to it: "If the Court please, I want to object to the offer at this time merely for the purpose of laying the foundation to later show that the agreement was not carried out or entered into. I want to—I am making the objection to its introduction at this time on the grounds that the agreement never went into effect. Of course, that is not before the Court, but I want to be in position to show that at a later time and not be precluded by not making my objection at this time."

Defendant complains because the trial court sustained an objection to the following question asked of Miss Jenkins on cross-examination: "And didn't you know on October 2nd, when you signed that contract, and before that time, that these grapes were being shipped by the Pacific Coast Fruit Distributors?" During the argument on the objection counsel for defendant stated: "If the Court please, I made objection to that agreement on the ground that I wanted to be able to show that that agreement never went into effect. * * * I think we have the right to go into who is actually the party to that agreement, and propose to show who those grapes were shipped through, that Miss Jenkins knew all about it all the time, that she even went farther than that and checked up at her bank to determine the financial responsibility of the parties to whom the grapes were being shipped, and was satisfied with that check, and that they were shipped by a regularly licensed commission merchant, broker and dealer."

T. R. Sunshine, president and manager of Pacific Coast Fruit Distributors, was subpœnæd as a witness but was not present at the trial. A continuance was asked and counsel for defendant made the following proffer of proof: "We offer to prove by Mr. Sunshine that he handled all of the grapes of Miss Jenkins, that he was a licensed dealer, commission merchant, a broker, and that that was handled, they were handled by him through an agreement or understanding with Mr. Montgomery and that all the cars were shipped by him from Hanford to various points, that he sold them and accounted for the entire proceeds thereof. * * * And that he authorized Mr. Montgomery, through the S. P. Railroad to sign the name of Pacific Coast Fruit Distributors to the bills of lading offered in evidence by the defendant and marked for identification."

The absence of A. M. Bruce was made one of the grounds of the motion for the continuance. The following proffer of proof was made: "I offer to prove by Mr. Bruce, A. M. Bruce, that he had informed Miss Jenkins, Miss Jenkins understood before any grapes were shipped or disposed of, that they were to be handled through Pacific Coast Fruit Distributors, shipped by them, returns made by them;".

Many more quotations could be made from the record to the same effect. Much of the documentary evidence offered by defendant but excluded by the trial court strongly negatives the theory that in negotiating for the grapes defendant was merely acting as agent for Pacific Coast Fruit Distributors, a disclosed principal. There are four checks for $300 each, payable to Miss Jenkins, signed by defendant individually and not as an agent. Two of them were cashed. There are several inspection certificates in which defendant is named as the shipper.

Defendant called the bookkeeper of the Pacific Coast Fruit Distributors as his witness. She testified that "Pacific Coast Fruit Distributors handled some grapes in which the defendant, C. R. Montgomery, was interested, that came from Hanford, * * *" that the Pacific Coast Distributors "do not purchase grapes" that its "dealings were solely with Mr. Montgomery".

[2] We can find no error in excluding evidence that the grapes were shipped through or by Pacific Coast Fruit Distributors as that evidence had no bearing on the real issues presented to the trial court nor has it any bearing on the question now argued, namely, that in contracting for the grapes defendant did not act for himself but as agent for Pacific Coast Fruit Distributors, his disclosed principal. Admitting that the grapes were shipped through or by that corporation would not of itself establish any such agency any more than proof of which particular common carrier was employed to transport them would have shown that the carrier was a principal and defendant its agent. The testimony expected to be

elicited from Mr. Sunshine and Mr. Bruce would have had no greater effect.

Subdivision "e" of section 1261 of the Agricultural Code contains the following: "The term 'commission merchant' means any person who shall receive on consignment or solicit from the producer thereof any farm product for sale on commission on behalf of such producer,".

Section 1263 of the same Code makes it unlawful for any one to act as a commission merchant without first having procured a license so to do. Section 1273 makes it a misdemeanor for any one to fail to comply with the provisions of the chapter containing those sections.

[3] It is clear that in so far as this case is concerned the necessary elements of the offense charged are, the solicitation of the grapes from Miss Jenkins for sale on commission, and the failure of defendant to have a license at that time to act as a commission merchant.

[4] These elements were both proved beyond a reasonable doubt and without conflict in the evidence. Because he expected to ship the grapes through or have them shipped by a licensed commission merchant had no bearing on his act of solicitation. Of itself such intention would not even tend to prove that in soliciting the grapes he was acting as agent for a disclosed principal or that the act of soliciting was in effect the act of the supposed principal.

[5, 6] When questions are asked of a witness there can be no error in sustaining objections to them where there is nothing to indicate to the trial judge that the expected answers might have a material bearing on the issues being tried As it was not even suggested during the trial that defendant was, or claimed to be acting as agent for Pacific Coast Fruit Distributors in his transactions with Miss Jenkins, the trial court properly sustained the objections. If it had been proved that Miss Jenkins knew that defendant proposed to have the grapes shipped through or by Pacific Coast Fruit Distributors it would have constituted no defense as it would not have tended to establish the agency. The act of shipping through or by that corporation was all that defendant attempted or offered to prove.

[7] Nor was it any defense to prove that some of the grapes delivered were U. S. No. 2 Juice. More than two of the cars were U. S. No. 1 Juice. That part of the grapes delivered and accepted were below the specified grade might be urged in a civil action but cannot constitute a defense here.

[8] Further, the testimony produced by defendant and the documentary evidence offered by him and excluded shows rather clearly that he contracted for the grapes for himself as the principal and not as an agent for a disclosed principal; that Pacific Coast Fruit Distributors was used to distribute and market the grapes for defendant. Should the judgment be reversed and the case be retried, this evidence could be admitted and would be strong against him. This evidence, with that now in the record, would negative any defense of agency. It is evident that there has been no miscarriage of justice so the judgment should not be reversed. Sec. 4½, art. VI, Const.

The judgment and order denying the motion for new trial are affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

41 Cal.App.2d 566

ROTHNEY v. ROTHNEY.

Civ. 6459.

District Court of Appeal, Third District, California.

Nov. 20, 1940.

Rehearing Denied Dec. 19, 1940.

Hearing Denied Jan. 16, 1941.

1. Deeds 🔑3

An effective deed requires that there be a grantor, a grantee, delivery of the instrument, and acceptance thereof.

2. Deeds 🔑66

"Delivery" of a deed is a question of fact which is to be determined from the circumstances surrounding the particular transaction.

See Words and Phrases, Permanent Edition, for all other definitions of "Delivery".

3. Deeds ⚿56(2)

An intention to pass immediate and irrevocable title to the property interest is an essential element of a "delivery" of a deed.

4. Deeds ⚿56(1)

The use of term "delivery" as simply designating transfer of physical custody or possession of a deed must be distinguished from use of the term in legal contemplation as constituting the necessary "delivery" required for execution of a deed.

5. Deeds ⚿61

Where father and son owning property as tenants in common each prepared a deed purporting to convey to other his undivided one-half interest, the depositing of deeds with an attorney accompanied by written instruction that attorney was to deliver "either of the deeds" to the one which survived the other, without providing for disposal of other deed, did not constitute a valid "delivery".

6. Deeds ⚿56(2), 142

A grantor can insert reservations and conditions in the deed itself which limit the estate granted, even reserving right to revoke instrument or sell property conveyed, but necessity of an intention to pass a present interest to grantee at time of delivery of deed is not dispensed with because of nature of interest conveyed.

◆

Appeal from Superior Court, Sutter County; Arthur Coats, Judge.

Suit by Rita Inez Rothney, administratrix of the estate of Kenneth Rothney, deceased, against George Rothney to quiet title to realty. From judgment entered, both the plaintiff and defendant appeal.

Reversed with directions.

Hearing denied; SHENK and HOUSER, JJ., dissenting.

Homer Lingenfelter, of Marysville, Butler Van Dyke & Harris, of Sacramento, and Arthur S. Powell, of Marysville, for plaintiff-appellant.

Brobeck, Phleger & Harrison, of San Francisco, and Hewitt & McBride, of Yuba City (Moses Lasky, of San Francisco, of counsel), for defendant-respondent.

Mr. Justice THOMPSON, delivered the opinion of the court.

This is an appeal on the behalf of both plaintiff and defendant from a judgment entered in this suit to quiet title.

The plaintiff is the administratrix of the estate of Kenneth Rothney, deceased. This suit was brought claiming the right to possession of an undivided one-half interest in and to certain real property which is the subject matter of this action. The defendant, George Rothney, the father of Kenneth, the deceased, denies that plaintiff has any right, title or interest in such real property.

The facts concerning this action are not in dispute and may be briefly stated as follows: The wife of George Rothney and the mother of Kenneth, owned the realty involved as separate property. Upon her death, George and Kenneth took title to this property by succession as tenants in common. Father and son agreed that the property should remain as a unit in their family, and sought to secure that result without the necessity of probating the estate in the event of the death of either party. It was intended that the property should belong unconditionally to the survivor. No plan was agreed upon between Mr. Rothney and his son, but for the purpose of accomplishing their desire, they went to their attorney. The attorney was informed that they desired the property to belong to the survivor at the death of either of them. The attorney was then requested to prepare deeds or instruments to effectuate the desired result. Two deeds were accordingly prepared under the direction of the attorney. The respective deeds were signed and acknowledged at that time. A letter of instruction, addressed to himself, was also prepared at that time by the attorney. The two deeds and the letter of instructions were then handed to the attorney, placed in an envelope and deposited in a safe in his office. It was understood between George and Kenneth Rothney and their attorney that the instruments should remain in the safe until the death of either George or Kenneth, and that when one or the other died, the deed running from the deceased to the survivor should be handed to the survivor. There was no instruction or agreement respecting the disposition of the other deed. Apparently there was no discussion in regard to this other deed.

The foregoing transaction between George and Kenneth Rothney and their attorney took place on the 11th day of February, 1930, in the office of the attorney. On the following day, Kenneth Rothney was married to the plaintiff in this action.

A daughter was born to them on March 4, 1931. Kenneth Rothney, the son, died July 20, 1938, at Sacramento. Shortly thereafter George Rothney called upon their attorney, who gave instructions for delivery of the proper deed to the father. Pursuant to the letter of instructions the deed from Kenneth to his father was handed to Mr. Rothney. There is no evidence regarding the disposition of the other deed. Apparently it remained in the safe.

The deeds running to George and Kenneth Rothney, respectively, purported to convey the undivided one-half interest which each party held as a tenant in common. There were no restrictions, reservations or conditions appearing in the deeds themselves. As to the respective interests held by each party, the deeds purported to grant an unconditional fee. The written instructions, accompanied by the deeds, prepared by the attorney and deposited in the safe, read as follows:

"Marysville, California.
"February 11th, 1930.

"Mr. Warren Steel,
"Attorney at Law,
"Marysville, California.

"Dear Sir:

"We, the undersigned, hand you herewith two deeds, dated this day, conveying certain real property in the County of Sutter, State of California, from each of us to the other.

"These deeds you are instructed to place in your safe and hold them, with the further instruction that you are to deliver either of the deeds to the one of us which survives the other.

"Very truly yours,
"George A. Rothney
"Kenneth G. Rothney."

The judgment of the lower court fails to support the contentions made by either party. The plaintiff claims a right of title in herself and daughter to the undivided one-half interest held by Kenneth, upon the theory that the deeds running from George and Kenneth were never legally delivered, and that the interest held by Kenneth at the time of his death passed by right of succession to plaintiff and her daughter. The defendant takes the position that the parties, George and Kenneth Rothney, intended an immediate delivery of the deeds and conveyance of title of their respective interests in the property, to each other, such interests being vested but dependent upon survivorship of the grantees. The property interest so conveyed, according to the contention of the defendant, is termed a vested contingent remainder. It is contended that both grantees received a vested interest in the property which was to become absolute upon the death of the grantor; that the interest held by the deceased grantor would accordingly terminate or divest in favor of the survivor. Defendant's position, if well taken, thus leads to the conclusion that George Rothney, the survivor, is entitled to the entire property as owner in fee. It is requested that the court reform the deeds to show the true intent of the parties, and that such reformed deeds be enforced so as to quiet title to the entire property in defendant, George Rothney.

The trial court concluded that the deeds deposited by the parties did effect a present passing of title. It was decreed, however, that a life estate was reserved by each grantor, and that the death of Kenneth terminated any and all interest which Kenneth originally had in the property described under the deed from himself to his father. As to the one-half interest described in the deed from George to Kenneth, it was determined this property passed to Kenneth and his heirs and assigns, subject to a life estate in George Rothney.

[1-4] The primary consideration before this court is the determination as to whether any transfer of title was effected by the transaction which took place between the parties on February 11, 1930. If, under the circumstances presented, it be concluded that no transfer of title took place between George and Kenneth Rothney, there is no necessity for considering the request to reform the deeds. An effective deed, transferring title, requires that there be a grantor, a grantee, delivery of the instrument and acceptance thereof. We are concerned only with the requirement of delivery. Delivery is a question of fact which is to be determined from the circumstances surrounding the particular transaction. The intention to pass immediate and irrevocable title to the property interest is the essential fact for consideration. It should be stated that there is a vital distinction between the use of the term delivery, which might simply designate the mere transfer of physical custody or possession of the deed, and the use of the term in legal contemplation as con-

stituting the necessary delivery required for "execution" of a deed. This distinction must be kept in mind in considering the circumstances presented by this action.

[5] A consideration of the attendant circumstances leading up to and transpiring at the time of the preparation of the deeds and their deposit with the attorney, together with a consideration of the written instructions which were acquiesced in by the parties to the deeds, and which instructions unquestionably conformed to the wishes of George and Kenneth Rothney, leads to the definite conclusion that there was a failure of delivery of the instruments. There having been a failure of delivery, neither George Rothney nor Kenneth Rothney conveyed any interest in the property to each other.

[6] In many cases the intention to pass an immediate and irrevocable title, which is necessary for a valid delivery, is plainly indicated, while in other cases where the intent is of necessity inferred from equivocal circumstances the problem becomes most difficult. In the present case, the facts presented, which include the specific written instructions, clearly negative an intention on the part of either George or Kenneth Rothney to pass a present interest in their property. As stated, the act of delivery must be completed with the intention to pass a present interest in the property, and is a necessary element even though the conveyance is conditional in its provisions. A grantor may insert reservations or conditions in the deed itself which limit the estate granted, even reserving the right to revoke the instrument or sell the property conveyed, but the necessity of an intention to pass a present interest to the grantee at the time of the delivery of the deed is not dispensed with because of the nature of the interest conveyed. Tennant v. John Tennant Memorial Home, 167 Cal. 570, 140 P. 242. Consequently, even though a separate written instruction may be effective as a limitation upon the estate granted under a deed absolute on its face and not regarded solely for the purpose of determining the necessary intention required for delivery, which is questionable, the instruction itself in the present case prevents the conveyance of a present interest under either deed. The instructions called for the delivery of "either of the deeds" to the survivor. At that time it was not known which one of the deeds would be claimed, as both parties were alive and only the deed prepared in favor of the survivor was to be delivered. No provision was made for the disposal of the other deed. It is uncontradicted that the parties intended, as evidenced by the testimony of George Rothney and their former attorney, that the entire property should be owned by the survivor. The evidence fails to support a conclusion that the parties intended to convey any present interest with reservation of a life estate. The evidence also fails to support the theory of the defendant; that is that the parties intended to create contingent remainders with life estates reserved. The stated intention of the parties, as expressed in the written instructions, called for the delivery of only one of the deeds. Clearly, it was not intended that any interest should pass under the other deed or the parties would not have used the term "either" in reference to the deed which should be delivered. By the use of the term "either" the parties have conditioned the passing of title under both deeds and consequently it is impossible to conclude that a valid delivery necessary to the execution of a deed was effective so as to pass any property interest.

The evidence introduced at the trial of this action fails to support a conclusion that any property interest passed by deed between either George or Kenneth Rothney. We assume that the citing of authority upon that subject is unnecessary. Nevertheless, there are two cases in which opinions rendered by the Supreme Court do by analogy definitely support our conclusion in that regard. In Stone v. Daily, 181 Cal. 571, 185 P. 665, the written instructions in regard to the disposition of the deed were in effect quite similar to the instructions under consideration in the present suit. The instructions in the Stone case, which were prepared by an attorney, read as follows:

"We George L. Daily and Rebecca J. Daily, husband and wife, do hereby deposit this sealed envelope and its contents in the Bank of Lake at Lakeport, Cal., and we and each of us do hereby instruct the said Bank of Lake to hold the said envelope and its contents so long as we may live; and during such time not to deliver the same to either of us nor to any other person, nor suffer the seals to be broken;

upon the death of either of is to deliver the same to the survivor on demand.

"Dated, January 11, 1900."

The court held there was a failure of delivery of the deed, even though, according to the testimony given at the trial, Mrs. Daily, prior to the time of the deposit of the deed with the bank, handed the deed to Mr. Daily, saying, "Here, George, is the deed, and now the property is your's." The court used the following language at page 574 of 181 Cal., 185 P. at page 666 of the opinion in determining the effect of the written instruction: "Upon the foregoing facts it is plain that if the delivery which must be relied on in order to make the deed effective was the final delivery to the bank under the instructions indorsed upon the envelope, there was no such absolute delivery as must exist in order to give the instrument life. The instructions on the envelope determine the character of the delivery, and make it one conditional upon Daily surviving his wife. If he did not survive her, the deed was to be returned to her, and the purpose for which this provision for a return to the grantor was made was very *evidently* that the deed should not take effect in the event of the grantee dying before the grantor."

The provision for the return of the deed to the survivor in the Stone case prevented an absolute delivery, just as the provision for delivery of "either of the deeds" precluded an absolute delivery in the present suit. The provision for delivery of "either of the deeds" to the survivor obviously presumes that the other deed shall be ineffective. In fact, a delivery of the deed in the Stone case, could more readily be upheld than a determination of delivery in the present case, as the instructions under consideration in the present suit call for delivery of "either of the deeds", and at the time of the transaction on February 11, 1930, it was impossible for either George or Kenneth Rothney to have then had the intention to presently convey title. It was not known at that time which deed would be delivered in conformity with the instructions.

The other case presenting the situation of delivery of a deed conditioned upon survivorship is Long v. Ryan, reported in 166 Cal. 442, 137 P. 29. The instructions for delivery in that case reads as follows: "This deed you will hold until July 22, 1910, at which time, if I be then living you will deliver the same to me, but if I should die in the meantime, you will thereupon immediately upon my death deliver said deed to my daughters Mary N. Ryan and S. Maude Ryan."

The instructions were construed by the court, at page 445 of 166 Cal., 137 P. at page 30 of the opinion, as follows: "In the present case the intent that the title should not pass upon the condition of the survival of the grantor until after July 22, 1910, was expressed in the writing itself. Her intent, therefore, must have been that upon that contingency there should be no delivery of the deed, and that it should be ineffectual to pass title, but that such title was to remain vested in the grantor."

It is our opinion that the transaction of February 11, 1930, fails to disclose any intention on the part of either George or Kenneth Rothney to pass a present interest in their respective properties, and that the written instructions prepared at that time which conformed to their wishes, precluded any possibility of the passing of a present interest under either deed. We also believe that the cited cases are controlling and dispel any doubt as to the invalidity of the delivery of the deeds in the present suit.

There having been a failure to pass title or interest under the respective deeds of either George or Kenneth Rothney, there is no need to discuss the application for reformation of deeds.

The judgment is reversed and the trial court is directed to enter a decree granting immediate possession of the real property described in the complaint to the appellant, Rita Inez Rothney, as administratrix of the estate of Kenneth Rothney, deceased, for the purpose of administration, and that Rita Inez Rothney and her daughter, Mary Adella Rothney be adjudged to be the owners in fee of the undivided one-half interest in said property as heirs at law of said deceased, free and clear of any right, title or interest therein which is claimed by the defendant George Rothney.

We concur: PULLEN, P. J.; TUTTLE, J.

41 Cal.App.2d 512

SMITH–GOLDEN, Inc., v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

PATTERSON v. SAME.

CENTRAL CHEVROLET CO. v. SAME.

Civ. 12713, 12720, and 12755.

District Court of Appeal, Second District, Division 2, California.

Nov. 18, 1940.

1. Witnesses 🔑16

An affidavit alleging the material facts necessary for issuance of subpœna duces tecum, but only on information and belief, without setting forth supporting facts, is not sufficient to sustain order for issuance of subpœna duces tecum. Code Civ.Proc. § 1985; Const. art. 1, § 19.

2. Witnesses 🔑16

As a "condition precedent" to issuance of subpœna duces tecum before trial, an affidavit must be presented to trial court showing facts set forth in statute as prerequisite to issuance of such order. Code Civ.Proc. § 1985.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition Precedent".

3. Witnesses 🔑16

Where association of automobile dealers, one purpose of which was to disseminate information concerning the industry, sought subpœna duces tecum against competitors of members of the association, every safeguard should be afforded to protect defendants from disclosing information that might be used to their detriment, unless it was clear that such information was relevant to one or more issues in the pending actions. Code Civ.Proc. § 1985; Const. art. 1, § 19.

◆

Original applications by Smith-Golden, Incorporated, by H. W. Patterson, and by the Central Chevrolet Company, against the Superior Court of the State of California in and for the County of Los Angeles and Benjamin J. Scheinman, Judge thereof, for writs of mandate requiring respondents to vacate orders for the issuance of subpoenas duces tecum and to grant motions to quash such subpoenas. Petitions consolidated on stipulation.

Writs of mandate granted.

Alford P. Olmstead and Arthur B. Armstrong, both of Los Angeles, for petitioner Smith-Golden, Inc.

A. J. Getz, of Los Angeles, for petitioners H. W. Patterson and Central Chevrolet Co.

J. H. O'Connor, Co. Counsel, Douglas De Coster, Deputy Co. Counsel, Dasteel & Lawton, and H. W. Steiner, all of Los Angeles, for respondents.

McCOMB, Justice.

These are original applications for writs of mandate requiring respondent Superior Court to vacate orders for the issuance of subpoenas duces tecum and to grant motions to quash the same. The above entitled petitions were consolidated on stipulation in this court, since the facts and issues are the same, for the purpose of hearing, argument, briefs, and decision.

These are the essential facts:

The Institute of Automobile Dealers, Inc., filed actions against each of petitioners, seeking to enjoin them from violating a provision of the Unfair Practices Act (Stats. of 1913, p. 508, as amended, Act 8781, Deering's General Laws of California [1937] Vol. Two, p. 4157.) Thereafter the clerk of the respondent court issued subpoenas duces tecum requiring petitioners to produce their books and records upon the taking of certain depositions. Petitioners made a motion that the subpoenas duces tecum be quashed in toto. This motion was denied except in certain particulars not necessary for us to now consider. The only affidavits used or filed in support of the applications for subpoenas duces tecum are affidavits of attorneys for the plaintiffs, wherein the material averments for the issuance of the subpoenas duces tecum are made upon the information and belief of the affiants and no facts are set forth to show the basis of affiants' information or belief.

This is the sole question necessary for us to determine:

Is an affidavit, wherein the material facts necessary for the issuance of a subpoena duces tecum are alleged only on information and belief without setting forth supporting facts, sufficient to sustain an order for the issuance of a subpoena duces tecum?

[1, 2] This question must be answered in the negative. The law is established in California that, as a condition precedent to

the issuance of a subpoena duces tecum before trial, an affidavit must be presented to the trial court showing the facts set forth in section 1985 of the Code of Civil Procedure, which are prerequisite to the issuance of such an order. The allegations in such an affidavit are insufficient, if they are based solely upon the information and belief of the affiant and there are no facts alleged to indicate the basis of affiant's information and belief. Ex parte Clarke, 126 Cal. 235, 240, 58 P. 546, 46 L.R.A. 835, 77 Am.St.Rep. 176; Kullman, Salz & Co. v. Superior Court, 15 Cal.App. 276, 286, 114 P. 589; Shell Oil Co. v. Superior Court, 109 Cal.App. 75, 80, 292 P. 531; see, also, Hupp v. Superior Court, 22 Cal. App. 162, 166, 133 P. 987; Funkenstein v. Superior Court, 23 Cal.App. 663, 665, 139 P. 101.

In Ex parte Clarke, supra, Mr. Justice McFarland, speaking for our Supreme Court, says at page 240 of 126 Cal., at page 548 of 58 P., 46 L.R.A. 835, 77 Am.St. Rep. 176: "* * * In Morrison v. Sturges, 26 How.Prac. [N.Y., 177] 179, the court says: 'It is not enough that the party believes or is advised that the paper contains material evidence. Facts must be shown to support such belief.'"

Again in Kullman, Salz & Co. v. Superior Court, supra, it is said at page 286 of 15 Cal.App., at page 593 of 114 P.: "* * * Nor is it enough, as is said by the court in Morrison v. Sturges, 26 How. Prac. (N.Y.) 179, 'that the party believes or is advised that the paper contains material evidence. Facts must be shown to support it.'"

The rule as announced in the two foregoing decisions is again reiterated in Shell Oil Co. v. Superior Court, supra.

Since the facts in the affidavits presented to the court in the instant case are predicated solely upon the information and belief of the affiants, unsupported by facts, the trial court should have made an order quashing the subpoenas duces tecum theretofore issued. The foregoing rule is consonant with the right of the people to be secure in their personal papers and effects against unreasonable seizure and search, as guaranteed by article I, section 19, of the Constitution of the state of California. The present case affords an excellent illustration of the necessity of strictly construing the foregoing constitutional provision for the protection of private individuals.

[3] The Institute of Automobile Dealers, Inc., is an association formed avowedly, as shown by its articles of incorporation, "to assist its membership by making general surveys from time to time in order to determine the actual cost of doing business in this industry, to promote and establish and maintain uniformity and equity in customs and usages in the field of operations of its membership; to acquire, preserve and disseminate valuable information concerning its industry". Petitioners are competitors of the members of the association seeking the subpoenas duces tecum. It is, therefore, obvious that information which may be disclosed by the books and records of petitioners may be used to their detriment by their competitors. Thus, every safeguard should be afforded to petitioners to protect them from making disclosures of such information, unless it is clear that such information is relevant, competent, and material to one or more issues in the actions now pending in the Superior Court.

For the foregoing reasons it is ordered that the writs of mandate issue in accordance with petitioners' prayers.

We concur: MOORE, P. J.; WOOD, J.

WHITECHAT et al. v. GUYETTE.*

Civ. 2537.

District Court of Appeal, Fourth District, California.

Nov. 20, 1940.

Hearing Granted Jan. 16, 1941.

1. Evidence 🔑591

In action for death of one riding in defendant's automobile which overturned, plaintiffs were not bound by all testimony of defendant, called as adverse witness by plaintiffs under statute, on question whether deceased was guest or passenger for compensation. Code Civ.Proc. § 2055; Vehicle Code, § 403, St.1935, p. 154.

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* Subsequent opinion 115 P.2d 814.

2. Trial 🔑139(1)

The jury is sole judge of weight, effect, and sufficiency of evidence to establish any fact, subject to exercise of legal discretion.

3. Evidence 🔑588, 591

The jury is sole judge of witnesses' credibility and may believe all testimony of defendant, called as adverse witness by plaintiffs under statute, or believe part and reject parts thereof. Code Civ.Proc. § 2055.

4. Appeal and error 🔑930(1), 996

On appeal, all legitimate and reasonable inferences must be indulged in support of judgment appealed from, and, when two or more inferences can reasonably be deduced from facts, reviewing court is without power to substitute its deductions for those of trial court.

5. Automobiles 🔑245(24)

In action for death of one riding in defendant's automobile which overturned, whether deceased was guest or passenger for compensation *held* fact question for jury under evidence. Vehicle Code, § 403, St.1935, p. 154.

6. Automobiles 🔑181(2)

To be "passenger" in automobile does not necessarily imply that there should be payment in money for transportation, but such status may be created by express or implied contract either between carrier and passenger or between carrier and third person for passenger.

See Words and Phrases, Permanent Edition, for all other definitions of "Passenger".

7. Automobiles 🔑244(20)

In action for death of one riding in defendant's automobile which overturned, evidence that purpose of trip was to take occupants of automobile to a meeting of an organization of which occupants were members, and that defendant received money for making the trip which was paid by the organization, supported jury's finding that deceased was not a "guest", but a "passenger" for compensation, and hence recovery could be had without proof of willful misconduct or intoxication of defendant required by the guest statute. Vehicle Code, § 403, St.1935, p. 154.

See Words and Phrases, Permanent Edition, for all other definitions of "Guest".

8. Automobiles 🔑181(1)

The automobile guest laws are in derogation of common law and must be construed strictly, and case should not be held within provisions of such statutes, unless such fact clearly appears. Vehicle Code, § 403, St.1935, p. 154.

9. Appeal and error 🔑930(1)

An appellate court must accept as true all evidence tending to establish correctness of finding or verdict on which judgment appealed from is based, consider evidence in aspect most favorable to prevailing party, and give such party benefit of every reasonable inference supporting his claim.

10. Automobiles 🔑244(20)

In action for death of one riding in defendant's automobile as result of overturning thereof, evidence *held* sufficient to support jury's finding that defendant was negligent in operating automobile not in safe mechanical condition because of rotten inner tube of one tire, driving at excessive speed, and failing to keep automobile under control and use proper care in bringing it to stop after sensing fact that such tube was leaking. Vehicle Code, §§ 511, 513, 679, St.1935, pp. 176, 177, 225.

* * *

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Action by David Michael Whitechat, a minor, and another, against Ervine O. Guyette, to recover damages for the death of David Whitechat. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Chester O. Hansen, of Fresno, for appellant.

Rae B. Carter and John D. Chinello, both of Fresno, for respondents.

GRIFFIN, Justice.

This is an action brought by the plaintiffs and respondents Anne Whitechat and David Michael Whitechat, as surviving widow and minor child, respectively, and as the only heirs at law of David Whitechat, deceased, for his alleged wrongful death as the result of an automobile accident involving an automobile owned and operated by the defendant and appellant Ervine O. Guyette. The case was tried before the court with a jury, which returned a verdict in favor of plaintiffs and respondents and against the defendant and appellant in the sum of $8,000. This is an appeal by the defendant and appellant from that judgment.

David Whitechat, aged 25, was killed on August 17, 1938, in the daytime, when the automobile in which he was riding overturned on highway No. 99, about 6 miles north of Fresno. It was a Plymouth sedan, 1933 model. Appellant purchased the car in February, 1938, from a dealer in used cars. At the time of purchase each car wheel was equipped with a used tire and used inner tube. The car was also equipped with a spare tire. All tires were retreads. In response to an inquiry made by appellant, one of the salesmen of the used-car concern said that all of the tires and inner tubes were in good condition. From later observation appellant learned, however, that the spare tire was in bad condition. He made no examination or inspection of the inner tubes. Appellant encountered tire trouble within a short time after purchasing the car. The left rear tire and inner tube were in such bad condition that they were thrown away following a puncture. The spare tire and tube were also thrown away because of their bad condition. Appellant thereupon bought two new tires and tubes and reassembled the tires on the car. The new tires and new tubes were placed on the front wheels. The tire and tube originally on the right rear wheel became the spare, and the tires and tubes originally on the front wheels were shifted to the rear wheels. Appellant made no check as to the condition of the inner tubes at that time. When asked if he had requested the tire people to check the inner tubes he replied: "I don't remember whether I did or not."

The other occupants of the car besides appellant were David Whitechat, Fred Suglian, Frank Bergon and Harry Bradley. All were members of the Young Men's Institute at Fresno. All but appellant were officers of the organization. He was a member of the executive committee. Bergon was an officer of the grand council. A meeting of the officers of the organization was scheduled at Stockton. The officers riding in the car were the representatives of the organization from Fresno. As a member of the grand council, Bergon was entitled to a fixed sum for mileage from the organization. This he agreed to pay to appellant Guyette for making the trip and carrying the officers to Stockton. Appellant was to receive this payment from the grand council.

While driving on a very warm day at 50 miles an hour on a broad, level, straight and dry highway, appellant encountered tire trouble. The left rear tire apparently went flat gradually. Appellant heard air escaping from the tire but did not apply the brakes on his car. For 300 feet or more he wrestled with the car in an endeavor to keep it on the highway and in its proper traffic lane. The tire ultimately came off the wheel. He lost control of his car. It left the highway, headed for a telegraph pole and overturned. Three of the occupants, including David and appellant, were thrown out of the car. When the car came to a stop it was facing south and the right wheel of the car was on top of David's head. The resulting injury caused his death.

When the accident occurred the inner tube in the left rear tire was "rotten" and in dangerous condition. A section thereof showing five or six patches was exhibited to the jury and admitted in evidence. A demonstration was made to the jury as to the ease with which the inner tube could be torn.

Appellant seeks a reversal of the judgment on the following grounds: (1) "The evidence is insufficient as a matter of law to support a judgment in favor of the plaintiffs and respondents, for the reason that the evidence most favorable to the plaintiffs and respondents shows that as a matter of law, David Whitechat was technically a 'guest' and was not a 'passenger for compensation', as alleged in plaintiffs' complaint, the plaintiffs' complaint charging the defendant and appellant with negligence and not with either wilful misconduct or intoxication," citing section 403 of the Vehicle Code, St.1935, p. 154, and McCann v. Hoffman, 9 Cal.2d 279, 70 P.2d 909. (2) "The evidence is insufficient as a matter of law to support the implied finding of the jury that the defendant and appellant was negligent", citing Bolin v. Corliss Co., 1928, 262 Mass. 115, 159 N.E. 612; Coppedge v. Blackburn, 15 Tenn.App. 587; and Kemp v. Stephenson, 139 Misc. 38. 247 N.Y.S. 650.

We will discuss these foregoing matters, or points, raised on this appeal, in the order in which they are stated.

All of respondents' testimony as to the status of David Whitechat, in reference to the nature of his occupancy of the car, came from the appellant himself under section 2055 of the Code of Civil Procedure. Pertinent portions thereof are:

"Q. (By Mr. Carter): * * * Now, you say you were driving these boys up there to that meeting? A. That is right.

"Q. And the Y. M. I. was paying for your gas and oil, a certain amount of money for driving up there? A. That is right. * * *

"Q. $5.00? A. Yes, sir."

Appellant thereafter, in his own behalf, on cross-examination, testified in part as follows:

"Q. (By Mr. Chinello): * * * it was the president of the organization * * * that asked you to take your car? A. Yes, sir.

"Q. All right. A. And I told him that working late at night like I had been, that I would be unable to go, because I had work to do. So the discussion went on, still went on and they still had not secured an automobile. So I finally consented to take my automobile, and Frank Bergon got up shortly afterwards and told me he would be willing to give me his expense money, given to him by the Grand Council of the organization, to defray my expenses of driving my automobile to Stockton. However, I got up immediately and told him it was not my interest in taking my automobile to Stockton, by taking my automobile to Stockton, it was being done in the interest of the organization and not for the $5.00, or whatever it was, offered for expense money. He in turn said no, it was being given to him for that purpose, and he wanted it to be used as such. * * *

"Q. Did you feel that would help you, by going up there anyway? A. I felt that it would help me in this way: these boys were all friends of mine, I had been very close to all of them, and I would do anything for them, and also for the order, and I did it with that intention in mind."

Respondents argue that the jury may have properly rejected as untrue certain parts of appellant's testimony and in so doing believed that (1) "the trip was not for social or pleasure purposes but was a business trip for the benefit of an organization wherein the participants were interested as officers or members"; (2) "that defendant was to receive money for making the trip and carrying the officers to Stockton"; and (3) "that the money was to be paid by the organization as a business obligation and not as a social amenity", citing Lindemann v. San Joaquin Cotton Oil Co., 5 Cal.2d 480, 503, 55 P.2d 870; Estate of McConkey, 33 Cal.App.2d 554, 562, 92 P.2d 456; Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183; Prager v. Israel, Cal.Sup., 98 P.2d 729; Walker v. Adamson, 9 Cal.2d 287, 70 P.2d 914; Peccolo v. City of Los Angeles, 8 Cal.2d 532, 66 P.2d 651; Duclos v. Tashjian, 32 Cal.App.2d 444, 90 P.2d 140; Jenkins v. National Paint & Varnish Co., 17 Cal.App.2d 161, 61 P.2d 780; Jensen v. Hansen, 12 Cal.App.2d 678, 55 P.2d 1201; Piercy v. Zeiss, 8 Cal.App.2d 595, 47 P.2d 818; Woodman v. Hemet Union High School District, 136 Cal.App. 544, 29 P.2d 257; Sumner v. Edmunds, 130 Cal.App. 770, 21 P.2d 159; Sullivan v. Richardson, 119 Cal.App. 367, 6 P.2d 567; Crawford v. Foster, 110 Cal.App. 81, 293 P. 841; and Boyson v. Porter, 10 Cal.App.2d 431, 52 P.2d 582.

It is further contended that the *main purpose* of the trip was the business activity of the organization whereof those participating in the trip were members or officers, and if there were any doubt existing, the issue was a question of fact which was presented for the determination of the jury and its determination was against the contention of appellant. In this respect they cite McCann v. Hoffman, supra, 9 Cal.2d at page 286, 70 P.2d at page 913, to the effect that "the cases indicate, either by a direct holding or by recognition, that where the relationship between the parties is one of business and the transportation is supplied in the pursuit thereof for their mutual benefit, compensation has been given and the plaintiff is a passenger and not a guest."

It is appellant's contention that the "motivating influence" for furnishing the transportation was not the amount agreed to be paid, but the *main purpose* was their joint benefit or pleasure and exchange of social amenities, and it is argued that the statement made in McCann v. Hoffman, supra, clearly applies, i. e.: "Therefore, where a special tangible benefit to the defendant was the motivating influence for furnishing the transportation, compensation may be said to have been given. But it is not given where the main purpose of the trip is the joint pleasure of the participants. The payment of a portion of the expense, as for gasoline and oil consumed on the trip, is merely incidental and does not constitute the moving influence for the transportation. The provocation for the offer of transportation remains the joint social one of reciprocal hospitality or pleasure."

[1-6] In considering the first question presented, i. e., whether the deceased was a "guest" or "passenger for compensation" within the meaning of those terms (McCann v. Hoffman, supra, 9 Cal.2d at page 282, 70 P.2d 909), we first find that the respondents in this regard rely upon the testimony of the appellant taken under section 2055 of the Code of Civil Procedure. The respondents herein were not bound by all of the testimony of the witness on the subject and subject to the exercise of legal discretion, the jury was the sole judge of the weight, effect and sufficiency of the evidence to establish any fact for which it might be offered. The jury was the sole judge of the credibility of the witnesses and could believe all of the testimony of this witness or believe a part and reject parts, as it might be convinced of the truth or falsity of such testimony. Lindemann v. San Joaquin Cotton Oil Co., supra, 5 Cal.2d at page 503, 55 P.2d 870. We must remember that on appeal all legitimate and reasonable inferences must be indulged in support of the judgment and when two or more inferences can reasonably be deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. Crawford v. Southern Pacific Co., supra, 3 Cal.2d at page 429, 45 P.2d 183. We are convinced from the evidence produced that it cannot be said that the deceased was, as a matter of law, a guest within the meaning of section 403 of the Vehicle Code. It therefore became a question of fact for the determination of the jury whether or not he was a "guest" or a "passenger for compensation". Sullivan v. Richardson, supra, 119 Cal.App. at page 370, 6 P.2d 567. To be a passenger does not necessarily imply that there should be a payment in money for transportation. It may be by contract, express or implied, and the contract need not be between the carrier and the passenger, but may be between the carrier and a third person for the passenger. Sullivan v. Richardson, supra. After full argument on the subject before the jury it returned into court to hear the deposition of appellant reread on this subject and also for further instructions in reference thereto. At the suggestion of the trial judge both counsel consented to have read the following instruction: "You are instructed that if you find from a preponderance of the evidence that the motivating influence for the defendant * * * furnishing transportation to the occupants of his automobile, at the time of the accident, was a social one of reciprocal hospitality and pleasure, then I charge you that the occupants of the defendant's automobile were guests, even if you also find from a preponderance of the evidence that, as an incident to furnishing such transportation, the defendant * * * did, or was to receive a payment on account of expenses, if such expenses were merely incidental to the operation of his automobile on the trip * * *."

After reading section 403 of the Vehicle Code, the court further read the following: "From that code section you will note that the law does not prohibit recovery of damages by any person riding in an automobile for whose ride compensation is being paid regardless of the amount, or of what it constitutes, since it need not be money. With this exception to that code section in mind, you are instructed that the law deems compensation made when compensation is being paid for the transportation by third persons, or when it may be said that the driver receives a direct, tangible benefit from the presence of the passenger. So also compensation is deemed made where a special, tangible benefit to the driver was the motivating influence for furnishing the transportation, or when there was a benefit of a tangible nature being conferred upon the driver by reason of the transportation."

[7, 8] The determination of the question by the jury cannot be said to be unsupported by the evidence, and the conclusion reached in the cases cited by respondent, supra, support the conclusion here reached. In view of the holding which prevails in this state (Prager v. Israel, supra, 98 P.2d 729), that the so-called "guest laws" are in derogation of the common law, and must be construed strictly, and that cases be not held within the provisions of such statutes unless it clearly appears that it should be so determined, we are impelled to hold adversely to appellant's contention in this respect.

[9] The second contention presents an equally close question. Appellant insists that the record does not establish that he failed to exercise ordinary care, and endeavors to defend on the doctrine of un-

avoidable accident. We are again confronted with the rule, as admitted by appellant, that in passing upon the merits of an appeal an appellate court will and must accept as true all evidence tending to establish the correctness of the finding or verdict and must consider the evidence in the most favorable aspect towards the prevailing party and give that party the benefit of every inference that can reasonably be drawn in support of his claim. Cope v. Goble, Cal.App., 103 P.2d 598.

Appellant argues that "the Gods of fortune do not smile on all persons equally. As a result, some people do not have the financial wherewithall to buy new automobiles, or in the event they buy used automobiles, to buy new tires and tubes 'all around'," and contends that appellant acted as a reasonable and prudent person would act under the same or similar circumstances after buying a second-hand car, and that his failure to dismount the rear tires on the automobile on the chance that he might find that the inner tubes were "lifeless", was not negligence. It is further argued that the owner of an automobile does not owe an absolute duty to others that his automobile shall be in a safe condition, but he is only bound to use reasonable care to see that his vehicle is in proper condition to use on the highways, citing Bolin v. Corliss Co., supra; Coppedge v. Blackburn, supra; and Kemp v. Stephenson, supra.

[10] Respondents claim that the record supports the finding that appellant was negligent in several respects: (1) That he violated section 679 of the Vehicle Code forbidding the operation of automobiles that are not in safe mechanical condition and which would endanger the driver or other occupant or any person upon the highway; (2) that he violated the speed laws of the state; and (3) that he failed to keep his automobile under control.

As to the first claim, the rule set forth in 2 California Jurisprudence Ten Year Supplement, section 157, page 234, is quoted to the effect that: "The statute declares that it shall be unlawful for any person to drive a vehicle unless it is in 'such safe mechanical condition' that its operation on the highway shall not endanger the driver or an occupant of the vehicle or any person upon the highway. 'It is the duty of one operating a motor vehicle to see that it is so equipped in order that it may at all times be under control and not become a menace to other traffic on the highway.' Proof having been made that the collision was occasioned by the defective condition of the party's vehicle, the issue as to his responsibility for the happening of the calamity depends upon the showing as to whether he knew or ought to have known of the existence of the defect."

An instruction to this effect was given in Brandes v. Rucker-Fuller Desk Co., 102 Cal.App. 221, 282 P. 1009, where an automobile left the highway and ran upon a sidewalk and injured a pedestrian due to the breaking of a portion of a steering gear, the evidence tended to show that the vehicle had been used to such an extent that its safety was a matter of doubt. See, also, Coppock v. Pacific Gas & Electric Co., 137 Cal.App. 80, 30 P.2d 549; Smith v. Brown, 102 Cal.App. 477, 283 P. 132; Maus v. Scavenger Protective Ass'n, 2 Cal.App.2d 624, 39 P.2d 209; Rath v. Bankston, 101 Cal.App. 274, 281 P. 1081; Silvey v. Harm, 120 Cal.App. 561, 8 P.2d 570; Dunn v. Shamoon, 37 Cal.App.2d 486, 99 P.2d 1113.

The question then presented is this: Do the facts in the instant case come within the rule which would impose negligence on the part of appellant? The force of the evidence on the mechanical condition of the car was that the left rear tire did not blow out but went flat because the inner tube was "rotten" and in a dangerous condition. A portion of the tube bore evidence of five or six patches. It was incapable of retaining air. The jury saw that portion of the inner tube and saw a demonstration of its condition. That the inner tube was not in a safe condition is not open to doubt.

From the evidence it appears that appellant was told by the salesman of the used car, at the time of the sale, that all of the tires and tubes were in good condition. Observation subsequently informed appellant, however, that the spare tire was in a bad condition, notwithstanding the salesman's statement. A few months after the sale, again notwithstanding the salesman's statement, and after a puncture appellant found that the left rear tire and tube were in such bad condition that they also had to be thrown away. This should have placed appellant upon notice of the fact at least, that the salesman's representation as to those particular tires and tubes was somewhat erroneous and of the added fact that if those tires and tubes were in such bad condition the same might be true of the others.

The added and admitted fact that appellant was operating his automobile, of somewhat ancient vintage, with tires and tubes of the kind described, on a warm day, at 50 miles per hour, may have been prima facie unlawful, and the jury had the right to determine that the operation of the vehicle under the surrounding circumstances, at the excessive speed, constituted negligence. Secs. 511 and 513, Vehicle Code.

The record further discloses testimony given by a witness for the respondents who had been in the automobile tire and garage business for 32 years, and who more or less qualified as an expert on the subject. His evidence substantiates respondents' claim that appellant did not use the proper care in bringing the car to a stop after he sensed the fact that the tube was leaking or that he was having tire trouble. It reads in part as follows:

"Q. (By Mr. Hansen): But I am asking you based upon what you saw, that the marks got wider as they went along, that it appears to you as a tire expert which you say you are, that the air did not leave that tire in just one explosion but went out gradually? A. Gradually, yes, sir. * * *

"Q. He (Guyette) said in his deposition that he couldn't control it, he was permitting it to stop without applying the brakes? A. Yes, sir.

"Q. As a tire man you would say that was the proper way to stop a car when you have a flat tire? A. No, sir.

"Q. What do you do, put on your brakes? A. No, sir.

"Q. What do you do? A. The minute you feel that tire flat, if you are going very fast, the best thing to do is slow it down a little and then when you come to your crawling speed you will have to release it, and when you get below that again, you put your brakes on again. * * *

"Q. But you wouldn't say that he did the wrong thing by not using his brakes hard when he felt the tire go down on him? A. Yes, sir, I do. I think that could have been avoided if he had been a little careful in putting them on quickly and using them at the proper time."

In Brandes v. Rucker-Fuller Desk Co., supra, it was held that if the question of whether or not the automobile was being operated in a careless manner was one from which reasonable minds might draw different conclusions, the determination of the jury that it was being carelessly operated was controlling on appeal.

In view of the finding of the jury on the two subjects presented and the conclusions here reached, we see no valid cause for disturbing the judgment rendered.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.

16 Cal.2d 650

LOVELL v. DEYOE et al.

L. A. 17627, 17628.

Supreme Court of California.

Nov. 29, 1940.

Rehearing Denied Dec. 26, 1940.

Appeal and error 🔑628(2)

Motions to dismiss appeals on ground that neither within time prescribed by statute, nor by rule of Supreme Court, did appellant file with clerk of Supreme Court either clerk's or reporter's transcript of proceedings had in the lower court, were denied, where record showed that failure was not directly chargeable to negligence of appellant, who had complied substantially with all requirements, and that the derelictions, if any, were those of the clerk or stenographic reporter of the lower court.

Appeals from Superior Court, Tulare County.

Action by Caroline A. Lovell against J. W. Deyoe, Gertrude K. Hurley, Edward J. Fleischer and wife, consolidated with proceeding by J. W. Deyoe against Edward J. Fleischer and wife, wherein Gertrude K. Hurley filed a cross-complaint against Caroline A. Lovell, Edward J. Fleischer and wife. From judgments entered, Caroline A. Lovell appeals. On motions to dismiss appeals.

Motions denied.

Guy B. Graham, of Los Angeles, for appellant.

Lewis D. Collings and Edgar C. Smith, both of Los Angeles, for respondent.

PER CURIAM.

In each of the above-entitled matters, a motion to dismiss an appeal is presented. The one relates to a judgment that was rendered and entered in an action in the lower court; the other is in respect to an order of nonsuit and an order of dismissal of the action therein by the same court.

The ground urged for the dismissal of each appeal is that neither within the time prescribed by statute, nor by rule of this court, did appellant file with the clerk of this court either the clerk's transcript of the proceedings had in the lower court or the reporter's transcript of the evidence which was adduced on the hearings of the respective causes.

A review of the several affidavits and statements that have been presented by respective counsel and parties hereto (which include more than 50 pages of typewritten matter) leads to the conclusion that each of the motions herein should be denied. Practically, it would serve no useful purpose to reproduce or to here review and analyze the "evidence" that is presented to this court in either or both of the instant proceedings. Suffice it to state that although the nonperformance of appellant in the respects specified in the several motions is not only apparent but in fact is conceded to exist, nevertheless from the record it is equally clear that such failure was not directly chargeable to the negligence of appellant.

An examination of the record discloses the fact that with respect to each of the appeals referred to in the instant motions—as far as appellant was concerned—a substantial compliance was had with regard to each and all of the statutory and other requirements hereinbefore referred to. The derelictions, if any, as set forth in the respective motions, were those of officers of the lower court, to-wit, either its clerk or its stenographic reporter, or both.

In such circumstances each of the motions herein presented should be denied. It is so ordered.

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16 Cal.2d 645

BEARD v. BEARD.

L. A. 16921.

Supreme Court of California.

Nov. 28, 1940.

Rehearing Denied Dec. 26, 1940.

1. Appeal and error 🔑957(1)
Judgment 🔑143(3)

Under statute, the setting aside of a default judgment within six months of entry for inadvertence, mistake, and excusable neglect is largely within trial court's discretion and will not be disturbed on appeal in absence of clear showing of an abuse of discretion. Code Civ.Proc. § 473.

2. Judgment 🔑143(10)

Where defendant in suit upon alimony judgment obtained default judgment on his cross-complaint, trial court's setting aside of default judgment, on ground that plaintiff's attorney's having allegedly been lulled into sense of security by continued negotiations between plaintiff and defendant for settlement out of court was sufficiently reasonable "excuse" for failure to file answer to the cross-complaint, was not an abuse of discretion. Code Civ.Proc. § 473.

See Words and Phrases, Permanent Edition, for all other definitions of "Excuse".

3. Judgment 🔑143(10)

Ordinarily, ignorance of law on part of an attorney is not sufficient ground for setting aside a default judgment under statute authorizing setting aside of a default judgment for "inadvertence, mistake and excusable neglect". Code Civ.Proc. § 473.

See Words and Phrases, Permanent Edition, for all other definitions of "Inadvertence, Mistake and Excusable Neglect".

4. Judgment 🔑143(10)

That plaintiff's attorney applying for setting aside of default judgment obtained by defendant upon his cross-complaint for declaratory relief in suit upon an alimony judgment erroneously stated in court that no answer could be filed to a complaint for declaratory relief, which error on part of attorney would not justify setting aside the default judgment, did not bar assertion of other sufficient grounds of inadvertence, mistake, or excusable neglect which warranted setting aside of the default. Code Civ.Proc. § 473.

5. Judgment 🔑143(2), 145(2), 160, 161

Party applying to have default judgment set aside must show not only a good excuse for his default, but also that he has a meritorious defense to the action, and showing of meritorious defense is usually made either by additional affidavit or by copy of proposed verified pleading required by statute to accompany the application. Code Civ. Proc. § 473.

6. Judgment 🔑160

An affidavit of meritorious defense accompanying an application to have default judgment set aside must state client's belief in merits of case and must show that he has fully and fairly stated the facts of the case to his attorney, and where such an affidavit is presented, the advice of counsel amounts to a prima facie showing of "meritorious defense". Code Civ.Proc. § 473.

See Words and Phrases, Permanent Edition, for all other definitions of "Meritorious Defense".

7. Judgment 🔑161

Notwithstanding affidavit of meritorious defense accompanying plaintiff's application to have default judgment obtained by defendant on his cross-complaint set aside was defective for failure to show that plaintiff had fully and fairly stated all facts of case to her attorney, where proposed answer to cross-complaint accompanied the affidavit, and verification by attorney in absence of plaintiff from state recited that contents of proposed answer were true of attorney's own knowledge, the filing of the proposed answer was a proper method of showing a meritorious defense. Code Civ.Proc. §§ 446, 473.

8. Judgment 🔑161

Where verified proposed answer accompanying plaintiff's application to have set aside default judgment obtained by defendant on his cross-complaint in plaintiff's suit on alimony judgment denied allegation in cross-complaint that defendant had performed terms and conditions of alimony judgment and was entitled to relief from further liability, the issue of fact and law thereby raised constituted a "meritorious defense" justifying setting aside of the default judgment. Code Civ.Proc. § 473.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Mary L. Beard against Frank A. Beard upon an alimony judgment, wherein defendant filed a cross-complaint. A default judgment for defendant upon his cross-complaint was entered, and from an order setting aside the default judgment upon motion, defendant appeals.

Affirmed.

Lois R. Mead and Euler & Subith, all of Los Angeles, for appellant.

Luther F. Opelt, of Los Angeles, for respondent.

TRAYNOR, Justice.

Respondent brought suit against appellant in the superior court of Los Angeles county on a judgment for payment of alimony secured in the circuit court of the state of Oregon. Appellant filed a cross-complaint alleging that the original alimony decree had been entered pursuant to a stipulation between the parties calling for payments for a period of only two years and that such payments had been made, and asking for a determination of his rights and duties under the stipulation and original judgment. The cross-complaint was duly served on respondent's attorney but respondent failed to file an answer. The court entered a default judgment declaring that appellant was "entitled to a satisfaction of said [prior] judgment and a release from further liability thereunder." When respondent's original cause came on for trial the appellant set up the judgment on the cross-complaint in defense and was sustained by the court. At this time the attorney for the respondent stated as his reason for failing to answer the cross-complaint: "You cannot file an answer to a complaint for declaratory relief," whereupon he was informed of his error by the court. Respondent then filed a motion to set aside the default judgment because of inadvertence, mistake and excusable neglect under Code of Civil Procedure, section 473, alleging that continued negotiations between respondent and appellant for a settlement of their claims out of court had lulled the attorney for the respondent into a sense of security by reason of which he failed to file an answer to the cross-complaint. Accompanying the motion was an affidavit by the respondent's attorney to the effect that the respondent had a good defense to the cross-complaint and appended thereto was a proposed answer to the cross-complaint verified by the respondent's attorney. The court granted the motion to set aside the default judgment. The appellant has appealed from the order granting this motion.

[1-4] The right to set aside a default judgment within six months of entry for inadvertence, mistake, and excusable neglect under Code of Civil Procedure, section 473, is a matter largely within the discretion of the trial court and will not be disturbed on appeal in the absence of a clear showing that this discretion has been abused. County of Los Angeles v. Lewis, 179 Cal. 398, 177 P. 154; Waite v. Southern Pacific Co., 192 Cal. 467, 221 P. 204; Brooks v. Nelson, 95 Cal.App. 144, 272 P. 610; Weck v. Sucher, 96 Cal.App. 422, 274 P. 579. In the present case the trial court found that there was a sufficiently reasonable excuse to justify the setting aside of the default judgment, apparently on the basis of respondent's allegation that the continued negotiations between the respondent and appellant had lulled the respondent's attorney into a sense of security. This exercise of discretion presents no apparent abuse to justify interference by this court. While it is true, as appellant contends, that ignorance of the law on the part of an attorney is not ordinarily sufficient grounds for setting aside a default judgment under section 473 of the Code of Civil Procedure (Shearman v. Jorgensen, 106 Cal. 483, 39 P. 863; Kammerer v. Marino, 66 Cal.App. 720, 226 P. 980; Alferitz v. Cahen, 145 Cal. 397, 78 P. 878), the mere fact that respondent's attorney erroneously stated in court that no answer could be filed to a complaint for declaratory relief does not bar respondent from asserting other grounds for setting aside the default which the court might find sufficient.

[5-7] Before the trial court can be called upon to exercise its discretion in relieving from a default judgment, however, the party in default must show not only a good excuse for his default, but also, that he has a meritorious defense to the action. Brooks v. Nelson, supra; Nickerson v. California Raisin Co., 61 Cal. 268; Greenamyer v. Board of Lugo E. S. District, 116 Cal.App. 319, 2 P.2d 848; Doyle v. Rice Ranch Oil Co., 28 Cal.App.2d 18, 81 P.2d 980; Morgan v. McDonald, 70 Cal. 32, 11 P. 350. The showing of meritorious defense is usually made either by additional affidavit or by a copy of the proposed verified pleading which is required by section 473 to accompany the application. If an affidavit of meritorious defense is presented, it must state the client's belief in the merits of his case, and it must show that he has fully and fairly stated the facts of the case to his attorney, in which situation the advice of counsel amounts to a prima facie showing of merit. Janson v. Bryant, 52 Cal.App. 505, 199 P. 542; Nickerson v. California Raisin Co., supra; Greenamyer v. Board of Lugo E. S. District, supra; Ross v. San Diego Glazed C. P. Co., 50 Cal.App. 170, 194 P. 1059; Pingree v. Reynolds, 23 Cal.App.2d 649, 73 P.2d 1266; Andrews v. Jacoby, 39 Cal.App. 382, 178 P. 969; Gill v. Peppin, 41 Cal.App. 487, 182 P. 815. In the present case, the affidavit filed by the attorney for respondent is defective in that it fails to show respondent had fully and fairly stated all the facts of the case to her attorney, the only averment in this regard being "That plaintiff had a good defense to said cross-complaint." Ibid. There was

appended to the affidavit, however, a proposed answer by respondent to the cross-complaint properly verified by her attorney as respondent was out of the state. Code Civ.Proc. sec. 446. In his verification respondent's attorney stated "that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge". The filing of such a proposed answer is clearly a proper method of showing a meritorious defense (Salsberry v. Julian, 98 Cal.App. 638, 639, 277 P. 516; Savage v. Smith, 170 Cal. 472, 150 P. 353; Sampanes v. Chazes, 54 Cal. App. 612, 202 P. 462; Park v. Hillman, 67 Cal.App. 92, 224 P. 100); and since the attorney in his verification stated that the contents were true to his knowledge, all necessary requirements were met.

[8] The proposed answer denied the allegation in the cross-complaint that appellant had fully performed all the terms and conditions of the alimony judgment and was entitled to a release from further liability, thereby clearly raising an issue of fact and law which the court was justified in holding a meritorious defense.

The order of the trial court is affirmed.

We concur: GIBSON, C. J.; SHENK, J.; HOUSER, J.; CURTIS, J.; EDMONDS, J.

I concur in the conclusion reached: CARTER, J.

16 Cal.2d 636

PEOPLE, on Complaint of CHAPMAN, v. RAPSEY.

S. F. 16379.

Supreme Court of California.

Nov. 27, 1940.

1. Officers 🔑1

Where the Legislature creates a position, prescribes the duties and fixes the compensation, and the duties pertain to the public, and are continuing and permanent, not occasional or temporary, such position or employment is an "office", and he who occupies it is an "officer".

See Words and Phrases, Permanent Edition, for all other definitions of "Office" and "Officer".

2. Municipal corporations 🔑123, 167, 170

A city attorney of a city of the sixth class is a "public officer", occupying a "public office", and as such is invested with all the rights and privileges and subjected to all of the limitations and restrictions imposed by the Constitution and laws of the state and considerations of public policy. Gen.Laws 1937, Act 5233, §§ 852, 879.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Officer" and "Public Office".

3. Officers 🔑30

The inhibition against one person simultaneously holding the positions of city judge and city attorney of a city of the sixth class must be predicated upon the common-law doctrine of "public policy".

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

4. Officers 🔑30

Offices are "incompatible" if the nature and duties thereof are such as to render it improper, from consideration of public policy, for one incumbent to retain both.

See Words and Phrases, Permanent Edition, for all other definitions of "Incompatible".

5. Officers 🔑30

The inconsistency which at common law makes offices "incompatible" does not consist in a physical impossibility to discharge the duties of both offices, but in a conflict of interests, as where one is subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power to remove the incumbent of the other, or to audit the accounts of the other.

6. Municipal corporations 🔑167, 170

The statute making it the duty of the chief of police in a city of the sixth class to prosecute before the city court all breaches or violations of or noncompliance with any ordinances which shall come to his knowledge does not deprive a city attorney of a city of the sixth class of the right and duty to carry on the legal proceedings pertaining to the prosecution of an action based upon violation of an ordinance. Gen.Laws 1937, Act 5233, § 880.

7. Officers ⚿30

The positions of city judge and city attorney of a city of the sixth class are "incompatible" and cannot be held by one person at the same time. Gen.Laws 1937, Act 2834a, § 4; Act 5149, § 2; Act 5150, § 2; Act 5233, §§ 850 et seq., 852, 853, 879, 880, 882; Code Civ.Proc. § 112, subd. 2; § 731.

8. Officers ⚿55(2)

The offices of city judge and city attorney of a city of the sixth class being "incompatible", acceptance of the office of city attorney had effect of vacating the right to hold office of city judge.

9. Quo warranto ⚿14

Quo warranto would lie to oust city judge of city of the sixth class from office on ground that his acceptance of the office of city attorney had terminated his right to hold office of city judge. Code Civ.Proc. § 803.

◆

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Quo warranto proceeding by the People, on the Complaint of B. C. Chapman, against Rudolph A. Rapsey to determine by what right the defendant held the office of city judge of the city of San Bruno in San Mateo county. From a judgment dismissing the proceeding, plaintiff appeals.

Reversed with directions.

Prior opinion, 96 P.2d 1000.

Earl Warren, Atty. Gen., Leon French and F. Walter French, Deputy Attys. Gen., and Kirkbride & Wilson, of San Mateo, for appellant.

J. W. Coleberd, of So. San Francisco, for respondent.

CARTER, Justice.

This is an action in quo warranto instituted by plaintiff and appellant with the authorization of the Attorney General of California pursuant to the provisions of section 803 of the Code of Civil Procedure to determine by what right and authority the defendant and respondent held the office of city judge of the city of San Bruno in San Mateo county. The city of San Bruno is a city of the sixth class, organized pursuant to the provisions of section 850 et seq. of the Municipal Corporations Act (Deering's General Laws, Act 5233).

The complaint alleged that on May 14, 1924, the city council of said city appointed the defendant as city judge of said city, and thereafter he took possession of said office and ever since has been and now is in control of said office; that on May 25, 1937, said city council appointed the defendant as city attorney of said city, and thereafter he took possession of said office and ever since has been and now is in control of said office.

The prayer of the complaint was for judgment that said defendant is not entitled to the office of city judge and that he be ousted and excluded therefrom.

To said complaint the defendant interposed a general demurrer which the trial court sustained without leave to amend, and thereupon entered judgment dismissing said action.

Appellant contends that the positions of city attorney and city judge of a city of the sixth class are incompatible and that one person cannot fully perform the duties of both positions at the same time without giving rise to such incompatibility as must operate to vacate the first position held. Respondent contends that a city attorney of a city of the sixth class is not a public officer, and even if he were such officer, the duties imposed upon him by statute are not such as to conflict with his duties as city judge and that there is no incompatibility between the two offices.

Authority for the appointment of a city attorney of a city of the sixth class is contained in section 852 of the Municipal Corporations Act (Deering's General Laws, Act 5233), wherein a city council is authorized to appoint "a city attorney * * * and such other subordinate officers or employees as in its judgment may be deemed necessary". The compensation of such city attorney may be fixed from time to time by the city council by resolution or ordinance and he shall hold office during the pleasure of said city council. Section 879 of said Municipal Corporations Act prescribes the duties to be performed by such city attorney as follows: "It shall be the duty of the city attorney to advise the city authorities and officers in all legal matters pertaining to the business of said city, to frame all ordinances and resolutions required by the city council, and perform such other legal services as said city council may require from time to time. * * *"

Other statutory provisions confer the following additional duties upon a city attorney of a city of the sixth class: To approve all bonds, notes and warrants which are to secure city deposits (Act 2834a, section 4 of Deering's General Laws); to defend all suits for damages brought against any officer of the city on account of injuries to person or property resulting from the negligence and carelessness of such officer or from the dangerous or defective condition of any public streets, highways, buildings, parks, grounds, or works due to such officer's negligence or carelessness (Act 5150, section 2 of Deering's General Laws); to defend the city in any suit for damages brought against the city on account of injuries to person or property alleged to have been received as a result of the dangerous or defective condition of any public streets, highways, buildings, parks, grounds, works or property (Act 5149, section 2 of Deering's General Laws); and to abate public nuisances (section 731 of the Code of Civil Procedure).

While there is no specific provision in the statutes requiring a city attorney to take an oath of office, section 853 of the Municipal Corporations Act provides: "Every officer of such city, before entering upon the duties of his office, shall take and file with the city clerk the oath of office required by the Constitution and the laws of the State."

In view of the statutory provisions creating the position of city attorney in cities of the sixth class and conferring upon such attorney the duties and responsibilities hereinabove specified, it would seem to be in harmony with the policy of this state as declared in its constitutional and statutory provisions to require that a city attorney of a city of the sixth class should take the oath required by the Constitution and laws of this state in accordance with the above-quoted provision of section 853 of the Municipal Corporations Act.

[1] While it is true that the compensation and term of office of a city attorney of a city of the sixth class is fixed by the city council of such city, it is equally true that the duties of such attorney as prescribed by statute pertain to the public and are continuing and permanent, and we think it is clear that the office of city attorney of a city of the sixth class falls well within the definition of the term "public office" as defined by this court in the leading case of Patton v. Board of Health, 127 Cal. 388, 59 P. 702, 706, 78 Am.St.Rep. 66, wherein this court said: "It seems to be reasonably well settled that where the legislature creates the position, prescribes the duties, and fixes the compensation, and these duties pertain to the public, and are continuing and permanent, not occasional or temporary, such position or employment is an office, and he who occupies it is an officer. In such a case, there is an unmistakable declaration by the legislature that some portion, great or small, of the sovereign functions of government are to be exercised for the benefit of the public, and the legislature has decided for itself that the employment is of sufficient dignity and importance to be deemed to be an office."

In the case of Leymel v. Johnson, 105 Cal.App. 694, 288 P. 858, 859, the District Court of Appeal quoted with approval from volume 21, California Jurisprudence, pages 819 and 820, as follows:

"'The words "public office" are used in so many senses that the courts have affirmed that it is hardly possible to undertake a precise definition which will adequately and effectively cover every situation. Definitions and application of this phrase depend, not upon how the particular office in question may be designated nor upon what a statute may name it, but upon the power granted and wielded, the duties and functions performed, and other circumstances which manifest the nature of the position and mark its character, irrespective of any formal designation. But so far as definition has been attempted, a public office is said to be the right, authority, and duty, created and conferred by law—the tenure of which is not transient, occasional, or incidental—by which for a given period an individual is invested with power to perform a public function for public benefit.

"'The individual who occupies such an office is a public officer. He is a public agent and as such acts only on behalf of his principal, the public, whose sanction is generally considered as necessary to give to acts performed by the officer the authority and power of a public act or law. An "incumbent" is one who is in the present possession of an office. The terms "officer" and "office" are paronymous, and in their original and proper sense are to be regarded as strictly correlative. They may be used in a sense other than the proper one, but the presumption is, unless the contrary appears, that the proper sense was intended.

"'Of the various characteristics attached to public office by definition, some are re garded as indispensable, and others, while not in themselves conclusive, are yet said to indicate more or less strongly the legislative intent to create or not to create an office. One of the prime requisites is that the office be created by the Constitution or authorized by some statute. And it is essential that the incumbent be clothed with a part of the sovereignty of the state to be exercised in the interest of the public.'"

[2] We see nothing in the above-quoted excerpts which can be said to be repugnant to a pronouncement that a city attorney of a city of the sixth class is a public officer occupying a public office under the law of this state, and we are of the opinion that he is such public officer invested with all the rights and privileges and subjected to all of the limitations and restrictions imposed by the Constitution and laws of this state and considerations of public policy.

Turning then to the question as to whether or not the positions of city judge and city attorney of a city of the sixth class are incompatible and cannot be held by one person at the same time, our attention is directed to section 882 of the Municipal Corporations Act (Deering's General Laws, Act 5233), which provides in substance that a city court is established in said city, to be held by a city judge, which in cities having a population of less than 30,000 shall have the same jurisdiction as a justice's court of a Class B in all civil and criminal actions arising within the corporate limits of such city and which might be tried in such a justice's court, and that such city court may also exercise the jurisdiction of a court of small claims in the same manner as provided by law for the exercise of similar jurisdiction by justices of the peace.

Turning to subdivision 2 of section 112 of the Code of Civil Procedure we find that justice's courts of Class B have original jurisdiction in all cases at law in which the demand exclusive of interest or the value of the property in controversy, amounts to $300 or less, except cases of law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll or municipal fine.

[3-5] It is conceded by both parties to this action that there is no statutory inhibition against the holding of both of the offices here in question by one person at the same time and that the impediment to such holding must be predicated upon the common law doctrine of public policy which is well recognized as the foundation for many decisions of the courts of this state. This policy and the rule which developed therefrom was given attention in the case of People v. Garrett, 72 Cal.App. 452, 237 P. 829, 830, where the court said: "The doctrine arising from attempts by single individuals to exercise the functions of incompatible offices springs out of considerations of public policy * * *, such considerations arising naturally from the view that two offices cannot be held by one person when, from the divergent character of the offices, the public interest will suffer thereby."

And at page 457 of 72 Cal.App., at page 831 of 237 P.: "The relationship between offices, which will lead to a judicial determination that they are incompatible, and cannot therefore be held by one person, will always appear when, to quote from a standard text-book: 'The nature and duties of the two offices are such as to render it improper, from consideration of public policy for one incumbent to retain both.' Dillon, Mun.Corp. (5th Ed.) § 419."

Section 469 of volume 2 of McQuillin on Municipal Corporations says: "Two offices are said to be incompatible when the holder cannot in every instance discharge the duties of each. Incompatibility arises, therefore, from the nature of the duties of the offices, when there is an inconsistency in the functions of the two, where the functions of the two are inherently inconsistent or repugnant, as where antagonism would result in the attempt by one person to discharge the duties of both offices, or where the nature and duties of the two offices are such as to render it improper from considerations of public policy for one person to retain both. The true test is whether the two offices are incompatible in their natures, in the rights, duties or obligations connected with or flowing from them."

In 46 Corpus Juris. 941, it is said: "At common law the holding of one office does not of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two offices in question. But where the functions of two offices are inconsistent, they are regarded as incompatible. The inconsistency, which at common law makes offices incompatible, does not consist in the physical impossibility to discharge the duties of both offices, but lies rather in a conflict of interest, as where one is subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power to remove the incumbent of the other or to audit the accounts of the other."

In State v. Jones, 130 Wis. 572, 110 N. W. 431, 432, 8 L.R.A.,N.S., 1107, 118 Am. St.Rep. 1042, 10 Ann.Cas. 696, the court said: "It was not an essential element of incompatibility at common law that the clash of duty should exist in all or in the greater part of the official functions. If one office was superior to the other in some of its principal or important duties so that the exercise of such duties might conflict, to the public detriment, with the exercise of other important duties in the subordinate office, then the offices are incompatible."

The offices of city judge and city attorney were declared to be incompatible by the Wisconsin Supreme Court in State v. Hines, 194 Wis. 34, 215 N.W. 447, at page 448, and the court in that case said: "In the instant case, the appellant attempted to hold two incompatible offices, contrary to public policy. He was at liberty to resign his office of municipal judge and accept the office of city attorney. He did not resign, but, under the common-law rule, he created a vacancy in the office of judge by accepting the incompatible office of city attorney."

[6] Respondent contends that since section 880 of the Municipal Corporations Act provides that it is the duty of the chief of police "to prosecute before the city court, all breaches or violations of or noncompliance with any ordinance which shall come to his knowledge", there is no requirement that the city attorney should appear before the city court in connection with prosecutions which might arise under any of the city ordinances. We are not impressed with this contention, as we think it places an altogether too narrow construction upon the statutes prescribing the duties of the city attorney. It is our view that this provision does not deprive a city attorney of a city of the sixth class of the right and duty to carry on the legal proceedings pertaining to the prosecution of an action based upon the violation of a city ordinance. The intention of the legislature in the enactment of section 880 of the Municipal Corporations Act was obviously to bestow upon the chief of police of such city the duty to institute prosecutions for breaches or violations of or noncompliance with city ordinances which shall come to his knowledge, but in the event such prosecutions result in the trial of cases, the duty should devolve upon the city attorney to conduct such trials as the officer of the city qualified for the performance of such duties.

[7] In the various statutes to which we have referred herein as specifying the duties which a city attorney of cities of the sixth class is required to perform, it is obvious that he may be required from time to time to appear before the city judge and prosecute or defend actions to which the city is a party. Many cities of the sixth class now own their own utilities such as water and electricity, and quite often it is necessary for such city to institute proceedings for the collection of claims for water and electricity furnished their patrons. Such actions could properly be brought in the city court, and the city attorney would, of course, represent the city. It is obvious that he could not do so if he were also city judge. As was declared by the Supreme Court of Maine in the case of Howard v. Harrington, 114 Me. 443, 96 A. 769, 771, L. R.A.1917A, 211: "He cannot be both prosecutor and judge. The duties are repugnant. He can only perform the duties of one office by neglecting to perform the duties of the other. It is not for him to say in a particular instance which he will perform and which he will not. The public has a right to know with certainty. Stubbs v. Lee, supra [64 Me. 195, 18 Am. Rep. 251]. Thence it is that two such offices must be held to be incompatible."

[8] The two offices in question being incompatible, it follows that when the respondent accepted the office of city attorney, said acceptance had the effect of vacating or terminating his right to hold the office of city judge. As was said in People v. Garrett, supra: "The rule is settled with unanimity that where an individual is an incumbent of a public office and, during such incumbency, is appointed or elected to another public office, and enters upon the duties of the latter, the first office becomes at once vacant if the two are incompatible (Mechem, Public Officers, § 419; 22 R.C.L. tit. 'Public Officers,' § 63). * * *"

McQuillin on Municipal Corporations, 2d Ed., Volume 2, Sec. 469, thus states the rule: "The common law rule is that the acceptance by a public officer of another office which is incompatible with the first thereby vacates the first office; that is, the mere acceptance of the second incompatible office per se terminates the first office as effectively as a resignation."

[9] It appearing from what we have said in the foregoing opinion that respondent was at the time of the commencement of this action unlawfully holding the office of city judge of the city of San Bruno, the present action in quo warranto was the proper method of challenging his right thereto, and the complaint on behalf of appellant alleged sufficient facts to constitute a cause of action, and defendant's demurrer thereto should have been overruled.

The judgment is reversed with directions to the trial court to overrule the demurrer and proceed with the disposition of the cause in accordance with the views herein expressed.

We concur: GIBSON, C. J.; SHENK, J.; CURTIS, J.; EDMONDS, J.

16 Cal.2d 651

SUNSET OIL CO. v. MARSHALL OIL CO. et al.

L. A. 17487.

Supreme Court of California.

Nov. 29, 1940.

Corporations ⟹499

Under statute preserving to a corporation whose powers are suspended for failure to pay corporate license tax the right to defend in court any action brought against it, a corporation which failed to pay license tax had the right to defend an action to quiet title to realty and likewise had the right to prosecute an appeal from an adverse judgment in the action. Gen.Laws 1937, Act 1743, § 11.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by the Sunset Oil Company against the Marshall Oil Company and others to quiet title to realty. From the judgment, defendants appeal, and plaintiff moves to dismiss the appeal.

Motion denied.

J. U. Hemmi, of Oceanside, and James R. Jaffray, of Los Angeles, for appellants.

Mitchell, Silberberg, Roth & Knupp and C. E. Erkel, all of Los Angeles, for respondent.

SHENK, Justice.

The defendant, Marshall Oil Co., appealed from a judgment in an action to quiet title to real property. The plaintiff moved to dismiss the appeal on the ground that the corporate powers of the defendant had been suspended in 1922 by the forfeiture of its charter for nonpayment of the corporate license tax, and that it had no power to prosecute an appeal under the powers reserved to it by the statute. The plaintiff presents a certificate of the secretary of state showing that the defendant had, on March 4, 1922, forfeited its charter for nonpayment of its license tax pursuant to the provisions of the Corporation License Act. Stats.1915, p. 422, revised by Stats.1917, p. 371, as amended; see Deering's Gen.Laws, 1937, Act 1743, p. 876. The material portions of section 11 of that act (Stats.1917, p. 377) provided and now provide: "After six o'clock P. M. of the Saturday preceding the first Monday in March in any year, the corporate rights, privileges and powers of every domestic corporation which has failed to pay the tax and money penalty for nonpayment thereof imposed by this act shall, from and after said hour of said day, be suspended, and incapable of being exercised for any purpose or in any manner, except to execute and deliver deeds to real property in pursuance of contracts therefor made prior to such time, and to defend in court any action brought against such corporation. * * * every person who attempts or purports to exercise any of the rights, privileges or powers of any delinquent domestic corporation except as permitted by this act * * * shall be guilty of a misdemeanor. * * * Every contract made in violation of this act is hereby declared to be void."

The legislature thus preserved to the corporation whose powers were suspended under said section the right or power "to defend in court any action brought against such corporation". It apparently is conceded that the right "to defend in court any action brought against" the corporation extends to any action which may be brought against the corporation subsequent to the forfeiture or suspension, and that the reservation of power to defend is not limited to actions pending at the time of the forfeiture or suspension. In short, it is the contention of the plaintiff that the right to defend does not include the right to give notice of, perfect, or prosecute an appeal from an adverse judgment. The contention is without merit.

The plaintiff does not present any authority to the effect that a suspended corporation which has the right to defend actions in court has not the right to appeal. The legislative history of the Corporation License Act, beginning with the Statutes of 1905, page 493, the changes and revisions therein, and the effect thereof upon the exercise of corporate rights and powers, is set forth in various decisions. See Kaiser Land & Fruit Co. v. Curry, 155 Cal. 638, 103 P. 341; Brandon v. Umpqua Lumber & Timber Co., 166 Cal. 322, 136 P. 62; Rossi v. Caire, 174 Cal. 74, 161 P. 1161; Anthony v. Janssen, 183 Cal. 329, 191 P. 538; California National Supply Co. v. Flack, 183 Cal. 124, 190 P. 634; Rossi v. Caire, 186 Cal. 544, 199 P. 1042; Ransome-Crummey Co. v. Superior Court, 188 Cal. 393, 205 P. 446; Van Landingham v. United Tuna Packers, 189 Cal. 353, 208 P. 973; Southern Land Co. v. McKenna, 100 Cal.App. 152, 159, 280 P. 144. For present purposes it is sufficient to note that the courts of this state have recognized that where, under forfeiture clauses, the right to defend actions in court was reserved to the corporation, such right included also the right to appeal. In Brandon v. Umpqua Lumber & Timber Co., supra [166 Cal. 322, 136 P. 63], a motion was made by the plaintiff to dismiss the defendant corporation's appeal on the ground "that the forfeiture took away the right of the corporation to give notice of, perfect or prosecute an appeal". The forfeiture in that case had occurred on November 30, 1912, for failure to pay the corporation license tax. The statute there involved permitted the directors of a corporation whose charter had been so forfeited to settle its affairs and to maintain or defend actions pending. The court denied the motion, holding that "the right of defense includes the right to prosecute an appeal in the name of the corporation". In the case of Nelson v. Marsh, 100 Cal.App. 578, 280 P. 695, 696, the corporation defendant had forfeited its charter for nonpayment of the corporation license tax. The right to appeal was not directly involved, but the court implied the existence of that right in the following language: "It thus appearing that the corporation has a right to defend actions, it logically follows that all the rights and privileges accrued to both parties to an action may be pursued as though there had never been any suspension of the corporation's right to do business."

It has been said that a corporation which is properly a party to an action may lawfully take any step that an individual may take under like circumstances to bring it to a final judgment. Alexandria Canal Co. v. Swann, 46 U.S. 83, 5 How. 83, 12 L.Ed. 60. It would seem anomalous to conclude that a corporation which has the right to defend an action has no right to take an appeal from an adverse judgment.

The plaintiff relies on the case of Ransome-Crummey Co. v. Superior Court, supra. There the petitioner was a corporation which had lost its rights for nonpayment of the license tax required by Statutes of 1917, page 371. It sought the assistance of this court in maintaining an action as plaintiff against one Graves. The following statement from the opinion in that case will serve to distinguish it from the case presented here: "During the time its taxes were unpaid, petitioner was shorn of all rights save those expressly reserved by the statutes. The right to institute or maintain actions is not included in this reservation, but is denied to corporations as a part of the penalty." [188 Cal. 393, 205 P. 448.]

The plaintiff also relies on Boyle v. Lakeview Creamery Co., 9 Cal.2d 16, 68 P. 2d 968, 970. In that case the defendant corporation had forfeited its corporate powers for nonpayment of franchise taxes required by the California Bank and Corporation Franchise Tax Act. Stats.1929, p. 19, as amended; Deering's Gen.Laws, 1937, Act 8488, p. 3851; 1939, p. 1544. That statute was enacted to carry into effect the provisions of section 16, article XIII, of the Constitution, providing for an "in lieu" tax imposed on the privilege of exercising the corporate franchise in this state, to be measured by net income. Section 32 of that act provided that the powers of a domestic corporation so failing to pay its taxes should be suspended and be incapable of being exercised "for any purpose or in any manner except for the purpose of amending the articles of incorporation to set forth a new name". The court reviewed the differences in the wording of section 32 of that statute, and of section 3669c of the Political Code, which was similar in wording and effect to section 11 of the Corporation License Act. The court distinguished the statute reserving to the corporation the right to defend and the Bank and Corporation Franchise Tax Act, which did not provide a similar reservation. The holding in that case was in the following language: "The conclusion which we are forced to draw is that the appellant corporation has lost the right to defend the suit in question, and since it has no right to defend, it has no right to appeal from an adverse decision." The court thus recognized, inferentially at least, that the right to defend includes the right to appeal. Section 11 of the Corporation License Tax (Stats.1917, p. 377), and not section 32 of the Bank and Corporation Franchise Tax Act, governs the disposition of the motion in the present case. That being so, the defendant corporation herein has the right to defend. Having that right, it likewise has the right to prosecute the appeal.

The motion is denied.

We concur: GIBSON, C. J.; HOUSER, J.; TRAYNOR, J.; EDMONDS, J.; CARTER, J.; SPENCE, J. pro tem.

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41 Cal.App.2d 694

KARALLIS v. SHENAS.

Civ. 2320.

District Court of Appeal, Fourth District, California.

Nov. 26, 1940.

1. Appeal and error 🔑927(3)

On plaintiff's appeal from judgment of dismissal, after motion for nonsuit, which was taken under advisement, was granted after defendant's evidence was heard, evidence would be viewed in light most favorable to plaintiff.

2. Trial 🔑143

Where issues of facts were presented upon conflicting evidence, the granting of a motion for nonsuit was improper unless granting of motion was justified by some rule of law under which it became unnecessary to decide issues of fact.

3. Fraud 🔑29

Generally, plaintiff cannot recover damages for fraud where to permit him to do so would be to allow plaintiff to take advantage of his own fraud, except where party seeking relief is not a free moral agent, where his consent to improper act is obtained through menace, duress, or undue influence, and where his wrongdoing is in fact much less than that of his adversary, who, taking advantage of him, has led him into it, and relief will not be denied to party least in fault against one who has led him into act of fraud by a violation of confidence.

4. Fraud 🔑29

Where plaintiff, who was uneducated, was confronted with necessity of selling or reorganizing restaurant business which he had operated in partnership with third party, who had died, and defendant, who owned restaurant building and refused to consent to plaintiff assigning lease, induced plaintiff to convey plaintiff's interest in business to defendant in reliance upon representations of defendant and attorney, who acted for defendant without plaintiff's knowledge and who was also public administrator, fraud, if any, practiced upon third party's estate by plaintiff, did not, as matter of law, preclude plaintiff from recovering damages from defendant for alleged fraud, since plaintiff did not act as a "free moral agent", with regard to transactions.

See Words and Phrases, Permanent Edition, for all other definitions of "Free Moral Agent".

5. Limitation of actions 🔑197(2)

In action for damages for alleged fraud through which plaintiff claimed to have been induced to transfer to defendant plaintiff's interest in a restaurant business, where transaction giving rise to action occurred in October and November, 1931, and complaint was filed on September 13, 1935, evidence warranted conclusion that three-year statute of limitations did not begin to run against cause of action until plaintiff was locked out of restaurant by defendant in November, 1932, and hence action was not barred by limitations. Code Civ.Proc. § 338, subd. 4.

6. Limitation of actions ⚷37(2)

An action for damages for fraud, through which plaintiff claimed to have been induced to transfer to defendant plaintiff's interest in a restaurant business, was governed by three-year statute of limitations concerning actions for relief on ground of fraud. Code Civ.Proc. § 338, subd. 4.

◆

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by John Karallis against Peter Shenas for damages for alleged fraud and misrepresentation through which plaintiff claimed to have been induced to transfer to defendant plaintiff's interest in a restaurant business, including fixtures. From a judgment of dismissal, plaintiff appeals.

Reversed.

Harry W. Horton, of El Centro, for appellant.

Hugh S. MacKinnon, of Hollywood, and C. B. Smith, of El Centro, for respondent.

BARNARD, Presiding Justice.

This is an action for damages for fraud and misrepresentation through which the plaintiff claims to have been induced to transfer to the defendant his interest in a restaurant business, including the fixtures. A motion for a nonsuit, which was taken under advisement, was granted after the defendant's evidence was heard. A judgment of dismissal followed, from which the plaintiff has appealed.

[1] Viewed in the light most favorable to the appellant the evidence shows that he and one Callas, as copartners, were operating a restaurant in a building owned by the respondent under a lease which contained a provision that it could not be assigned without the written consent of the respondent. Callas also owed the appellant $1,059 on a note secured by a chattel mortgage on his interest in the restaurant fixtures. On May 25, 1931, Callas died and thereafter the appellant continued to operate the business as the surviving partner. He endeavored to sell the restaurant but was unable to do so because the respondent refused to consent to an assignment of the lease. In October, 1931, the respondent told him that he would not consent to a transfer of the lease but that he desired to enter into a partnership with him in operating the restaurant. He also told him that a certain lawyer in El Centro was the public administrator, and that for a fee of $100 this lawyer would take the necessary steps to enable this to be done, including the getting of a good title from the estate of Callas.

The respondent took the appellant to this lawyer, who had been the respondent's lawyer for more than ten years, and the lawyer told the appellant that the best way out of the situation was for the respondent to buy the entire business, that it would be necessary to get the court's approval of the sale of the estate's interest, and that after the matter was completed the respondent would convey a one-half interest back to him. The appellant told the lawyer that he knew nothing about courts or lawyers and asked for some writing to show what he was to get. He was told that he could trust the respondent who was his friend. As a result of a plan then explained to him the appellant loaned the respondent $1,000 which he used to purchase the business. The respondent agreed to repay this $1,000 to the appellant, to pay the $1,059 which was owed him by the deceased partner, and to give him a half interest in the business after the deal was completed. The lawyer prepared all papers and put the deal through. Among other things, he prepared for the appellant and presented to the court an account and report of his activities as surviving partner, alleging therein that he had received an offer from the respondent of $1,000 for the entire restaurant business, that this was the best sale that could be made of the property, and praying for an order approving such sale. At the hearing of this petition and report in the probate proceeding the appellant testified and an order was made approving this sale.

The sale was consummated and title to the restaurant business was transferred to the respondent on November 14, 1931. The appellant and the respondent then operated the restaurant business, dividing the profits between them, until November, 1932. At that time the respondent locked the appellant out of the restaurant, declared that he had no rights in connection therewith and refused to pay him anything or to permit him to continue in the operation of the business.

On behalf of the respondent there was evidence to the effect that he purchased the entire business for $1,000 without any agreement that the appellant was to have any interest therein, and that he temporarily allowed the appellant to continue to work in the restaurant on an agreement that he was to receive one-half of the profits in lieu of wages. While he admitted receiving $1,000 from the appellant at the time he purchased the restaurant he claimed that the appellant had paid him this amount for a release from further liability on the original lease, which did not expire until 1935, and he denied that he owed anything to the appellant or that he had made any agreement with him other than an agreement for his services for an indefinite time.

[2] It is apparent that issues of fact were presented upon conflicting evidence and that the granting of a motion for nonsuit was improper unless the same was justified by some rule of law under which it became unnecessary to decide these issues of fact. The motion for nonsuit was made upon two grounds: First, that the evidence disclosed that the appellant had conspired with the respondent to commit a fraud on the estate of Callas and also upon the court and, second, that the action was barred by the statute of limitations. The motion must have been granted upon one or both of these grounds, and the respondent here contends that either ground is sufficient to sustain the judgment of dismissal.

On behalf of the respondent it is argued that, irrespective of any issue of fact, the appellant could not be allowed to recover anything since to permit him to do so would be to allow him to take advantage of his own fraud. It is argued that, at best, the appellant relies upon a secret agreement with the respondent and that he could not recover without proving that he had been guilty of a fraud upon the estate of Callas and upon the court. Conceding that such a situation appears, it may be first observed that it does not appear that the estate of Callas was defrauded in the sense that its interest in this restaurant property was sold for less than could otherwise have been obtained. Apparently, all efforts to sell the property had been blocked by the respondent and we can find no evidence in the record which would indicate that a larger amount could have been realized by the estate for its interest in the property.

[3] While the general rule relied upon is well established there is a well recognized exception to the rule in cases where the party seeking relief is not a free moral agent, where his consent to the improper act is obtained through menace, duress or undue influence, and where his wrongdoing is in fact much less than that of his adversary who, taking advantage of him, has led him into it. Birney v. Birney, 217 Cal. 353, 18 P.2d 672; Anderson v. Nelson, 83 Cal.App. 1, 256 P. 294; Young v. Young Holdings Corp., Ltd., 27 Cal.App.2d 129, 80 P.2d 723; Grider v. Manisera, 11 Cal.App.2d 355, 53 P.2d 982; Tognazzi v. Wilhelm, 6 Cal.2d 123, 56 P.2d 1227. As was said in Anderson v. Nelson [83 Cal.App. 1, 256 P. 296], supra: "Many of these cases proceed upon the theory stated in the one last cited, that 'relief will not be denied to the party least in fault against one who has led her into the act by a violation of confidence. They are not in equal wrong.'"

In Birney v. Birney, supra [217 Cal. 353, 18 P.2d 674] the court said: "The further claim that plaintiff is not entitled to the relief sought for the reason that he does not come into a court of equity with clean hands is also without merit. At the time of the transaction plaintiff was over seventy-two years age and infirm, he being a physical cripple. He had great confidence in defendant's legal ability and was guided by her advice. It was upon her constant urging that he sent the bonds to her for safe-keeping, and his wife had no interest in the same; they being his separate property. It is true that in the action by his wife for separate maintenance and support plaintiff made an affidavit to the effect that he was worth only about the sum of $5,000, when as a matter of fact he owned the bonds in question. In the present suit he denied ever having advised his attorney to incorporate such a statement in the affidavit, and he testified that he signed all papers prepared by his attorney upon his advice without reading them. However this may be, defendant should not be permitted to take advantage of her own wrong. As was said in Chamberlain v. Chamberlain, 7 Cal.App. 634, 95 P. 659, one cannot lay a trap for another, secure his confidence, induce him to make a conveyance of his property in expectation that it will be returned, and thereafter retain the fruits of his perfidy on the ground that the donor too readily yielded to temptation to save himself at the possible expense of his creditors. The greater offense of the tempter overshadows and renders innocuous the weakness of the one of whom advantage is taken. Though a deed made for an improper purpose is unfairly procured through the undue influence of the grantee, in violation of a fiduciary relationship, abuse of confidence, oppression, or fraud, a court of equity will still grant relief to one in fault. Such relief will not be denied to a party least in fault against one who has led him into the act by a violation of confidence. They are not in equal wrong."

[4] We think the instant case comes within the exception above noted. It appears that the appellant was not an educated man, that he was trying to make the best of the circumstances in which he was involved by the death of his partner, and that he was faced with legal problems with which he was unfamiliar. In a very real sense he was not a free moral agent but was subject to a form of coercion. He was under the necessity of selling or reorganizing the business and he found himself unable to sell because the respondent refused to consent to the assignment of the lease. The respondent had him within his power and he was not free to do as he pleased. While he was in this position the respondent suggested a course of procedure to him and told him that the public administrator, who was also a lawyer, could handle the matter in proper legal form and to that end. Without telling the appellant that this man was also his own lawyer, the respondent took the appellant to this lawyer and with his help the matter was carried out as the respondent had suggested. Relying upon what was told him by the respondent and his attorney the appellant conveyed his property to the respondent. While the appellant was induced to do something which he should not have done it should not be held, under these circumstances, that as a matter of law his act prevents his recovery as against the one who was mainly responsible for any unlawful act and who was guilty of the greater wrong.

[5, 6] The only remaining question is whether the action was barred by the statute of limitations. The transaction giving rise to the action occurred in October and November, 1931. The complaint in this action was filed on September 13, 1935. The respondent argues that the appellant knew that the agreement was not going to be kept by the respondent as early as February, 1932, and that the statute of limitations began to run at that time. Reliance is placed upon a conversation which the appellant admitted he had had with the respondent in February, 1932, in which the respondent told the appellant that if he did not sign and accept certain papers which were then offered to him he would get nothing further. In this connection it appears that in February, 1932, the respondent had his lawyer, the one who represented him in the original transaction, prepare a lease of the restaurant premises whereby the same were leased to "Peter Shenas and John Karallis, Copartners", and also a note for $990 payable to the appellant and secured by a chattel mortgage in which the respondent mortgaged "an undivided one-half interest" in the furniture and fixtures of this restaurant to the appellant. These papers were dated February 19, 1932, and the respondent signed the note and mortgage. The respondent sent the appellant to his lawyer's office for the purpose of signing the lease. The appellant refused to sign or to accept the note and mortgage because the latter did not cover the full amount which the respondent had agreed to pay him. A few days later, the appellant had a conversation with the respondent in which he told the respondent that the papers were not correct and the respondent told him that he "would not do anything else". The respondent argues that this was sufficient to inform the appellant that he repudiated the original agreement and would give the appellant no interest in the restaurant, and that the statute of limitations then began to run. We find nothing in the record showing that the respondent then told the appellant that he would have no further interest in the restaurant. The most that can be said is that the appellant was then informed that the respondent would not pay him a larger amount than $990 on that part of the agreement which called for a payment to the appellant. Nothing was said, however, to the effect that the respondent would no longer recognize that the appellant still owned a one-half interest in the business. The respondent's wife, who was the bookkeeper in the business, then told the appellant "We will fix things up", and the parties went on operating the restaurant as before and continued to divide the profits half and half. That situation prevailed until November, 1932, when the appellant was locked out and for the first time informed that he had no interest in the business. If, as the respondent now claims, he owed the appellant nothing, and merely allowed the appellant to work in the restaurant for a time for one-half of the prof-

its in lieu of wages, it is passing strange that in February, 1932, he had his lawyer prepare a lease to himself and the appellant as copartners and at the same time had prepared and signed a note for $990 payable to the appellant, secured by a chattel mortgage on his undivided one-half interest in the fixtures in the restaurant. While it appears that a dispute existed as to the amount owed to the appellant, there is no evidence of any controversy at that time with respect to the appellant's right to an equal ownership in the business. No change then took place and the parties continued to operate the business as they had been doing, until the final break came. Under the circumstances appearing, it cannot be held that the statute of limitations began to run against this cause of action until the appellant was locked out in November, 1932. The action is governed by subdivision 4 of section 338 of the Code of Civil Procedure, and it follows that it was not barred.

Plaintiff's cause of action not being barred by either of the rules of law relied upon, and issues of fact having been presented which should have been passed upon, the court erred in granting the motion for a nonsuit and in entering the judgment of dismissal.

The judgment is reversed.

We concur: MARKS, J.; GRIFFIN, J.

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41 Cal.App.2d 595

HILL v. BANK OF SAN PEDRO et al.

Civ. 12064.

District Court of Appeal, Second District, Division 1, California.

Nov. 22, 1940.

Hearing Denied Jan. 20, 1941.

1. Banks and banking 🔑63½

Refusal of state superintendent of banks to fix fees of bank conservator's attorney by denial of such attorney's application for allowance of fees did not deprive superior court of jurisdiction to fix fees in attorney's action to recover amount thereof. Gen.Laws 1937, Act 652, § 136.

2. Banks and banking 🔑63½

It is duty of conservator of closed bank to act as receiver for benefit of bank's depositors and other creditors during interim between time when bank was taken over by superintendent of banks and time when its business is finally disposed of. Gen.Laws 1937, Act 652, §§ 135c, 136.

3. Banks and banking 🔑63½

The term "conserve," as used in Emergency Bank Act, requiring conservator of closed bank to take such action as he deems necessary to conserve bank's assets pending further disposition of its business, connotes careful, conservative action calculated to keep bank's assets safe, sound and unimpaired until disposition thereof. Gen.Laws 1937, Act 652, § 135c.

The verb "conserve" means "to keep in a safe or sound state; to save; to preserve from change or destruction"; its synonyms are "maintain," "sustain," "uphold," "defend," "protect," "guard," "shield," and "secure;" "to conserve" means to keep something, especially institutions, prerogatives and conditions, unimpaired or sound; and word stresses idea of maintenance of existing condition.

See Words and Phrases, Permanent Edition, for all other definitions of "Conserve", "Maintain", "Sustain", "Uphold", "Defend", "Protect", "Guard", "Shield" and "Secure".

4. Banks and banking 🔑63½

The purpose of appointment of conservator of closed bank by state superintendent of banks is to hold matters in status quo pending receivership or some change which may allow bank to reopen. Gen.Laws 1937, Act 652, § 135c.

5. Banks and banking 🔑63½

A bank conservator, appointed under Emergency Bank Act, is intended to act under direction and supervision of state superintendent of banks in exercise of all of conservator's functions, and he has no broader powers than those given such superintendent, in absence of contrary clearly expressed or implied provisions of statute. Gen.Laws 1937, Act 652, § 135c.

6. Banks and banking 🔑63½

It is bank conservator's function to conserve bank's assets, not to liquidate them, as in case of receiver. Gen.Laws 1937, Act 652, § 135c.

7. Banks and banking 🔑63½

A closed bank's corporate entity is not lost through conservatorship of its assets, but board of directors thereof and corporate organization still exist and only power of management is taken over temporarily by conservator. Gen.Laws 1937, Act 652, § 135c.

8. Banks and banking 🔑63½

Under Emergency Bank Act, board of directors of bank taken over by state superintendent of banks has power to formulate plan for reorganization of bank and submit it to superintendent for his approval, subject to reorganization conditions in statute. Gen.Laws 1937, Act 652, § 135c, subd. 4.

9. Banks and banking 🔑63½

Any part taken by conservator of closed bank in plan for reorganization of bank must be in interests solely of its depositors and other creditors, as opposed to stockholders' interests, to keep within authority given him by such act. Gen.Laws 1937, Act 652, § 135c, subd. 4.

10. Banks and banking 🔑63½

As duties of closed bank's conservator are to act in interests of bank's depositors and other creditors, not stockholders thereof, under Emergency Bank Act, conservator is without authority to formulate and effect plan for reorganization of bank, in absence of clear expression or implication of such authority in such act. Gen.Laws 1937, Act 652, § 135c, subd. 4.

11. Banks and banking 🔑63

The language of Emergency Bank Act should not be extended by unnecessary inference beyond reasonable requirements of emergency conditions under which it was adopted. Gen.Laws 1937, Act 652, §§ 135b–135f.

12. Banks and banking 🔑63½

In action for attorney's fee, trial court erred in permitting jury to consider evidence of services rendered by plaintiff in attempting to effect plan for reorganization of closed bank when determining value of plaintiff's services as counsel to bank conservator. Gen.Laws 1937, Act 652, §§ 135c, subd. 4, 136.

13. Banks and banking 🔑63½

In attorney's action to recover fees for services rendered to closed bank's conservator, instructions that conservator had power to formulate, propose and take steps to effect reorganization of bank, and to employ plaintiff as attorney for such purpose, were erroneous, as was refusal to instruct jury that conservator had no authority to employ counsel in aid of bank's reorganization. Gen. Laws 1937, Act 652, §§ 135c, subd. 4, 136.

14. Banks and banking 🔑63½

Under Emergency Bank Act, conservator of closed bank may employ such counsel as may be necessary for conservation of bank's assets. Gen.Laws 1937, Act 652, §§ 135c, 136.

15. Banks and banking 🔑63½

As conservation of closed bank's assets is necessary to proper and equitable liquidation and distribution thereof, employment of counsel by conservator to advise and assist in matters of conservation is within power, expressly given him by Emergency Bank Act, to employ such counsel as may be necessary in liquidation and distribution of bank's assets. Gen.Laws 1937, Act 652, §§ 135c, 136.

16. Banks and banking 🔑63½

An attorney, rendering proper services to closed bank's conservator, was entitled to recover reasonable value thereof, not exceeding amount prayed for, in absence of set agreement as to amount of compensation therefor. Gen.Laws 1937, Act 652, § 136.

17. Banks and banking 🔑63½

In attorney's action to recover fees for services rendered to closed bank's conservator, error, if any, in rendering judgment against both bank and superintendent of banks in his official capacity, rather than against superintendent alone, was immaterial, as judgment must be paid out of bank's funds in superintendent's hands in any event, and bank's corporate entity continued after superintendent took possession of its assets. Gen.Laws 1937, Act 652, § 136.

18. Appeal and error 🔑1031(3, 6)

On appeal from judgment on jury's verdict, it must be assumed that jury gave due consideration to court's erroneous instruction and took into account evidence improperly admitted in arriving at verdict, so that such errors cannot be regarded as unprejudicial.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Ben A. Hill against the Bank of San Pedro and others to recover an attorney's fee. Judgment for plaintiff, and defendants appeal.

Reversed and remanded.

John Gee Clark, of Long Beach (Clyde Doyle and Walter Desmond, Jr., both of Long Beach, of counsel), for appellants.

Lawler & Felix, of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal by defendants from a judgment in favor of plaintiff, an attorney at law, entered upon the verdict of a jury awarding plaintiff $14,000 in an action brought by him to recover a fee for professional services rendered.

It appears from the record, and the same is not disputed, that the services in question were rendered for and at the request of one Henry E. Sherer as conservator of the Bank of San Pedro, a state bank, acting as such conservator under appointment by the state superintendent of banks pursuant to the provisions of the general laws of California, popularly known as the Emergency Bank Act. Secs. 135b–135f, added by Stats.1933, pp. 319–323, incl., Act 652, vol. 1, Deering's General Laws, 1937, pp. 297–301.

It appears that the Bank of San Pedro, which carried on a general banking business at San Pedro, California, was closed along with other banks on March 1, 1933, under the general banking holiday then proclaimed, which holiday terminated March 15, 1933. However, the Bank of San Pedro was not permitted to reopen by the California state superintendent of banks and Mr. Sherer was thereupon appointed by said superintendent to act as conservator for the bank and to take charge of the bank's affairs accordingly. Mr. Sherer was chairman of the board of directors of said bank and respondent had for some time acted as the bank's attorney.

As soon as Mr. Sherer received word of his appointment as conservator he got in touch with respondent, had a conference with him and requested respondent to act as attorney for Mr. Sherer as conservator, which respondent agreed to do. It further appears that respondent acted as such attorney from that time, March 15, 1933, until the termination of the conservatorship in December, 1934.

As to the matter of fees, there was offered and received in evidence at the trial an itemized list of attorney fees paid by the conservator to respondent over a period from May 19, 1933, to December 12, 1934, showing a total of fees paid in the sum of $4,287.50. Respondent admitted receiving these fees. It also appears that respondent filed with the superintendent of banks two separate itemized claims for specific legal services rendered to the said conservator, one in the total sum of $1,489.16, and the other in the sum of $553.75, both of which were paid. It therefore appears that during the time respondent acted as attorney for the conservator he actually received the sum of $6,330.41 for certain specified legal services. These respondent testified were separate and apart from the claim here sued upon.

The claim here sued upon appears to have been first filed with the superintendent of banks on May 11, 1935. It was formally drawn up and contained an itemized account of the services rendered, the time spent, etc., and was for 602 hours of legal services and consultations in respondent's office, at the rate of $10 per hour, and 938 hours of services and consultations rendered outside the office, at $15 per hour, a total of $20,090 in all. This claim was rejected by the superintendent of banks.

Under date of August 22, 1935, the superintendent of banks notified respondent by letter of the rejection of his said claim, calling attention to the provisions of section 136 of the Bank Act (a section of the same act hereinabove referred to, i. e., Act 652, Deering's), which provides: "If the superintendent of banks doubts the justice and validity of any claim, he may reject the same, and serve notice of such rejection upon the claimant. * * * Any action upon a claim so rejected must be brought within six months after such service."

Respondent commenced the present action on February 13, 1936, praying judgment for his fees in the sum of $20,090.

There appears to have been no definite agreement or understanding as to any total amount of compensation respondent was to receive for all of his services. Respondent estimated that his time and efforts for which he sought compensation were about equally divided between matters related to conservation and those related to reorganization of the bank. Respondent testified that work on plans for reorganization ceased after the superintendent of banks accepted an offer of the Bank of America to purchase approximately one million dollars worth of the assets of the Bank of San Pedro for cash, since that purchase made the reorganization impossible.

The questions here raised by appellants are: Whether the provisions of the California Bank Act permit or authorize a conservator, appointed as above set forth, to employ an attorney at law to *reorganize* a closed bank and thereby incur an obligation to pay an attorney's fees; whether, assuming that a conservator had no such authority, the sum of $7,000 is a reasonable attorney's fee for services rendered to the conservator in liquidation matters, which services consisted of advice and consultations, when the same attorney had already been paid over $6,000 for services in matters closely connected therewith; and whether, assuming that the conservator *had* such authority to incur the obligation of an attorney's fee for reorganization work, the sum of $14,000 is a reasonable attorney's fee for about 1,500 hours' work, when the attorney had already received over $6,000 for work closely connected therewith.

[1] Appellants contend that since compensation for the services for which respondent sought to recover had never been fixed by the superintendent of banks or reported to any court prior to the suit herein, there was no jurisdiction in the trial court to fix the same in the first instance.

The provisions of the Bank Act, supra, pertinent to the question involved, are found in section 136 thereof, and provide: "The compensation of * * * counsel and other employees and assistants, * * * shall be fixed by the superintendent of banks and shall be paid out of the funds of such bank in the hands of the superintendent of banks. Such expenses of liquidation must be reported by the superintendent of banks to the superior court of the county in which the principal place of business of such bank was located, upon each application for payment of dividend." In the instant case the superintendent of banks refused to fix the fees by his denial of respondent's application therefor.

It is not necessary to consider the propriety of appellants here urging lack of jurisdiction on the grounds above stated, for even assuming, without deciding, their right to raise the question at this time, their contention is without merit. A similar question was before the Supreme Court of Arizona in Sawyer v. Ellis, 37 Ariz. 443, 295 P. 322, under a like statutory provision. There the court said (at page 325 of 295 P.): "On examination of the statute we are of the opinion the contention is not well founded. It provides, not that the superintendent of banks may be allowed an attorney's fee in his accounts, but expressly that the attorney's fee 'shall * * * be paid out of the funds in the hands of the Superintendent of Banks.' We think this is an implied statement by the statute that no personal liability on the part of the superintendent of banks can exist for counsel fees incurred in the liquidation of the bank. Such being the case, if we were also to hold that as a jurisdictional matter the fee of counsel employed must be fixed first by the superintendent of banks, and unless he did so fix it the attorney might not secure a fee from the insolvent bank, it would, in effect leave an attorney who had in good faith performed valuable services at the mere whim or caprice of the superintendent of banks, with no remedy whatever. Such a rule would be highly unjust, and we should not so hold if there is any other possible reasonable construction of the law." The injustice of refusing to grant respondent recourse to the court after the denial of his claim for fees, made in apparent good faith, is at once manifest. See, also, Button v. Sullivan, 38 Ariz. 125, 297 P. 878; Oakley v. Davis, 142 Wash. 432, 253 P. 648; Kelly v. Davis, 142 Wash. 702, 253 P. 653. The Bank Act in question clearly does not call for any such construction.

The principle question raised upon this appeal is whether the conservator had the authority under the California Bank Act to formulate, propose and seek to effect a plan of reorganization of the bank, employ counsel for that purpose and thereby incur an obligation for attorney's fees to be paid out of the funds of the bank in the hands of the superintendent of banks.

It is undisputed that a portion of the services for which respondent sought compensation were directly concerned with a plan for reorganization of the bank, which plan had been initiated by the conservator. The record reveals that evidence on behalf of respondent as to such services was admitted over the objection of appellants that the conservator had no authority to employ an attorney to render services in connection with reorganization of the bank.

Appellants argue as follows: "The problem * * * is whether or not such official may, under a statute neither expressly denying or granting him the power, himself, or through his attorney, actually formulate, draw up and carry through a reorganization of the bank which has come into his hands." Concededly, the California Bank Act does not expressly give a conservator such power. Respondent, on the other hand, contends that the said act impliedly gives a conservator the power to formulate and effect a reorganization. In support of their respective contentions both parties cite authorities in other jurisdictions concerning the provisions of legislation on the subject, some of which is claimed to be similar to that of California. However, certain of the authorities cited by respondent are concerned with express authority to effect reorganization, and can have no application here.

The pertinent provisions of the California Bank Act are found in section 135c thereof, which section provides for the appointment and powers and duties of conservators. Sub-paragraph (4) of the same section provides for the reorganization of a bank and the manner in which it may be effected. The relation of subparagraph (4) to the other provisions will be taken up later. Concerning the appointment of conservators, their powers and duties, section 135c reads in part as follows: "Whenever he shall deem it necessary in order to conserve the assets of any bank *for the benefit of the depositors and other creditors thereof,* the Superintendent of Banks may appoint a conservator for such bank and require of him such bond and security as the Superintendent of Banks deems proper. The conservator under the direction of the Superintendent of Banks shall take possession of the books, records and assets of every description of such bank, and take such action as he may deem necessary to conserve the assets of such bank *pending further disposition of its business as provided by law.* Such conservator shall have all the rights, powers and privileges now possessed by or hereafter given the Superintendent of Banks, with relation to banks of which he has taken charge under the provisions of section 136 of this act, and shall be subject to the obligations and penalties, *not inconsistent with the provisions of this section* to which the Superintendent of Banks now or may hereafter become subject. During the time that such conservator remains in possession of such bank the rights of all parties with respect thereto, *subject to the other provisions of this section,* shall be the same as if the Superintendent of Banks had taken such bank into possession for purposes of liquidation." (Italics added.)

There is nothing in section 136, referred to in the above quotation which could be said to give, either expressly or impliedly, power or authority to effect a reorganization. As to employment of counsel, however, section 136 provides: "The superintendent of banks may employ such counsel and procure such expert assistance and advice as may be necessary in the liquidation and distribution of the assets of such bank, and for that purpose may retain such of the officers or employees of such bank as he may deem necessary. * * * The compensation of * * * counsel * * * and all expenses of supervision and liquidation, shall be fixed by the superintendent of banks and shall be paid out of the funds of such bank in the hands of the superintendent of banks."

As to reorganization, subparagraph 4 of Section 135c provides: "Any bank, including a bank in the possession of the Superintendent of Banks pursuant to the provisions of section 136 of this act, may be reorganized under a plan which requires the consent, (a) Of depositors and other creditors, or (b) Of stockholders, or (c) Of both depositors and other creditors and stockholders." It is further provided that such reorganization shall become effective only when the superintendent of banks shall be satisfied that the plan of reorganization is fair and equitable as to all depositors, other creditors and stockholders and is in the public interest, and shall have approved the plan subject to such conditions, restrictions and limitations as he may prescribe, and when, after notice of such reorganization satisfactory to the superintendent of banks, either depositors and other creditors of the bank representing at least seventy-five per cent. in amount of its total deposits and other liabilities, or stockholders owning at least two-thirds of its outstanding capital stock, or both such depositors, etc., and stockholders, have consented in writing to the plan of reorganization. It is also provided in substance that when such reorganization becomes effective the management of the bank shall be returned to its board of directors by the conservator.

Although it may be assumed, but with out deciding, that the superintendent of banks has authority to employ counsel to assist in the determination of the question as to whether the plan of reorganization is fair and equitable, nevertheless it must be conceded that plaintiff in the within action was not so employed nor did he act for the superintendent of banks in such capacity.

[2, 3] The language employed in section 135c indicates clearly that a conservator is appointed for the benefit and protection of the *depositors* and other *creditors* of the bank. In fact the section expressly provides that such conservator may be appointed whenever the superintendent of banks deems such an appointment necessary to conserve the assets for the benefit of the depositors and other creditors. It is also expressly provided that the conservator shall take over the assets, etc., of the bank and act to conserve the same *pending further disposition of the business of the bank as provided by law.* The law provides two general methods of disposing of the business of a bank which has been taken over by the superintendent of banks, namely: By liquidation, or, by return of the affairs of the bank to its board of directors, with or without reorganization. Secs. 135c and 136, Bank Act, supra. The language of the statute clearly indicates that it is the duty of the conservator to act as a receiver for the benefit of the creditors of the bank in the interim between the time the bank is taken over by the superintendent of banks and the time its business is finally disposed of. It is to be noted that his duty is to *conserve* the assets of the bank. The verb "conserve" is defined as meaning "to keep in a safe or sound state; to save; to preserve from change or destruction". Its synonyms are: Maintain, sustain, uphold, defend, protect, guard, shield, secure. In present usage, to conserve is to keep something (especially institutions, prerogatives, conditions) unimpaired or sound; it stresses the idea of maintenance of an existing condition. See: Webster's New International Dictionary. (cf.: The term "conservative".) As used in the statute the term "conserve" connotes careful, conservative action calculated to keep the assets of the bank safe, sound and unimpaired until such time as disposition is made of them.

[4] Section 135c of the California Bank Act, in so far as it pertains to the appointment and duties of a conservator, is substantially the same as Section 203 of the Federal "Bank Conservation Act". 12 U.S.C.A., § 201 et seq. Of the latter it has been said: "* * * it was the evident purpose of this legislation, as the very title indicates, to hold the assets of a bank in the condition they were at the time and maintain that status until it could be determined whether the bank could safely continue to transact business, should be reorganized or be liquidated." Giffen v. First National Bank & Trust Co. of Greensburg, Pennsylvania, 123 Pa.Super. 476, 187 A. 283, 285. "The purpose of the appointment of a conservator is to hold matters in status quo pending a receivership or some change which may allow the bank to re-open." Downey v. City of Yonkers, D.C., 23 F.Supp. 1018, 1022. To same effect see: Bryce v. National City Bank of New Rochelle, D.C., 17 F.Supp. 792, 799.

[5] Respondent argues that the powers given the conservator under section 135c of the California Bank Act are by way of *grant and permission,* and are not by way of *limitation,* and that the provisions of said section are in no way limited by other sections. A conservator appointed under the provisions of the Federal Bank Conservation Act, supra, has been held to be a receiver, with limited jurisdiction, subject to the control of the Comptroller of the Currency. In re Hober's Estate, 118 Pa.Super. 209, 180 A. 140, 143, citing Commonwealth v. United States Fidelity & Guaranty Co., 314 Pa. 140, 145, 170 A. 686, 91 A.L.R. 229. The same reasoning is directly applicable to the provisions of the California Bank Act and it is readily seen from the language thereof that a conservator appointed under section 135c was intended to act under the direction and supervision of the superintendent of banks in the exercise of all of his functions. Unless the contrary were clearly expressed or implied in the provisions of the statute, it would be inconsistent with the intent and purpose of the act in question to ascribe to the conservator any broader powers than those given to the superintendent of banks himself.

[6] Moreover, there is a distinction to be drawn between the duties of receivers generally and those of a conservator. "It is the function of a conservator to conserve and not, as in the case of a receiver, to liquidate." Gray v. First Nat. Bank & Trust Co. of Yonkers, 263 N.Y. 479, 189 N.E. 557, 559.

While it is true that provisions governing reorganization of banks are contained in the same section of the act (sec. 135c, above outlined) as are those regarding the duties of a conservator, a reading of the entire section reveals no direct or necessary connection between such a reorganization and the duties and powers of a conservator. It is to be noted that it is not expressly provided that a conservator may reorganize a bank, but that "any bank", including one in the hands of the superintendent of banks, may be reorganized under a plan which requires the consent of depositors, creditors or stockholders. The statute does not state who shall formulate such a plan of reorganization. It does, however, expressly provide that the plan must have the approval of the superintendent of banks. On the other hand, the powers and duties of a conservator under section 135c are expressly given for the purpose of conservation of the assets of the bank, nothing is said about his power or authority to reorganize. Unless reorganization is necessarily included within the act of conservation it cannot be said that the authority of the conservator to reorganize the bank is necessarily implied from the powers expressly given.

[7, 8] In this connection, it should be borne in mind that the corporate entity of the bank is not lost through the conservatorship of its assets. The board of directors and the corporate organization still exists, the power of management only being taken over temporarily by the conservator. Westveer v. Ter Keurst, 276 Mich. 277, 267 N.W. 834; Giffen v. First Nat. Bank & Trust Co. of Greensburg, Pennsylvania, supra. This being the case, and banks in the hands of the superintendent of banks being expressly permitted to reorganize with the approval of said superintendent, it follows that under the California Bank Act the board of directors of a bank so taken over would have the power to formulate a plan of reorganization and submit the same to the superintendent of banks for his approval, subject of course, to the conditions of reorganization provided in the statute. Since the power to reorganize is preserved to the board of directors of a bank under the supervision of the superintendent of banks, can it be said that it was the intention of the legislature in enacting the provisions of section 135c also to give that power to a conservator?

Under a statute imposing upon the auditor of the state of Illinois the duty of assuming control of a bank "for the purpose of reorganization or liquidation through receivership", it has been held manifest that the auditor cannot undertake proceedings necessary to reorganize a bank, and that if a reorganization is to be effected it can be done only by the bank, acting through its officers and directors in cooperation with the state banking authorities. People v. Halsted Street State Bank, 295 Ill.App. 193, 14 N.E.2d 872, 878.

As pointed out by appellants, a reorganization of a bank is primarily for the benefit of the stockholders. It must be borne in mind that a conservator under the Bank Act is appointed to act in the interests of the creditors and depositors, not the stockholders. Were the intention otherwise the legislature would have included the word "stockholders" in the provisions of section 135c, above referred to, which state the persons for whom the assets of the bank are to be conserved.

It is noteworthy that in subparagraph 4 of said section, providing for consent to reorganization of a bank, the legislature has included stockholders as a class of persons from whom such consent is to be obtained, but has required a different per centum for a consent of stockholders than for a consent of depositors and other creditors and has clearly set stockholders apart as a class distinct from that of depositors and other creditors.

"It will therefore be seen that the term 'stockholders' is used by the Legislature to denote a distinct class, separate and apart from depositors and creditors, and we must conclude not only from the nature and history of the legislation, but from the general use of the term 'creditors' and a careful reading of the Act, that the Legislature intentionally omitted the word 'stockholders' from the subsection authorizing the appointment of a conservator." Ex parte Miller, 191 S.C. 260, 1 S.E.2d 512, 516, in construing a statute of South Carolina similar in language and identical in purpose to the one here in question.

[9] Conceivably, a conservator would not, under the Bank Act, necessarily have to hold himself aloof from the formulation of a plan of reorganization of the bank under his control, but any part taken by him as conservator in such a plan must be in the interests solely of depositors and other creditors as opposed to the interests of the stockholders, in order to keep within the authority given him by the act.

In the instant case the conservator was chairman of the board of directors and a large stockholder of the insolvent bank. Respondent had been attorney for the bank up to the time the conservator was appointed. The plan of reorganization appears to have been formulated and initiated by the conservator.

Under such circumstances it is difficult to say whether in formulating such a plan he was acting in his capacity as chairman of the board and stockholder or in the capacity of conservator. However, as pointed out above, his only authority as conservator was to act in the interests of the depositors and other creditors, and since in formulating a plan of reorganization he must of necessity have been acting also in the interests of the stockholders, it must be assumed that he was then acting not as conservator but as chairman of the board.

[10, 11] It is necessary to go even further and to hold that because of the nature of the duties of a conservator under section 135c of the Bank Act, in the absence of any authority clearly expressed or implied in such act, a conservator is without authority to formulate and effect a plan of reorganization of a bank under his control. The language of the act in question should not be extended by unnecessary inference beyond the reasonable requirements of the emergency conditions under which it was adopted. Mauro v. Vervena, 58 R. I. 24, 190 A. 796.

[12] It follows therefore, that the trial court erred in permitting the jury to consider evidence of respondent's services rendered in attempting to effect a plan of reorganization, when determining the value of respondent's services as counsel to the conservator.

[13] It appears that the court instructed the jury to the effect that the conservator had the power and authority to formulate, propose and take steps to effect the reorganization of the bank and to employ respondent as his attorney for this purpose, and refused to give an instruction requested by appellants to the effect that under the provisions of the Bank Act a conservator and the superintendent of banks are only permitted to employ such counsel as may be necessary to assist in the liquidation and distribution of the assets of the bank and that there was no authority to employ respondent to render services with respect to any reorganization, all of which appellants assign as error on the part of the court. As may be seen from the foregoing, the instructions given were of course erroneous, as was the refusal to instruct the jury that the conservator had no authority to employ counsel in aid of the reorganization of the bank.

[14, 15] As to that portion of the proposed instruction to the effect that a conservator under the Bank Act is only permitted to employ such counsel as may be necessary to assist in the liquidation and distribution of the assets of the bank, there is a question as to whether this places too narrow a construction upon a conservator's authority to employ counsel. It is true that the only express authority given to the superintendent of banks to employ counsel, as provided in section 136, is that he "may employ such counsel and procure such expert assistance and advice as may be necessary in the liquidation and distribution of the assets", and that the authority of the conservator to employ counsel may only be derived from the provision of section 135c that he "shall have all the rights, powers and privileges now possessed by or hereafter given the Superintendent of Banks, with relation to banks of which he has taken charge under the provisions of section 136." However, as noted above, it is the duty of a conservator to conserve the assets and not to liquidate them. Moreover, as a receiver of the assets for the purpose of conservation, the conservator should be entitled to the advice of counsel. This being the case, in reading sections 135c and 136 together and having in mind the general purpose for which the former section was enacted, it would not be placing too strained a construction upon the language of the statute to hold that a conservator may employ such counsel as may be necessary in the conservation of the assets of the bank. In fact, such a construction is wholly consistent with the apparent legislative intent shown by the enactment of the provisions of section 135c. Furthermore, conservation of the assets of a bank is necessary to a proper and equitable liquidation and distribution, and hence employment of counsel to advise and assist in matters of conservation is well within the expressed power to employ such counsel as may be necessary in the liquidation and distribution of the assets.

Therefore, a proper instruction in this regard would be to the effect that a conservator may employ such counsel as may be necessary in the conservation of the assets of the bank for the benefit of depositors and other creditors, and an instruction to the effect that he may only employ such counsel as may be necessary in the liquidation and distribution of the assets of the bank would be erroneous and misleading if given without further amplification.

The authority of the insurance commissioner to effect the rehabilitation of an insurance company under the Insurance Code as exemplified in the Pacific Mutual case, Carpenter v. Pacific Mut. Life Ins. Co., 10 Cal.2d 307, 74 P.2d 761, cited by respondent, is wholly inapplicable. As pointed out by appellants, such rehabilitation was effected solely for the benefit of the policyholders. Furthermore, the Insurance Code expressly confers such power on the insurance commissioner by section 1043 thereof, St.1935, p. 547, § 1043. Any instance of express statutory authorization is of no assistance in deciding the question here involved.

Inasmuch as the errors pointed out above will require a retrial of the issues herein it is unnecessary at this time to consider such of appellants' contentions as are based solely upon the nature and character of the evidence adduced at the first trial.

[16] Appellants' objections to two instructions, one as to compensation for unpaid services and the other as to compensation on a quantum meruit basis in the event there was no agreed compensation, are unfounded. If proper services were rendered for which respondent had not been paid, he was entitled to recover compensation therefor, and if there were no set agreement as to the amount of compensation, respondent was entitled to recover the reasonable value of his services, not exceeding the amount prayed for.

[17] Appellants contend that the court erred in rendering judgment against both defendant bank, in liquidation, and the superintendent of banks, in his official capacity, and that the judgment should have been against the superintendent of banks, as such, alone. Since the judgment would have to be paid out of the funds of the bank in the hands of the superintendent in any event, it is difficult to see what difference the form of the judgment makes. The effect of the judgment is the same in either case. As pointed out above, the corporate entity of the bank continued to exist after the superintendent of banks took possession of the assets.

[18] Manifestly, it must be assumed that the jury gave due consideration to the court's instruction and also took into account, in arriving at its verdict, the evidence improperly admitted. In the circumstances here presented such errors cannot be regarded as unprejudicial.

For the reasons as above set forth, the judgment is reversed and the cause remanded for a new trial.

We concur: YORK, P. J.; WHITE, J.

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41 Cal.App.2d 653

ORWITZ v. BOARD OF DENTAL EXAMINERS OF CALIFORNIA.

Civ. 11263.

District Court of Appeal, First District, Division 1, California.

Nov. 26, 1940.

Rehearing Denied Dec. 26, 1940.

Hearing Denied Jan. 23, 1941.

1. Mandamus 🔑168(2, 4)

In dentist's proceeding for writ of mandate to annul board of dentistry's suspension for one year of his license for advertising in manner contrary to statute, proof that dentist, who denied "knowledge" of the advertisement, prepared, placed or even saw the advertisement, was unnecessary if he was conscious or aware of the advertisement, and such awareness could be proved by circumstances. St.1915, p. 698; St.1937, p. 1249, § 1680(11, 14).

"Knowledge" is generally associated with the mental impression made upon an observer of external facts, that is, that they in fact exist.

See Words and Phrases, Permanent Edition, for all other definitions of "Knowledge".

2. Evidence 🔑595

Where a denial of an inferred fact is open to doubt, the inference drawn from facts legally proved is not dispelled as a matter of law by the denial and may overcome the denial.

3. Appeal and error ⚷1012(1)

On appeal, the District Court of Appeal was not required to weigh the evidence.

4. Mandamus ⚷168(4)

In dentist's proceeding for writ of mandate to annul board of dentistry's suspension for one year of his license for advertising in manner contrary to statute, where dentist's knowledge of and consent to the improper advertisement was open to doubt, his denial of knowledge and consent did not as a matter of law dispell reasonable inference from other facts proved that he had knowledge of and consented to the advertisement. St.1915, p. 698; St.1937, p. 1249, § 1680(11, 14).

5. Mandamus ⚷168(4)

In dentist's proceeding for writ of mandate to annul board of dentistry's suspension for one year of his license for advertising in manner contrary to statute, evidence that dentist who maintained several offices was informed of the improper exhibit in one of the branch offices, which exhibit continued for about a year, and that he visited the office several times, justified the suspension on ground that he knew of and approved the exhibit. St.1915, p. 698; St.1937, p. 1249, § 1680(11, 14).

◆

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Samuel D. Orwitz against the Board of Dental Examiners of the State of California, for a writ of mandate to annul the board's action suspending plaintiff's license to practice dentistry for a period of one year. An alternative writ of mandate was granted, and, from judgment discharging the alternative writ and denying the writ of mandate, plaintiff appeals.

Affirmed.

Rehearing denied; PETERS, P. J., dissenting.

Faulkner & O'Connor, of San Francisco, for appellant.

H. E. Lindersmith, of Los Angeles, for respondent.

WARD, Justice.

Appellant in the superior court obtained an alternative writ of mandate to annul the action of the Board of Dental Examiners of the State of California suspending his license to practice dentistry for a period of one year. Upon stipulation of the respective parties, the hearing in the trial court was confined to the evidence contained in a transcript of testimony taken before the board. The writ of mandate was denied and the alternative writ discharged.

The accusation against appellant before the board contained four counts. He was acquitted upon the third and fourth, and found guilty on the first and second, which charged (1) that appellant in advertising as a dentist caused to be exhibited to the public from a show window of one of his dental offices "a representation of the tooth, teeth, bridgework or a portion of the human head; (2) that he "made use of advertising statements of a character tending to deceive or mislead the public."

Appellant maintains dental offices in seven California cities. The charges upon which his suspension is based have reference to one of two offices in Sacramento —a branch office, located in a store building fronting directly on the sidewalk. A licensed practitioner was in charge of the two Sacramento offices, visiting the office in question with a dental nurse approximately during the noon hour each day. Otherwise the office was in charge of a man described by appellant as a male nurse or technician. In the window of the office were displayed a human skull, several dentures and a picture of George Washington, accompanied by a statement comparing by inference plates worn by Washington with those made by appellant. At the top of a small case containing dentures there was a piece of paper upon which was typed the word "Unbreakable". Appellant testified that as soon as the advertising matter was called to his attention he directed its discontinuance; that the advertising matter was contrary to the provisions of Business and Professions Code, sec. 1680, subds. 11, 14, St.1937, p. 1249. That appellant's license was subject to revocation or suspension seems to be conceded, but it is urged that there is an entire lack of evidence disclosing a knowledge on the part of appellant of the existence of the displays or exhibits.

We approach the question upon the theory that there must be some substantial evidence, even though it may be circumstantial, to prove appellant knew of this advertising. The evidence shows the exhibits introduced to be advertising matter. A photograph thereof was made on April 27, 1937, and the photographer testified that the display in the window several months later appeared to be the same as on the date the photograph was taken. Another witness saw a display on May 11, 1937. A third witness first saw the display in June of 1936, and a fourth testified that he observed it at least nine times between January and April of 1937.

The dentist in charge of the Sacramento offices testified that the nurse attached to the main office called his attention to the window exhibit during the latter part of April, 1937, and that he directed its removal; that on account of the mental and physical condition of the male nurse in charge of the branch office, Dr. Orwitz was communicated with and that he appeared in Sacramento and directed the transfer of the male nurse to San Francisco. This witness testified that he observed the advertising exhibit only upon one occasion—the date of its removal. The office nurse at the main Sacramento office corroborated the dentist in charge except that she fixed the time of the removal of the male nurse to San Francisco as the month of May. Appellant's bookkeeper placed the time of the transfer of the male nurse as between May 15th and May 22nd.

Appellant testified that he practiced in San Francisco and attempted to make visits in his various offices once a week. He also testified that he had not seen and did not know of the window display; that it had been made without his knowledge; that he would not have permitted such an exhibit in any of his offices; that he knew it was illegal. He denied ownership of the skull and testified that he did not make "unbreakable" plates; that at this time there is no denture that is unbreakable.

There is ample evidence to support the findings made and filed in the superior court. The particular point made by appellant is with relation to the right of the court to reject direct and positive testimony of a fact in favor of reasonable inferences drawn from indirect evidence at variance with it. He urges that "there is an entire lack of evidence disclosing a knowledge on the part of appellant of the existence of such displays or exhibits".

[1] Knowledge is generally associated with the mental impression made upon an observer of external objects, that is, that they in fact exist. Appellant was accused of advertising in a manner and form obnoxious and in fact contrary to the provisions of the Dental Practice Act, St.1915, p. 698. It would not be necessary to show that he prepared or placed or even saw the advertisement if there was a consciousness or awareness on his part of the advertisement. This awareness might be proven by circumstances. For instance, evidence of information conveyed to appellant of the existence of the exhibition or that he was often placed physically in such a position in passing into the Sacramento branch office that it might reasonably be concluded that he ultimately saw and understood the purport of the advertisement.

[2] Appellant relies upon certain language in Osborne v. Baughman, 85 Cal. App. 224, 259 P. 70, and Engstrom v. Auburn Auto Sales Corp., 11 Cal.2d 64, 77 P.2d 1059. In the Engstrom case (11 Cal. 2d page 70, 77 P.2d page 1063), the court said: "On the other hand, an *inference* is dispelled as a matter of law when it is rebutted by clear, positive, and uncontradicted evidence *which is not open to doubt* * * *." (Italics added.) In many cases on appeal and on trial, it is urged that a direct denial of a fact is equivalent to a complete destruction of any evidence in conflict therewith. If this contention, as often broadly stated, were accepted, it would not be possible to prove any fact against a direct denial, including the denial of an accused guilty of an offense denounced by the Penal Code. It was not intended that a denial should be classified as conclusive evidence. This was demonstrated when the statement in the Engstrom case was qualified by the phrase "not open to doubt". In other words, if the denial is open to doubt, an inference drawn from a fact legally proved may overcome the denial. That such thought controlled in the writing of the Engstrom opinion is shown by an analysis of the facts which led to the statement. The vital question there under consideration was the length of time permitted by an automobile sales company to a prospective buyer to use and operate an automobile on a test tour. The facts are set forth in the opinion (11 Cal. 2d page 67, 77 P.2d page 1061) as follows: "After some consultation between the sales manager and salesman, it was agreed that defendant Silkman might take the car for the purpose specified. However, the evidence indisputably discloses that Silkman was expressly told he was to return the car within an hour and a half or two hours at the outside. He agreed to this condition and promised to return the car within two hours. He departed the salesroom with the car at about 5 p. m. on July 25,

1935. He did not return the car within the agreed time. In fact, he did not return it that day or night. On the contrary, he returned it the following day at approximately 4 p. m., the accident having occurred shortly prior thereto. Following the expiration of the period prescribed for the return of the car, the respondents made several efforts to locate the defendant Silkman. Their efforts in this regard culminated shortly prior to its return in a report to the police department that the car had been stolen. The appellant made no effort to controvert the evidence that the car had been intrusted to Silkman for the limited period of two hours or that the accident had occurred long after the period had expired. The evidence in this respect is uncontradicted."

The contention was presented that the inference drawn from proof of ownership and the permission for the two-hour test was prima facie proof of permission to use the car for approximately twenty-four hours. This was sufficient to preclude the granting of a nonsuit. The denial of permission was not contradicted by direct or circumstantial evidence in the Engstrom case, and the question of "knowledge" was not involved. However, in Osborne v. Baughman, supra, "knowledge" was a subject of consideration. In that case the question determined was whether in an aiding and abetting case any testimony was adduced proving that a dentist was chargeable with knowledge that one of his unlicensed employees was practicing dentistry. The employee had previously been convicted of practicing without a license. We quote from the Osborne case (85 Cal.App. pages 226, 227, 259 P. page 71) as follows: "The appellants assert that from the fact that Dr. Osborne had heard that Wilson had been accused of practicing without a license in San Diego, and from the fact that Wilson was managing his office in Los Angeles—which Dr. Osborne had not visited in two or three months—they were justified in believing that respondent had knowledge of the fact that Wilson was doing operative dentistry. This argument would be more forceful, had there been a series of acts instead of an isolated instance; but as it stands we may only suspicion that there was more than one act, and, building upon suspicion rather than proof, if we adopt appellants' argument, infer that the doctor must have had knowledge by reason of its continuity. No inference is legally justifiable in this situation, and there is uncontradicted evidence in the record that Wilson's one act of practice was without Dr. Osborne's knowledge. But even if an inference were justified, the positive uncontradicted testimony to the contrary would dispel the inference."

[3-5] In the instant case there was evidence of continuity of exhibition of this advertisement extending for approximately a year. Unlike the Osborne case, there is not an entire lack of competent evidence upholding the position of the board. Fuller v. Board of Medical Examiners, 14 Cal. App.2d 734, 59 P.2d 171; County of Los Angeles v. Industrial Acc. Comm., 13 Cal. App.2d 69, 56 P.2d 577. It is not the duty of this court to weigh the evidence, but we may point out that from the numerous visits of appellant to that particular office, there was ample opportunity for him to have known by actual observation that the exhibits occupied the window, and this is reinforced by the positive testimony of the dentist in charge of the main office, and the nurse there, that the information was conveyed to the appellant. On rebuttal one witness testified that the advertisement was there after subpœnas had been issued to witnesses to attend the hearing before the board.

The question of knowledge and consent on the part of appellant relative to the maintenance of the exhibit as an advertisement is open to doubt within the meaning of the Engstrom case; therefore the denial did not as a matter of law dispel a reasonable inference drawn from other facts proven in the case. From all the evidence, the approval of the maintenance of the exhibit could be implied. Engstrom v. Auburn Auto Sales Corp., supra, 11 Cal.2d page 68, 77 P.2d 1059. On the hearing before the superior court in the present case, the judge commented as follows: "Having read and reviewed all of the evidence presented at the hearing conducted by the Board, it is my conclusion that such evidence is amply sufficient to justify the Board's findings and action. Petitioner has been unable to convince me that the board's decision is contrary to the weight of the evidence. It is my independent conclusion, derived from the evidence, that petitioner knew, consented to and authorized the maintenance of the objectionable conditions on which the charges against him are based."

In Drummey v. State Board of Funeral Directors, 13 Cal.2d 75, 85, 87 P.2d 848, 854, the court said: "In view of these principles, it necessarily follows that the court to which the application for mandate is made to secure the restoration of a professional license must exercise an independent judgment on the facts. This does not mean that the preliminary work performed by the administrative board in sifting the evidence and in making its findings is wasted effort. As was pointed out in the St. Joseph Stock Yards case, supra [St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 56 S.Ct. 720, 80 L.Ed. 1033], in weighing the evidence the courts can and should be assisted by the findings of the board. The findings of the board come before the court with a strong presumption of their correctness, and the burden rests on the complaining party to convince the court that the board's decision is contrary to the weight of the evidence."

The judgment is affirmed.

We concur: PETERS, P. J.; KNIGHT, J.

41 Cal.App.2d 638

DUNN et al. v. STRINGER.

Civ. 6402.

District Court of Appeal, Third District, California.

Nov. 22, 1940.

Rehearing Denied Dec. 19, 1940.

1. Joint adventures 🔑5(1)

In suit to rescind contract of association between plaintiffs and defendant to collaborate in joint adventure to produce and market stories for radio broadcasting where defendant filed cross-complaint for accounting as to undistributed funds allegedly received by plaintiffs from sales of stories under contract, money necessarily expended by plaintiffs, on account of defendant's breach of contract, was properly credited to plaintiffs' account in determining amount of undistributed funds due defendant. Civ. Code, §§ 1689, 3406.

2. Joint adventures 🔑5(2)

In suit to rescind, on ground of alleged fraud by defendant, a contract of association between plaintiffs and defendant to collaborate in joint adventure to produce and market stories for radio broadcasting, evidence justified judgment for plaintiff on ground that defendant procured execution of contract by fraudulent representations, that defendant failed to fulfill contract, and that plaintiffs received nothing of value thereunder. Civ.Code, §§ 1689, 3406.

3. Joint adventures 🔑5(1)

Where plaintiffs and defendant entered into contract of association to collaborate in joint adventure to produce and market stories for radio broadcasting, and defendant procured execution of contract by means of fraud, and breached contract by failing to perform its terms, in that manuscripts furnished plaintiffs by defendant did not conform to requirements of contract and were not supplied by defendant within time specified, plaintiffs were authorized to rescind contract for "failure of consideration" and because it was procured by fraudulent representations. Civ.Code, §§ 1689, 3406.

See Words and Phrases, Permanent Edition, for all other definitions of "Failure of Consideration".

4. Joint adventures 🔑5(1)

In suit to rescind contract of association between plaintiffs and defendant to collaborate in joint adventure to produce and market stories for radio broadcasting, proceeds received by plaintiffs from sales of stories prior to notice of cancellation of contract were properly included in accounting demanded by defendant under cross-complaint for accounting by plaintiffs as to undistributed funds allegedly received by plaintiffs from sales of stories under contract.

5. Cancellation of instruments 🔑57

When a court acquires jurisdiction in a suit to rescind a contract on ground of fraud, under a prayer for general relief, and when a cross-complaint affirmatively demands an accounting, the court may decree an accounting and render a money judgment against defendant incidental to rescission of contract to maintain status quo of respective parties.

6. Cancellation of instruments 🔑57, 58

On a bill for rescission, an accounting may be ordered in a proper case, even though bill fails as to rescission, and, in accordance with principle that parties will be given complete relief, whether equitable or legal in nature, the court may, in a proper case, award complainant a judgment for money damages.

7. Joint adventures 🔑5(1)

Where trial court, upon demand of defendant in cross-complaint for accounting in suit to rescind contract of association between plaintiffs and defendant to collaborate in joint adventure to produce and market stories for radio broadcasting, held that all money derived from sales of stories had been properly distributed between parties, except a certain amount which was paid by plaintiffs, pursuant to terms of contract, for necessary expenses incurred on account of defendant's failure to perform contract, it was proper to decree that no money was due defendant from plaintiffs.

8. Appeal and error 🔑882(3)

Where suit for rescission of contract of association between plaintiffs and defendant to collaborate in joint adventure to produce and market stories for radio broadcasting was tried on theory that a settlement of proceeds from sales of stories was mutually submitted to trial court by consent of parties as an incident to suit for rescission, and accounting was sought by defendant's cross-complaint, defendant could not complain on appeal of that portion of decree which determined result of accounting.

9. Joint adventures 🔑5(2)

Where complaint in suit to rescind contract of association between plaintiffs and defendant to collaborate in joint adventure to produce and market stories for radio broadcasting alleged that defendant falsely represented that he was possessed of unlimited material suitable for use in stories, and that he was able to and would furnish valuable personal service in preparing stories, that defendant refused to supply materials and co-operate with plaintiffs, and that defendant's services under contract were valueless, complaint stated a cause of action for rescission, notwithstanding that it did not specifically allege that plaintiffs were pecuniarily damaged by fraud or as result of breach of contract. Civ.Code, §§ 1689, 3406.

10. Cancellation of instruments 🔑43

Ordinarily, fraud without resulting injury will not afford relief in suits to rescind a contract, but it is not necessary to plead or prove pecuniary damages as a result of fraud and breach of contract, it being sufficient to show that substantial injury has resulted from fraud and breach. Civ.Code, §§ 1689, 3406.

11. Pleading 🔑406(7)

In suit to rescind a contract, defendant, by failing to demur to complaint, "waived" his right to object to insufficiency of complaint for omission to specifically state that plaintiffs were pecuniarily damaged by defendant's fraud or as result of defendant's breach of contract. Civ.Code, §§ 1689, 3406.

See Words and Phrases, Permanent Edition, for all other definitions of "Waived".

12. Contracts 🔑94(1)

In suit for rescission of a contract on ground of fraud, between parties thereto, instrument may be cancelled, even in absence of a showing of actual pecuniary loss to plaintiff.

13. Appeal and error 🔑1071(6)

Failure to specifically adopt findings upon a particular issue was not reversible error where a more specific finding would necessarily have been adverse to appellant.

14. Joint adventures 🔑5(2)

In suit to rescind, for alleged fraud by defendant, a contract of association between plaintiffs and defendant to collaborate in joint adventure to produce and market stories for radio broadcasting, evidence supported finding that manuscripts prepared by defendant and furnished to plaintiffs were valueless. Civ.Code, §§ 1689, 1691, subd. 2, 3406.

15. Cancellation of instruments 🔑24(1)

Where thing involved in a rescission suit has no value to either party, it is not necessary, as a prerequisite to cancellation of contract, to restore the property. Civ.Code, § 1691, subd. 2.

16. Appeal and error 🔑938(3)

On defendant's appeal from adverse judgment in suit to rescind contract of association between plaintiffs and defendant to collaborate in joint adventure to produce and market stories for radio broadcasting, exhibits on file would be presumed to include all manuscripts involved in suit.

17. Joint adventures 🔑5(1)

In suit to rescind contract of association to collaborate in joint adventure to produce and market stories for radio broadcasting, where judgment was properly awarded to plaintiffs, manuscripts furnished plaintiffs by defendant should have been ordered returned by plaintiffs to defendant, although manuscripts were valueless for purpose of marketing them, where manuscripts might possess some value to defendant. Civ. Code, § 1691, subd. 2.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Suit by Winifred Dunn and another against Sparks Stringer to rescind a contract of association between plaintiffs and defendant to collaborate in a joint adventure to produce and market a series of stories for radio broadcasting, wherein defendant filed a cross-complaint. From a judgment for plaintiffs, defendant appeals.

Judgment modified and, as modified, affirmed.

Spencer Austrian, of Los Angeles, for appellant.

Cummins, McMillan & Cummins, of Los Angeles, for respondents.

Mr. Acting Presiding Justice THOMPSON, delivered the opinion of the court.

This is a suit to rescind a contract of association of the respective parties in this suit to produce and market for radio broadcasting a series of stories under the title of "The Unbelievable" and a serial story "The Secret City", and to obtain an accounting of the proceeds derived therefrom. The court adopted findings and rendered a judgment against the defendant, cancelling the contract and determining that neither party is indebted to the other. The plaintiffs were awarded their costs of suit. From that judgment the defendant has appealed.

The complaint alleges that on December 30, 1936, the respective parties to this suit executed a written contract of association, a copy of which is attached as an exhibit thereto, by the terms of which they agreed to collaborate in a joint adventure in writing and producing serial stories to be copyrighted and sold for radio broadcasting and publication under the title of "The Unbelievable" and "The Secret City"; that the defendant, Sparks Stringer, falsely represented that he was possessed of unlimited authentic facts and material and that he would promptly furnish plaintiffs historical facts and real incidents suitably outlined with respect to the plots, characters and dialogues involved to enable the plaintiffs to edit, correct, write, dramatize, complete, copyright and market the stories; that the said representations were false and fraudulent, as the defendant then knew, and upon the contrary that the defendant owned no such facts or material and that he failed to obtain or supply them to plaintiffs, who signed the contract in reliance upon the defendant's representations; that on July 26, 1937, the plaintiffs notified the defendant in writing of their cancellation of the contract, offering to restore to him everything of value received by them, which the defendant subsequently refused. The complaint asks for a rescission of the contract and for restoration to the plaintiffs of their original status quo, together with such further relief as may be meet in the premises.

The defendant answered the complaint, admitting the execution of the contract, but denying all other material allegations of the pleading. He also filed a cross-complaint, reciting that thirty serial stories, under the title "The Unbelievable" had been prepared and sold by the parties to the contract for the sum of $8,100, payable at the rate of $270 for each story when it was accepted and used; that the sum of $5,193.18 had been received on that account and divided between the parties in the proportions designated by the contract, but that the remaining sum of $2,906.82 had not been distributed and on the contrary that the last-mentioned sum was wrongfully appropriated by the cross-defendants; that the proportions of said sum to which the respective parties are entitled according to the provisions of the contract, is 45 per cent. thereof to the cross-complainant, Sparks Stringer, a similar amount to the cross-defendant, Winifred Dunn, and the remaining 10 per cent. to the cross-defendant, Harold Swar that the cross-defendants breached contract and refused to perform its ter and the cross-complainant is entitled to his proportion of the undistributed money on hand. The cross-complaint thereupon demanded an accounting, a judgment for the amount of money due to plaintiff and cancellation of the contract. Plaintiffs answered the cross-complaint, denying the material allegations thereof, except that it was admitted that $8,100 was received from the sale of episodes, but asserted that the entire sum had been disbursed in accordance with the provisions of the contract and they then prayed for judgment accordingly.

[1] The court adopted findings adverse to the defendant and cross-complainant on every material issue. It was determined that the defendant procured the execution of the contract in question by false and fraudulent representations, reciting specific acts and declarations constituting that fraud, and the court thereupon rescinded the agreement on that account. The court found that the defendant and cross-complainant failed to fulfill his contract, and on the contrary that the plaintiffs and cross-defendants received "nothing of value * * * under the contract". The court further found, as a result of the accounting which was held at the request of the cross-complainant, that plaintiffs were required to and did expend large sums of money, authorized by the terms of the contract, because of the defendant's failure to comply therewith, amounting in the aggregate to more than the undistributed funds to which the defendant would otherwise be entitled under the contract, and that he is therefore entitled to recover nothing from the plaintiffs in this action. The court specifically found that the plaintiffs necessarily expended, on account of the defendant's breach of contract, money for items aggregating the sum of $1,335.29, which exceeds the proportion of the undistributed funds to which the defendant would otherwise be entitled. Those several items were properly credited to the account of the plaintiffs.

[2] The findings and judgment are adequately supported by the evidence in spite of the existing conflict of testimony. The record consists of a thousand pages of evidence and a large number of exhibits. It would be an idle task to attempt to review the record merely to prove there is substantial testimony to support the findings and judgment.

[3, 4] There is evidence to show that the defendant procured the contract with the plaintiffs by means of fraud and that he breached that agreement by failing to perform its terms. While the defendant did furnish plaintiffs with certain manuscripts of episodes for broadcasting, they did not conform to the requirements of the contract and they were rejected by the proposed purchasers because they were plagiaristic and not founded on factual incidents. The material was not supplied by the defendant within the time specified and it was not presented in suitable form to render it marketable. The plaintiffs were therefore required to compromise a demand for damages claimed by Charles Fort, the author of books from which the defendant plagiarized and appropriated many plots and incidents incorporated in his proposed stories. His failure to furnish plaintiffs with material for episodes within a reasonable time required them to make independent research and to originally prepare their manuscripts at a considerable expense of time and money. The plaintiffs were therefore justified in giving to the defendant notice of rescission of the contract. The agreement was not void, but merely voidable. The proceeds derived from the sales of serial stories were received prior to the notice of cancellation of the contract. They were properly included in the accounting demanded by the defendant in his cross-complaint.

[5, 6] The plaintiffs were authorized to rescind the contract in the present case for failure of consideration and because it was procured by fraudulent representations. Secs. 1689 and 3406, Civ.Code. When a court actually acquires jurisdiction in a suit to rescind a contract on the ground of fraud, under a prayer for general relief, and when a cross-complaint affirmatively demands an accounting, the court may decree an accounting and render a money judgment against the defendant incidental to the rescission of the contract to maintain the status quo of the respective parties. Stewart v. Crowley, 213 Cal. 694, 700, 3 P. 2d 562, 564; 12 C.J.S. Cancellation of Instruments, 1083, § 79 [a]; 4 Cal.Jur. 797, sec. 29; 9 Am.Jur. 402, sec. 65. In 12 C.J.S., supra, it is said in that regard:

"On a bill for rescission, an accounting may be ordered in a proper case, even though the bill fails as to the rescission. * * *

"In accordance with the principle that the parties will be given complete relief, whether equitable or legal in nature, it has been held that the court may, in a proper case, award complainant a judgment for money damages."

In the Stewart case, supra, the judgment was affirmed on appeal. The decree in that case, determined that the contract in question should be cancelled, and directed judgment for $2,500 against the appellant. It was contended the court had no jurisdiction in a suit for rescission of a contract to also award a money judgment. The court said: "Appellant likewise contends that the trial court committed error in decreeing rescission and in giving a $2,500 judgment against him in the same action, on the ground that rescission and 'damages' cannot be granted in the same action. The trial court in its judgment made the rescission of the lease conditional upon respondents paying Hudson the $2,500 he had paid Crowley for the lease, and decreed that Crowley must reimburse the respondents for this outlay. The judgment is a correct and proper one, and in accordance with the principle that in such actions the court should do complete equity between the parties. It is well settled that in such actions the court may grant any monetary relief necessary to do complete equity between the parties."

[7, 8] In the present case, upon the specific demand of the defendant in his cross-complaint for an accounting, the court merely held that all money derived from sales of the serial stories had been properly distributed between the respective parties, except the sum of $1,313.39 which was paid by the plaintiffs, pursuant to the terms of the contract for necessary expenses incurred on account of defendant's failure to perform the contract on his part. The court therefore properly held, as a result of that accounting, that no money was due to the defendant from the plaintiffs and cross-defendants. The defendant may not complain of that portion of the decree which determines the result of the accounting. The accounting was sought by the cross-complaint of the defendant. The case was tried on the theory that a settlement of the proceeds from the sales of the stories involved in the contract was mutually submitted to the court by consent of the parties as an incident to the suit for rescission.

[9, 10] The appellant asserts, for the first time, on appeal, that the complaint fails to state a cause of action for rescission of the contract because it does not specifically allege that the plaintiffs were pecuniarily damaged by the fraud or as a result of the breach of contract. There is no merit in that contention. The complaint specifically charges that the defendant falsely represented that he was possessed of unlimited material suitable for use in the serial stories and that he was able to and would furnish valuable personal service in preparing them; that he "failed and refused * * * to supply said materials and to co-operate with these plaintiffs as provided by the terms of said contract," and that "his services under the contract were valueless". No demurrer to the complaint was filed. While it is true that ordinarily fraud without resulting injury will not afford relief, in cases of this class, it is not necessary to plead or prove pecuniary damages as a result of the fraud and breach of contract. It is sufficient to show that substantial injury or prejudice has resulted from the fraud and breach of contract. Spreckels v. Gorrill, 152 Cal. 383, 92 P. 1011; Menefee v. Oxnam, 42 Cal.App. 81, 83, 183 P. 379. In the Spreckels case, supra, which was a suit for rescission of a contract creating a joint adventure similar to the transaction which is involved in this case, the court said [152 Cal. 383, 92 P. 1014], "The fraud is the essential thing, the precise amount of damage being of secondary importance." In that case the defendant also contended that the complaint failed to state a cause of action, just as the appellant claims a lack of an allegation of damages in the present case, because no pecuniary loss was specifically alleged as a result of the fraud. The court said in that regard: "It is also claimed that the complaint is insufficient because of the absence of any showing therein that any pecuniary damage was caused by the fraud alleged. It is true that there is no express allegation that plaintiff suffered pecuniary damage therefrom, but in cases of this character this is not necessary. That fraud which has produced, and will produce, no injury will not justify a rescission, nor support an action either for rescission or damages, is an established principle of law and equity. But there is no rule that the injury must be of such a nature that it can be accurately measured in money. And we know of no rule of pleading which, in an action based upon a rescission between the parties or seeking to enforce such rescission, requires a statement that the fraud complained of had caused or would cause a specific amount of damages."

[11] The defendant waived his right to object to the insufficiency of the complaint for the omission to specifically state that the plaintiffs were pecuniarily damaged, by his failure to demur to the pleading. In the Spreckels case, supra, it is said in that regard: "If the defendant desired a more explicit statement showing the amount of the pecuniary loss, he should have presented the objection by means of

a demurrer for uncertainty in that particular."

[12] It has been frequently held in suits for rescission of a contract on the ground of fraud, between the parties thereto, that the instrument may be cancelled even in the absence of a showing of actual pecuniary loss. Munson v. Fishburn, 183 Cal. 206, 217, 190 P. 808; Rodriguez v. Bulotti, 123 Cal.App. 264, 266, 11 P.2d 9; Aycock v. Carr, 105 Cal.App. 675, 288 P. 448; Davis v. Butler, 154 Cal. 623, 98 P. 1047; Denovan v. Golden State Woolen Mills, 104 Cal.App. 504, 286 P. 714.

[13] There is no merit in appellant's contention that the court failed to adopt findings to the effect that his radio stories submitted to the plaintiffs under the title of "The Secret City" were not also in violation of the terms of the contract. There is some evidence that one episode was prepared and presented by the defendant under that title. Our attention is called to no evidence indicating that that manuscript complied with the terms of the contract or that it was marketable. The court did find that the only stories which were sold were prepared wholly by the research and the efforts of the plaintiffs, and that they were sold under the title of "The Unbelievable". No episode was sold under the title of "The Secret City." The court did specifically find that no material of value was received from the defendant, and, on the contrary determined that "It is not true that the scripts already produced in the series entitled 'The Secret City', have a marketable value." It is apparent that a more specific finding regarding the use of the title "The Secret City", would necessarily have been adverse to the defendant. Under such circumstances the failure to specifically adopt findings upon a particular issue is not reversible error. Hulen v. Stuart, 191 Cal. 562, 572, 217 P. 750; Norton v. Puter, 138 Cal. App. 253, 260, 32 P.2d 172.

Finally, the appellant contends that the court erred in rescinding the contract without requiring the plaintiffs to restore to him the manuscripts of proposed stories which were prepared by him. The court specifically found that those documents were valueless, because they were not in the form prescribed by the contract; the incidents contained in them were plagiarized, without the consent of the author, from the books of Charles Fort, in violation of the copyright law, and they were not adaptable to a form which would render them merchantable. For that reason the court failed to require the plaintiffs to restore to the defendant those documents.

[14, 15] We are of the opinion the evidence supports the finding of the court that those documents are valueless. We are directed to no evidence that the manuscripts in question have any intrinsic value. Section 1691, subdivision 2 of the Civil Code, requires the restoration only of property possessing a value. It has been repeatedly held that where the thing involved in a rescission suit has no value to either of the parties it is not necessary, as a prerequisite to the cancellation of a contract, to restore the property. Orton v. Privett, 202 Cal. 754, 262 P. 713; McElligott v. Freeland, 139 Cal.App. 143, 159, 33 P.2d 430; 4 Cal.Jur. 767, sec. 9.

[16, 17] We have looked in vain among the exhibits on file, which are presumed to include all of the manuscripts involved in this suit, for any document entitled "The Secret City" or for any episode which purports to have been originally prepared by the defendant. But since those original manuscripts furnished by the defendant may possess some value to him, although they are valueless for the purpose of marketing them for radio broadcasting, we are of the opinion they should be returned to the defendant.

The judgment is accordingly modified to require the plaintiffs to restore to the defendant all of his manuscripts of proposed episodes for radio broadcasting which may be in their possession or accessible to them. As so modified the judgment is affirmed.

We concur: TUTTLE, J.; PAULSEN, Justice pro tem.

41 Cal.App.2d 623

JOHNSON v. SOUTHWESTERN ENGINEERING CO. et al.

Civ. 12481.

District Court of Appeal, Second District, Division 2, California.

Nov. 22, 1940.

1. Negligence 🔑83

The "last clear chance" doctrine is applicable where plaintiff, as result of his negligence, is in position of danger from which he cannot escape by ordinary care, either because of physical impossibility or his unawareness of danger, and defendant knows, or in exercise of ordinary care should know, that plaintiff cannot escape, and defendant fails to exercise last clear chance to avoid accident by exercising ordinary care, and accident results, and plaintiff is injured as result of such failure.

See Words and Phrases, Permanent Edition, for all other definitions of "Last Clear Chance".

2. Negligence 🔑100

The failure of defendant to use ordinary care in circumstances where doctrine of last clear chance is applicable is "willful" and "wanton", and under such circumstances contributory negligence on part of injured person will not defeat recovery.

See Words and Phrases, Permanent Edition, for all other definitions of "Wanton" and "Willful".

3. Appeal and error 🔑1064(1)
Automobiles 🔑227(1, 3)

In action for injuries sustained when motorist's automobile collided with pick-up truck, application of "last clear chance" doctrine was reversible error, where dangerous predicament which truck driver was in was due solely to fact that truck driver had fallen asleep and was unaware of situation, and motorist had no knowledge that such was the fact, and had no opportunity to avoid collision.

4. Automobiles 🔑171(13)

A motorist colliding with truck at intersection was not called upon, in exercise of ordinary care, to anticipate that truck driver would violate the law by failing to maintain lookout, by driving on wrong side of road and by failing to yield right of way.

MOORE, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action for damages sustained in automobile collision by Harvey Johnson against the Southwestern Engineering Company and John Opstad. John Opstad filed a cross-complaint. From a judgment against John Opstad on the cross-complaint, John Opstad appeals.

Reversed on the cross-complaint.

Nourse & Jones, of Los Angeles, for appellant.

Parker & Stanbury, Harry D. Parker, Raymond G. Stanbury, and White McGee, Jr., all of Los Angeles, for respondent.

WOOD, Justice.

This appeal is prosecuted by John Opstad from a judgment entered against him on his cross-complaint after a jury trial. The litigation resulted from a collision of two automobiles at the intersection of two desert roads. Appellant filed an action in Kern county on July 29, 1938, naming as defendants Harvey Johnson, the driver of one of the cars, and A. J. Bruce, its owner. On August 1, 1938, Johnson filed the action in which this appeal is taken, naming as defendants appellant Opstad and his employer, Southwestern Engineering Company. Appellant filed a cross-complaint and this action was brought to trial. The jury returned verdicts in favor of the plaintiff Johnson and the cross-defendants. An appeal was taken by both Opstad and Southwestern Engineering Company but a stipulation has been filed providing for the satisfaction of the judgment in favor of Johnson on his complaint and specifically setting forth that Opstad retains the right to prosecute his appeal from the judgment entered on his cross-complaint.

The accident occurred on June 9, 1938, at about 11 a. m. at the intersection of two roads in the desert. Gold Queen road, which runs north and south, is 21 feet in width and is paved to the intersection. Cactus Queen road extends east and west and is a dirt road 28 feet in width. At the time of the collision the weather was clear and the roads were dry. Opstad was driving a 1932 Packard sedan in an easterly direction on Cactus Queen road and Johnson, who was driving a 1932 Chevrolet pick-up truck, was traveling south on Gold Queen road. Both roads were lined on each side by sage brush approximately three and one-half feet high and were from eighteen inches to two feet below the grade of the land at the northwest corner of the intersection. The only testimony as to the manner in which the accident occurred was that of Opstad—plaintiff Johnson having no memory of any of the events prior to the actual impact of the two cars and having been totally unaware of the presence of Opstad's car at the intersection.

From the testimony of Opstad it appears that when he had reached a point from 250 to 300 feet from the intersection he first observed the truck driven by Johnson, which was then about 500 or 600 feet north of the intersection. Opstad was then driving at a speed of from 25 to 30 miles an hour, while Johnson's speed was between 60 and 70 miles an hour. Upon reaching a point about 25 or 30 feet from the intersection Opstad again observed the truck, which was then 40 to 50 feet from the intersection and was traveling at a reduced speed of 45 to 50 miles an hour. Just as he entered the intersection Opstad again saw the truck, which was then 25 feet from the intersection. He proceeded through the intersection without again looking at the truck until he reached a point in the southeast part of the intersection near the eastern boundary of Gold Queen road, where the truck collided with his car. Immediately prior to the accident the truck swerved from the right hand (west) side to the left hand side of Gold Queen road, thereby causing the right front corner of the truck to strike the left side of Opstad's car. There is no evidence that Opstad ever saw Johnson's person before the impact, the only testimony being that he observed the truck. Johnson made the following statement to Opstad at the scene of the accident: "I must have fallen asleep * * * I was going too fast * * * it was all my fault * * * I didn't see your car."

Upon this state of the evidence the court, at Johnson's request, instructed the jury relative to the doctrine of last clear chance. It is claimed on this appeal that the evidence fails to disclose the existence of all of the elements necessary for the application of this doctrine and that as a result the court committed prejudicial error in so instructing the jury.

[1, 2] In Girdner v. Union Oil Co., 216 Cal. 197, at page 202, 13 P.2d 915, at page 917, the court sets forth the elements which must be shown to exist before the doctrine of last clear chance may properly apply: "That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care; that this includes not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape; that defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation, and has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise the same, and the accident results thereby, and plaintiff is injured as the proximate result of such failure." If any one of these elements is not shown by the evidence to exist the doctrine of last clear chance is not applicable. In the Girdner case the court pointed out that the failure of a defendant to use ordinary care in circumstances where the doctrine of last clear chance is applicable may well be termed willful and wanton and under such circumstances contributory negligence upon the part of the injured person will not defeat a recovery.

[3] It is clear that in the present action the evidence fails to establish all of the elements necessary to make applicable the doctrine of last clear chance. There is no evidence whatever that Opstad had knowledge that Johnson was in a position of danger and there is no evidence whatever that Opstad had knowledge that Johnson was unaware of the true situation. In Bogardus v. Snyder, 17 Cal.App.2d 411, 62 P.2d 153, 154, the court in concluding that the doctrine of last clear chance did not apply observed: "But if we take the stand that plaintiff was in a position of danger from which he could not extricate himself, because he was unaware of his danger, and hence could not bring ordinary care into play, then it appears that defendant did not know that he was so situated, because she did not know that plaintiff was unaware of his danger * * *". The cases of Girdner v. Union Oil Co., supra, and Center v. Yellow Cab Co., 216 Cal. 205, 13 P.2d 918, which are relied upon by Johnson in support of his claim that the doctrine of last clear chance was properly applied, are easily distinguishable. In each of these cases the defendant actually saw that the plaintiff was unaware of his predicament. In the present case the dangerous predicament which Johnson was in was due solely to the fact that he was unaware of the situation—of which fact Opstad had no knowledge.

Since all of the essential elements are not present, it was reversible error for the court to instruct the jury on the doctrine of last clear chance. Erwin v. Morris, 10 Cal. App.2d 168, 51 P.2d 149; Wallis v. Southern Pacific Co., 184 Cal. 662, 195 P. 408, 15 A.L.R. 117.

[4] The only reasonable conclusion that may be reached from the evidence is that Opstad reached the intersection first after observing the approach of the truck and noting that its speed had been decreased from 60 to 70 to 45 or 50 miles an hour, that at no time prior to the accident did he know that Johnson was unaware of his situation, that in proceeding through the intersection he unquestionably had the right of way, that after his car had reached a point in the southeast part of the intersection there was ample room to the rear of his car for Johnson's truck to pass safely through the intersection, and that there was nothing in the situation which would cause him to believe that the truck would swerve to the left or wrong side of the road and thus collide with his car after he had reached a place of apparent safety near the east boundary of the intersection. The situation thus presented is similar in principle to that which the court had under consideration in Richardson v. Ribosso, 120 Cal.App. 641, 8 P.2d 226, where it was held that the doctrine of last clear chance was not applicable. In that case the defendant was driving an automobile along a street and while so doing observed the plaintiff's minor son playing on the sidewalk and saw him suddenly start to run obliquely across the street upon which the defendant was traveling. The minor continued on his course without looking in the direction he was traveling and ran into the left side of the defendant's automobile. The court appropriately observed at page 642 of 120 Cal.App., at page 226 of 8 P.2d that: "The reasonable inference to be drawn from this evidence is that, after the defendant had passed the course upon which the boy was traveling, he had no reason to anticipate that the boy would continue without looking * * *". In the instant case it is apparent that, after Opstad had passed the center of the intersection, he had no reason to anticipate that Johnson would continue without looking and no reason to anticipate that he would suddenly veer from his proper course to the wrong side of the road. In the exercise of ordinary care Opstad was not called upon to anticipate that Johnson would violate the law by failing to maintain a lookout, by driving on the wrong side of the road and by failing to yield the right of way. It must be borne in mind that Opstad had no knowledge that Johnson had "fallen asleep".

The evidence of the physical facts as well as Opstad's testimony compel the conclusion that Johnson was not in a position of danger from which he could not escape until after he had swerved his truck to the east side of Cactus Queen road, at which time Opstad had traversed the greater part of the intersection. As Opstad approached the intersection he noted that the speed of the truck was less than it had been when he first saw it. If Johnson had continued in the course he was traveling while Opstad observed his approach to the intersection the collision would have been avoided. Opstad testified that he did not see the truck swerve from its former course. Manifestly, Opstad did not have a clear chance to avoid the accident. The doctrine of last clear chance "says to a negligent plaintiff that in spite of his lack of caution he will be protected against wanton, willful or avoidable harm." Erwin v. Morris, supra [10 Cal.App.2d 168, 51 P.2d 151]. The doctrine is not here applicable, for Opstad, not knowing that Johnson had fallen asleep, did not know that he was in a position of danger and did not have the opportunity of avoiding the collision.

The judgment on the cross complaint is reversed, cross complainant to recover costs on appeal.

I concur: McCOMB, J.

MOORE, Presiding Justice (dissenting).

I dissent. The conclusion reached by the majority opinion is not consistent with the law and is contrary to the decisions of the supreme court for the reason that it rejects the implied findings of the jury and rules, as a matter of law, that Opstad did not have knowledge of Johnson's perilous position and further that Opstad did not know or that he did not have reason to believe that plaintiff was oblivious of the danger and that he was in a position from which he could not extricate himself. Except for the omission of some pertinent facts hereinafter set forth, the resume recited constitutes a fair summary of the testimony presented to the jury.

It is there said that Opstad, while traveling at a speed of 25 to 30 miles per hour and while at a distance of 250 to 300 feet west of the intersection first observed the truck of Johnson approaching 500 to 600 feet north of the intersection traveling at a speed of 60 to 70 miles per hour. It then proceeds to say that upon reaching a point 25 to 30 feet from the intersection, Opstad again observed the truck which was then 40 to 50 feet from the intersection and was traveling at a reduced speed of 45 to 50 miles an hour. From these statements, two inferences are drawn, viz.: (1) that Opstad did not observe the truck at any time between the point 500 feet north of the intersection and its position 40 to 50 feet from the intersection, and (2) that plaintiff did in fact reduce his speed from 60-70 to 40-50, and the authors of the opinion, having drawn those inferences, conclude that the triers of the facts must have drawn the same inferences and if they did not, then they should have done so. But let us supplement the statement of the evidence contained in the opinion.

The police officer testified: "Mr. Opstad told me * * * when he got approximately 200 feet of the intersection of Gold Queen road and Cactus Queen road, he noticed a south bound car on Gold Queen road, which was, at that time approximately two to three hundred feet north of the intersection, and they both arrived at the intersection at approximately the same time, and he * * * Mr. Opstad * * * thought that the car on the Gold Queen road would yield the right of way to him, and so he kept proceeding, but on seeing that the south-bound car was not going to yield the right-of-way, he applied his brakes and then the crash."

Referring to Opstad's view of the truck, he testified at the trial: "You could see part of it all the time * * *" that he saw the truck at various times "from the time he was 300 feet west of the intersection until he had reached a point 25 feet west of the intersection." He further testified: "When I was 250 or 300 feet from the intersection * * * he was approximately twice as far as I was." When asked: "During all that time you did not put your brakes on or did you?" he answered: "No, sir * * * I went right through." From the first time he saw the Chevrolet until he reached the intersection, "he must have been driving between 60 and 70" and when asked: "And the speed of the Chevrolet pick-up never slowed down at all, *it kept going at the same speed?*" Opstad answered: *"It seemed to be going at the same speed."* Later, however, he testified that, when it was at point 0.2 (40 to 50 feet north of the intersection), "It was going at a pretty good speed * * * around 50, 45 or 50, in that neighborhood * * * it was going pretty fast." From these statements, it was a fair inference that Opstad knew that the plaintiff was approaching the intersection at a speed of 60 to 70 miles per hour and that plaintiff did not reduce or alter the speed of the truck. The fact that the witness gave contradictory testimony merely presented an additional question of fact and entitled the jury to accept or reject whatever version it chose. People v. Crownover, 34 Cal. App.2d 7, 92 P.2d 929.

The majority opinion states that immediately prior to the accident the truck swerved from the right hand side to the left hand side of Gold Queen road, but the police officer who inspected the premises testified that he found no marks indicating a swerving of the truck prior to the impact. A map of the premises was introduced in evidence upon which Opstad in the presence of the jury located the position of the truck on the map when it was at a point 40 to 50 feet north of the intersection, and again where it was after the impact. In answer to the question what course did the Chevrolet take from the point 0.2, his answer was, "Well, it was in the center of the road and he was on the left and right and all over the road." If the jury believed that plaintiff drove at 70 miles per hour and was in the center of the road and on its right and left and "all over the road" they would have been justified in inferring that plaintiff was helpless to avoid a collision and in concluding that Opstad perceived plaintiff's predicament or by the exercise of ordinary care should have perceived it. Wallis v. Southern Pac. Co., 184 Cal. 662, 673, 195 P. 408, 15 A.L.R. 117; Girdner v. Union Oil Co., 216 Cal. 197, 13 P.2d 915; 45 Cor.Jur. 990, sec. 542. See, also, discussion, 2 Cal.Jur.Supp. 156, sec. 104. Hence it was the duty of the court to instruct, as was done, upon the doctrine of the last clear chance. The fact that Opstad never saw the person of Johnson prior to the impact is of little consequence in view of the following facts: (1) The truck when first seen by Opstad was traveling 60 to 70 miles per hour; (2) the truck was driven on a paved boulevard 21 feet wide; (3) as Opstad arrived at the intersection, he was driving slowly upon a dirt road 28 feet wide; (4) when the truck was 40 to 50 feet north of the intersection Opstad saw that it was going 60 to 70 miles per hour; (5) at the time Opstad arrived at the west line of the intersection, the truck was only 25 feet north of the intersection or was at the intersection and its speed was either "reduced" to 75 feet per second, or it had not changed its speed from 105 feet per second; (6) from his position, according to his own testimony, Opstad saw that the truck was "all over the road" after it passed the point 0.2 or that it continued straight, either of which evidenced ignorance of his danger; (7) Johnson never sounded any warning signal of approach.

There was no question of plaintiff's negligence and of its continuance to the moment of the accident. From the facts before the jury, they determined under proper instructions that plaintiff was in a position of danger from which he could not extricate himself by the exercise of ordinary care; that plaintiff was unconscious of his own peril; that Opstad realized plaintiff's peril, or in the exercise of ordinary care should have known it and should have exercised the last clear chance to avoid injuring plaintiff.

In my opinion the case of Girdner v. Union Oil Co., 216 Cal. 197, 13 P.2d 915, and Center v. Yellow Cab Co., 216 Cal. 205, 13 P.2d 918, 920, justify the jury's verdict. It should not be expected that the facts which constitute the bases of those decisions would be identical with the facts of the case under consideration. The question is whether or not the facts of the instant case are such as would warrant the application of the principle announced by those authorities. In both Girdner v. Union Oil Co., supra, and Center v. Yellow Cab Co., supra, the defendant saw the perilous position of the plaintiff; in each of them the defendant perceived that the plaintiff was unconscious of his peril and that plaintiff could not be relied upon to avert the collision. By the exercise of reasonable care Opstad would have seen that plaintiff could not by the exercise of extraordinary care have stopped his truck before crossing the intersection and could have observed that plaintiff was unaware of his own peril. Surely, it cannot be the law that one in Opstad's position as he entered the intersection could shut his eyes to the danger of Johnson's flying truck and avoid his obligation by declaring that he did not see it or that he himself had the right of way. It was Opstad's duty to avoid an impact if he had the last clear chance to do so. It cannot be said that the negligence of plaintiff was the proximate cause of his injuries for the reason that if defendant had the last clear chance to avoid the injury, the chain of causation, begun with plaintiff's contributory negligence, was broken and defendant's refusal to act to avoid an impact became the proximate cause. "Whether * * * [the] negligence is the proximate or remote cause, depends upon the facts of the particular case." Center v. Yellow Cab Co., supra; Girdner v. Union Oil Co., supra; Carrillo v. Helms Bakeries, 6 Cal. App.2d 299, 44 P.2d 604; Palmer v. Tschudy, 191 Cal. 696, 218 P. 36. In considering the foregoing authorities, the majority opinion has erred in concluding as a matter of law that Opstad had no knowledge of the fact that Johnson was unaware of his peril, whereas it was a fact to be determined by the jury whether plaintiff was in a position of peril from which he could not extricate himself; whether Opstad could perceive, or should have perceived that plaintiff was unaware of his peril, and whether by continuing across the highway Opstad would probably cause a collision, or by stopping he could avoid it. Plaintiff's negligence is not the proximate cause of his injuries where he was oblivious of his danger and where the defendant, on seeing the plight and that he was unaware of it, had the power by the exercise of ordinary care to avoid a collision and failed to exercise his last clear chance to avoid the accident.

The cases relied upon by appellant are not in point and hence do not control. Young v. Southern Pac. R. R., 189 Cal. 746, 210 P. 259; Behne v. Pacific E. Ry. Co., 30 Cal.App.2d 437, 86 P.2d 843; Bogardus v. Snyder, 17 Cal.App.2d 411, 62 P.2d 153; Leblanc v. Coverdale, 213 Cal. 654, 3 P.2d 312; Keyes v. Hawley, 100 Cal.App. 53, 279 P. 674. In Behne v. Pacific E. Ry. Co., supra, the doctrine was not applicable because there was no evidence as to when plaintiff reached a position when the doctrine of last clear chance could be applied. In Bogardus v. Snyder, supra, two cars had collided at an intersection, plaintiff going in excess of 20 miles per hour, defendant in excess of 30 miles per hour. It was clear that the defendant did not have a chance to avoid the accident by the exercise of ordinary care; the plaintiff had a better chance to avoid the accident than did the defendant who was driving more slowly. In Leblanc v. Coverdale [213 Cal. 654, 3 P.2d 314], the doctrine did not apply as "the question of [plaintiff's] negligence was rightly left to the jury, and its determination thereof was, in our opinion, in accordance with the great preponderance of the evidence". In the case of Keyes v. Hawley, 100 Cal.App. 53, 279 P. 674, 677, "because of the want of any proof of negligence on the part of the appellant" (defendant) the judgment was reversed. The cases of Erwin v. Morris, 10 Cal.App. 168, 51 P.2d 149, and Wallis v. Southern Pac. Co., 184 Cal. 662, 195 P. 408, 15 A.L.R. 117, are also distinguishable. In the Erwin case, plaintiff was parked upon the right side of the highway to repair his windshield wiper. The defendant approached plaintiff properly and at a point about 60 feet behind plaintiff, defendant pulled across the center of the highway in order to pass plaintiff's parked car. In the course of passing, her car skidded into plaintiff's car. It was obvious that the defendant did not have the last clear chance to avoid colliding with the plaintiff after defendant's car began to skid. By the exercise of no amount or degree of care could the defendant have avoided striking plaintiff's car after her own car began to skid. In the Wallis case, the engineer used every means available to stop his train. He thereby avoided liability that might have arisen because of the last clear chance. In the case of Basham v. Southern Pac. Co., 176 Cal. 320, 168 P. 359, 363, when the fireman discovered that the driver of the wagon approaching the track was inattentive, he gave urgent orders to the engineer to stop. He had no reason to realize the danger sooner or had no "cause to realize it sooner". Hence in these cases the last clear chance doctrine never came into operation.

The majority opinion compares the facts of the instant case to those in the case of Richardson v. Ribosso, 120 Cal.App. 641, 8 P.2d 226, where the doctrine was not applied. In that case, the defendant, driver of an automobile, was proceeding southerly along a public street where he observed a minor child playing on the sidewalk on the opposite side; he saw him start running obliquely across the street toward a point in front of defendant's car. The car was traveling at ten miles per hour. That case was submitted to a jury which held that the boy was guilty of contributory negligence and the defendant was excused from the application of the doctrine of last clear chance for the reason that he had passed the point on the course upon which the boy was traveling and he did not see and had no reason to anticipate that the child would continue on and run into the rear end of defendant's car. Ribosso, having driven past the point in line with the Richardson's boy, had no reason to suspect that the child would continue without looking. But in the case of the plaintiff Johnson, Opstad had arrived at the intersection; he not only heard but actually saw Johnson's car traveling more than 500 feet at a speed ranging, according to his testimony, from 70 to 45 miles per hour. In the course of that travel, he saw it "all over the road" and in view of the fact that it was driving upon a paved boulevard at an excessive speed, it was a question of fact for the jury to determine whether Opstad *"knew", or in the exercise of ordinary care should have appreciated* that Johnson was in a position of peril from which, for any reason, he could not extricate himself and whether Johnson was unaware of his peril and whether Opstad had a last clear chance to avoid injuring him.

To make it clear, then, it was for the jury to determine in the first place and for the trial judge on the new trial proceedings in the second place, whether when Johnson reached the intersection, he was able by the vigilant use of his powers to extricate himself to avoid injury and whether Opstad knew or had good reason to believe that Johnson was unconscious of his peril. The rule is stated in the case of Wallis v. Southern Pac. Co., supra, as follows [184 Cal. 662, 195 P. 412, 15 A.L.R. 117]: "In order to make the defendant liable, notwithstanding contributory negligence of the plaintiff, the defendant must not only be aware of the danger in time to avert it, but must also know or have reason to believe that the plaintiff is oblivious of the danger and is in a position where he cannot extricate himself from it." See Girdner v. Union Oil Co., supra.

The majority opinion, in arguing the technical rights of Opstad to proceed across Gold Queen road because he arrived at the intersection ahead of plaintiff take from the jury its prerogative of determining whether Johnson was unaware of his own peril and of determining whether Opstad perceived that Johnson was oblivious of his peril. This has the effect of taking from the plaintiff his right to have his case determined by a jury. Appellate courts must be on their guard not only to protect the substantive rights of litigants but they must be alert to protect the right of a litigant to have questions of fact determined by the jury if they have been properly submitted to a jury.

From the record in this case, the jury had the right to draw inferences that would support their verdict. "Where mandatory presumptions are not exacted, it is the right and duty of the jury to draw such reasonable inferences from the evidence as may appeal to and satisfy their minds." Thomas v. Visalia Elec. R. R., 169 Cal. 658, 147 P. 972, 973. In the case of Rovegno v. San Jose K. of C. Hall, 108 Cal.App. 591, 291 P. 848, 850, it is said: "In California, inferences in themselves constitute a recognized class of indirect evidence which a court or jury may not disregard. Code Civ.Proc., §§ 1957, 1958. Furthermore, 'upon a trial of a case the jury is to find not only the facts but also the inferences from them, if any may properly be drawn. * * * When an inference is supported by the evidence and is not opposed to human experience and reason it cannot be disturbed by an appellate court.'"

In the case of Hamilton v. Pacific Electric Co., 12 Cal.2d 598, 86 P.2d 829, 830, the right of the plaintiff to recover depended upon whether or not the defendant had given reasonable inspection of its waiting room. The only evidence on the matter of inspection was by the plaintiff who testified that in the 20 or 30 minutes during which plaintiff was in the waiting room of the defendant she "did not observe" that any person either entered into or departed from the waiting room. In deciding that case, Mr. Justice Houser stated: "From a consideration of the foregoing, it would seem well established not only that plaintiff had offered sufficient evidence to sustain a judgment in her favor, but also that it was within the province and power of the trial court to draw therefrom the inference that the defendant had not performed its duty in giving a reasonable inspection to the premises in question. * * * It may be confidently declared that, founded upon the evidence, the jury not only is authorized to make any logical and reasonable deduction, but also that the jury is the exclusive judge of the weight and value of the inference that may be drawn by it; furthermore, as corollary thereto, that any attempt on the part of an appellate court to draw an inference of fact constitutes 'a usurpation of the province of the trial court'. The fact that some inference other than that which has been drawn by a jury may appear to an appellate tribunal to be the more reasonable, affords no sufficient reason for disturbing the inference in question. * * * It also appears to be well-established that notwithstanding the fact that the evidence upon which the inference is founded is undisputed or without conflict, *an appellate court has not the power to draw an inference different from that which the jury has deduced.* * * * *'The question of negligence is one of fact for the jury, and the finding of the jury cannot be overturned by this court where the evidence is conflicting, or where, although the evidence is without conflict, different inferences may reasonably be drawn from it.'* [Anderson v. Los Angeles Transfer Co., 170 Cal. 66, 67, 148 P. 212.] * * * 'This court has frequently held that even though all the facts are admitted or uncontradicted, nevertheless, if it appears that either one of two inferences may fairly and reasonably be deduced from those facts there still remains in the case a question of fact to be determined by the jury (or by the trial judge where the case is tried without a jury), and that the verdict of the jury or the finding of the trial judge thereon cannot be set aside by this court on the ground that it is not sustained by the evidence. * * *' [Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 426, 213 P. 42, 26 A.L.R. 123.]"

In the recent case of Weiand v. Southern Pac. Co., 34 Cal.App.2d 500, 93 P.2d 1023, 1025, Weiand was killed when he was knocked off a step ladder on a freight car by a caboose "spotted" too close to the track on which his train was moving. The evidence of the accident was circumstantial. It was contended that there was no evidence that the negligence of defendant was the proximate cause of the accident. Commenting thereon, the court said: "Obviously, if plaintiff has failed to make out a case for the jury on either of two theories, no recovery can be had. *If, however, plaintiff has proven sufficient facts to justify a verdict upon one theory, the fact that there may be one or more other seemingly rational explanations of the episode in no manner precludes a recovery or invalidates the verdict. These are mere* *matters of argument to be presented to the jury.*" Likewise, in the case of Sherman v. Southern Pac. Co., 34 Cal.App.2d 490, 93 P.2d 812, 818, Sherman was killed when he was thrown from the foot board of an engine upon which he was riding, due to an alleged defective cutting lever. The evidence was all circumstantial. The court said: "In this case there is no uncertainty about the fact that the bracket holding the cutting lever gave way when decedent took hold of it, and that he fell as a result. An inference that he fell when mounting the foot board was reasonably dispelled when it appeared in evidence, from decedent's own statement just before he died, that the lever broke 'and that is the reason I fell'. * * *" It was necessary to prove by substantial evidence that the appliance failed in the purpose for which it was designed. This substantial evidence might well be the reasonable inference drawn from the implied findings of the jury of the proven facts which overcame any conjectural inference or mere guess.

"When no conflict in the evidence appears, but there may be a conflict as to the inferences that may be drawn from such evidence, unless the inferences that sustained the verdict are conjectural, appellate courts will not interfere. The test is whether or not the inferences which may be drawn from the evidence to sustain the verdict are reasonable." Sherman v. Southern Pac. Co., supra. All conflicts must be resolved in favor of the respondent and all reasonable and legitimate inferences may be indulged to uphold the verdict, if possible. Where two or more inferences can reasonably be deduced from the facts, the reviewing court is without power to substitute its deductions for those of the jury or the trial court. Crawford v. Southern P. Co., 3 Cal.2d 427, 45 P.2d 183; Treadwell v. Nickel, 194 Cal. 243, 228 P. 25; Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 134 P. 1157; Wing v. Kishi, 92 Cal.App. 495, 268 P. 483.

Application of the doctrine of the last clear chance in cases arising from the collision of motor cars should not be unduly restricted by judicial decision. Not only is this indicated by the language in the Wallis and Girdner cases, supra, but the appalling and unending parade of destruction of life and property demands a liberal observance of the humanitarian doctrine. It is observed by the courts of more than twenty states of the Union, by the federal courts, and by those of Canada and of England. 45 Cor.Jur. 990. It is more nearly consonant with the moral responsibilities cast upon those who are permitted to operate an enginery of destruction upon paved highways than is the commonly accepted concept of the California doctrine which arose in the days when the covered wagon collided with the locomotive. But within the purview of our own cited decisions, the facts of the instant case do not justify this court in defeating the verdict of a jury on questions of fact properly submitted to them. To do so is to reject the right of trial by jury upon a matter concerning which a jury is competent to try. Traveling at a slow rate of speed and having the ability to stop within a distance of a few feet, he had the only opportunity to avoid the collision. Bagwill v. Pacific Elec. Ry. Co., 90 Cal.App. 114, 265 P. 517. He could have avoided the collision by a simple application of his brakes. This would have been a much simpler process than his present defense. Cady v. Sanford, 57 Cal.App. 218, 207 P. 45.

The judgment should be affirmed.

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41 Cal.App.2d 680

CHILDS v. GROSS et al.

Civ. 6397.

District Court of Appeal, Third District, California.

Nov. 26, 1940.

Hearing Denied Jan. 24, 1941.

1. Wills 🔑**537(1)**

A testamentary provision, bequeathing and devising "all the rest and residue and remainder" of testator's estate in trust after directing payment of all debts and funeral expenses, was not a "residuary clause".

See Words and Phrases, Permanent Edition, for all other definitions of "Residuary Clause".

2. Wills 🔑**587(1)**

A "residuary clause" in will is clause disposing of part of testator's property remaining after satisfying bequests and devises.

3. Wills 🔑589

The section of Probate Code, providing that devise or bequest of all of testator's real or personal property passes all such property which he was entitled to dispose of by will at time of his death, "including property embraced in a power to devise," continued in effect sections of Civil Code, providing that real or personal property embraced in power to devise passes by will devising all real or personal property of testator, and that devise or bequest of all his real or personal property passes all such property which he was entitled to dispose of by will at time of his death, and makes such sections applicable to power relating to both real and personal property. Probate Code, §§ 2, 125; Civ.Code, §§ 1330, 1331.

4. Statutes 🔑147

In revision of statutes, alteration of phraseology or omission or addition of words will not necessarily change operation or construction of previous statutes, but language of statute as revised or legislative intent to change previous statute must be clear before change in construction and operation of such statute can be pronounced.

5. Descent and distribution 🔑1

There is no natural right to succeed to a decedent's estate, but one seeking to establish such right must base it on statute.

6. Wills 🔑589

The Probate Code section, providing that devise or bequest of all of testator's real or personal property passes all such property which he was entitled to dispose of by will at time of his death, "including property embraced in a power to devise," applies to power of appointment relating to personal property, such as testator's interest in bank stock under trust agreement directing distribution thereof to testator and others on trustor's death. Probate Code, § 125.

7. Wills 🔑589

If intent to execute power to convey or devise property is inferable from tenor and effect of deed or will or such instrument is not operative as parties intended without referring to such power, instrument will be held valid and effective execution of power, which need not be referred to in deed or will, if intent to execute it is otherwise manifested by all circumstances of case.

8. Wills 🔑589

In action to quiet title to bank stock and compel transfer thereof to plaintiff as legatee under will of her father, to whom trust agreement, executed by his mother, directed distribution of such stock on her death, evidence that mother was still alive when will was executed and that testator was insolvent warranted inference that he intended to exercise power to appoint his share of stock held by trustee, though trustor possessed considerable property. Probate Code, § 125.

9. Appeal and error 🔑1010(1)

The appellate court is bound by trial court's fact findings supported by any substantial evidence in record.

10. Powers 🔑33(1)
Wills 🔑589

Intent to execute power to convey or devise property need not be proved without conflicting evidence or so clearly that only one inference may be drawn from evidence.

11. Trial 🔑105(1)

Fact findings may be made by trial court on inadmissible testimony, in absence of objection thereto at trial.

12. Wills 🔑589

In determining whether instrument, such as will, was intended as execution of power to convey or devise property, evidence of surrounding facts and circumstances under which instrument was made is admissible. Code Civ.Proc. § 1860.

13. Trusts 🔑58

The terms of trust agreement could not be modified and right in bank stock constituting corpus of trust acquired by persons not named as trust beneficiaries through agreement with such beneficiaries, who had power under trust agreement to transfer their interest in stock by will only.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Emeleen Bate Childs against Robert Frank Gross, as trustee, the Farmers & Merchants National Bank of Los Angeles, and others, to quiet title to certain stock of such bank and compel transfer thereof to plaintiff, in which defendant bank filed a cross-complaint to require plaintiff and codefendants to interplead and litigate among themselves their claim to such stock. From a judgment for defendants, cross-complainant and certain cross-defendants, plaintiff and other cross-defendants appeal.

Reversed in part, with directions, and otherwise affirmed.

Hearing denied; CURTIS, HOUSER, and CARTER, JJ., dissenting.

Meserve, Mumper, Hughes & Robertson and Voltaire Perkins, all of Los Angeles (E. Avery Crary, of Los Angeles, of counsel), for appellants.

Leander O. Hatch, A. J. Cathcart and Burr & Smith, all of Los Angeles, for respondents.

Mr. Justice TUTTLE, delivered the opinion of the court.

This action was brought to quiet title to certain stock of the Farmers & Merchants National Bank of Los Angeles, and to compel the transfer of said stock to plaintiff. After trial by the court, findings upon all issues were made against plaintiff, and in favor of all respondents. The appeal is taken from the judgment.

The facts of the case are practically without dispute. On the 20th day of June, 1927, Emeline H. Childs was the owner of 1,150 shares of the capital stock of said bank. On or about the 27th day of June, 1927, she executed a trust agreement whereby she conveyed and transferred to Robert Frank Gross, as trustee, all of the above-mentioned stock, and a certificate for said stock was thereupon duly issued by the bank in the name of Robert Frank Gross, as trustee, and delivered to him. Said agreement was signed not only by Emeline H. Childs, but also by her then only living children, Ozro W. Childs, Emma Childs Dwight, Carrie M. Hicks, Ruth Childs Redman, and Hortense Childs Reynolds. The agreement was in the following language:

"This Agreement, made this 20th day of June, 1927, by and between Emeline H. Childs, known hereinafter as the 'trustor', and Robert Frank Gross, known hereinafter as the 'trustee':

"Witnesseth:

"That the trustor, for the sum of One Dollar lawful money of the United States of America, to her in hand paid, receipt of which is hereby acknowledged, and for diverse other good and valuable considerations has this day granted, bargained, sold, assigned, set over and transferred to the said trustee 1150 shares of the par value of One Hundred Dollars ($100.00) each of the capital stock of the Farmers & Merchants National Bank of Los Angeles, an association organized under the laws of the United States of America;

"To Have and To Hold said shares of stock to said trustee in trust for the following uses:

"(a) To exercise all the powers, rights, remedies and privileges of said shares of stock.

"(b) To pay all profits, income dividends (except stock dividends) which may accrue from said shares of stock above mentioned to the trustor during the period of her natural life.

"(c) To receive dividends paid on the stock of the said Farmers and Merchants National Bank in the same manner as the above designated shares are held and to pay dividends (except stock dividends) from such shares of stock to the trustor during her natural life.

"Upon the death of the trustor, the entire trust estate shall be distributed, share and share alike, to the following, viz: Ozro W. Childs, Los Angeles, California; Emma Childs Dwight, Washington, D. C.; Carrie M. Hicks, Los Angeles, California; Ruth Childs Redman, Los Angeles, California; Hortense Childs Reynolds, Pelham Manor, New York.

"In the event of the death of any one of the beneficiaries prior to the death of the trustor, their particular portion of this trust estate shall be turned over to the heirs of their body or to such person as they may designate by will. In the event of the death of the trustee, the beneficiaries then living shall appoint a successor in trust.

"Said trustee has paid no consideration to the trustor, and is in no way entitled to any of the benefits or proceeds of the trust estate."

[1, 2] On the 28th day of January, 1933, said Ozro W. Childs died, leaving a last will and testament. At the outset we wish to call attention to the portion of the will which devises and bequeaths all of the real and personal property in trust. It is referred to by both parties as a "residuary clause". We do not so regard it. After directing the payments of all debts and funeral expenses, the will bequeaths and devises "all the rest, residue and remainder" of the estate in trust. The debts and funeral expenses are charges against the estate, and could not constitute bequests. A "residuary clause" has been defined to be the clause in a will by which that part

of the property is disposed of which remains after satisfying bequests and devises. 69 C.J. p. 413, sec. 1472. As there were no bequests or devises other than the trust provision which disposed of the entire estate, there was no "residue" involved. Said will was admitted to probate, and A. W. Redman was appointed executor thereof, and he is still acting in such capacity. By the terms of the will all of the property of decedent, "both real and personal, of whatsoever kind or nature, and wheresoever situated", was devised and bequeathed to A. W. Redman, to be held in trust, one-half of the income therefrom to be paid to the wife of decedent, Suzanne Bate Childs, and one-half of the income therefrom to be paid to the daughter of decedent, Emeleen Bate Childs (plaintiff herein), as long as both of them were living. It further provided that if the daughter died before the wife, the entire net income from the trust estate should be paid to the wife in monthly instalments during her life. It also provided that the trust should cease and terminate upon the death of the wife, and in that event, the whole of the principal of the trust estate should be transferred and delivered to plaintiff. Numerous other provisions are made in the trust agreement, but they do not concern us here. The plaintiff is the sole surviving heir of Ozro W. Childs.

The Farmers & Merchants National Bank filed a cross-complaint in said action, wherein the said children of Emeleen Bate Childs and Ozro W. Childs, The Third, and Emelie Gertrude Childs, children of a deceased child of said Emeleen Bate Childs, are made cross-defendants. It is prayed in said cross-complaint that cross-defendants be required to interplead and litigate among themselves their claims to 230 shares of the stock which are the subject of this litigation. Issues were duly joined on the complaint and on said cross-complaint. The judgment was that plaintiff take nothing by reason of her complaint. It was further adjudged that cross-defendants, Ozro W. Childs, The Third, and Emelie Gertrude Childs, were each the owners of 19⅙ shares of said stock, and that A. W. Redman, as trustee under the will of Ozro W. Childs, deceased, was the owner of 191⅔ shares of the capital stock mentioned.

One contention made by plaintiff as a ground for reversal of the judgment is that the evidence was insufficient to sustain the following finding made by the trial court:

"That the said Ozro W. Childs, deceased, by his last Will and Testament, intended to and did designate A. W. Redman, as trustee thereunder, and in case of his death, or his refusal or inability to act, the Citizens National Trust & Savings Bank of Los Angeles, as trustee thereunder for the benefit of the said Emeleen Bate Childs and the said Suzanne Bate Childs and others mentioned therein, as the person to whom his particular portion of the trust estate under the trust agreement dated the 20th day of June, 1927, between Emeline H. Childs, as trustor, and Robert Frank Gross, as trustee, and others, should go and be turned over. That by his said last Will and Testament the said Ozro W. Childs intended to and did appoint his share of the stock under said trust agreement dated on the 20th day of June, 1927, to A. W. Redman as trustee, as-aforesaid, and in case of his death or his refusal or inability to act, the Citizens National Trust and Savings Bank of Los Angeles, as such trustee."

It is the position of all the respondents, except Emelie Gertrude Childs and Ozro W. Childs, The Third, that the power of appointment under the trust agreement was exercised by Ozro W. Childs by virtue of the application of section 125 of the Probate Code. The *other two* respondents seek to uphold the judgment in their favor, under and by virtue of an agreement executed on January 23, 1931, by Ozro W. Childs and the other heirs of Emeline H. Childs, which purported to alter the terms of the original trust agreement of 1927, by providing that the respondents, although they were not named as beneficiaries of said trust, should nevertheless participate in the division of the stock in such a manner that they would each receive one-sixth of the 230 shares of stock to which Ozro W. Childs was entitled.

[3] Taking up the first argument of all respondents except Ozro W. Childs, The Third, and Emelie Gertrude Childs, they contend that the judgment should be upheld, and that the title of the trustee to the 230 shares of stock should be quieted against plaintiff under and by virtue of section 125 of the Probate Code, which reads as follows: "A devise or bequest of all the testator's real or personal property, in express terms, or in any other terms denoting his intent to dispose of all his real or personal property, passes all the real or personal property which he was entitled to dispose of by will at the time of

his death, including property embraced in a power to devise."

The determination of this question involves the construction of that portion of said section which reads, at the end thereof: "including property embraced in a power to devise". Appellant contends that the words "devise" and "bequest" are not in every case synonymous, and that the above-mentioned section does not apply to power of appointment relating to *personal* property, and that therefore, since Ozro W. Childs' interest in the trust was *personal* property, his will cannot be given effect under said section, as an exercise of his power to designate a successor to his interest in the trust property. We believe that an examination into the history of the section of the Probate Code mentioned will throw considerable light upon the question as to whether or not the legislature intended, by the use of the word "devise", to include the exercise of a power relating not only to real, but also to personal property. At the outset, section 2 of the Probate Code provides: "The provisions of this code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof, and not as new enactments." By turning to the cross-reference tables which appear in the Probate Code, and which were prepared by the Code Commission, it appears that section 125 of the Probate Code had its origin in sections 1330 and 1331 of the Civil Code. Those sections formerly read as follows:

"1330. Power to Devise, How Executed by Terms of Will. Real *or* personal property embraced in a power to devise, passes by a will purporting to *devise* all the real *or* personal property of the testator.

"1331. Devise or Bequest of All Real or All Personal Property or Both. A devise or bequest of all the testator's real *or* personal property, in express terms, or in any other terms denoting his intent to dispose of *all* his real or personal property, passes all the real or personal property which he was entitled to dispose of by will at the time of his death." (Italics by counsel.)

In 1931, when all the various Code sections relating to probate matters were collected in the Probate Code, the legislature, evidently for the sake of brevity, combined the two foregoing sections into present section 125. It appears beyond question that if the said former sections of the Civil Code were now in force, the judgment should be upheld. See McAdoo v. Sayre, 145 Cal. 344, 78 P. 874. We are of the opinion that by enacting section 125 of the Probate Code, the legislature intended to continue in effect said sections of the Civil Code. We do not believe that the word "devise" was there employed in a narrow or restricted sense, and are of the opinion that it was the legislative intent to make said sections applicable to a power relating to both real and personal property. This construction is strengthened by the fact that the first portion of said section 125 refers to a *"devise* or *bequest* of all the testator's *real* or *personal* property". It is hardly reasonable to suppose that after making this provision, the legislature, at the end of the section, would exclude personal property when it dealt with "a power to devise". The rule of construction laid down in section 2 of the Probate Code follows the weight of authority. In 59 C. J. page 894, sec. 493, it is said: "A mere change of phraseology, or punctuation, or the addition or omission of words in the revision or codification of statutes, does not necessarily change the operation or effect thereof, and will not be deemed to do so unless the intent to make such change is clear and unmistakable. Usually a revision of statutes simply iterates the former declaration of legislative will. No presumption arises from changes of this character that the revisors or the legislature in adopting the revision intended to change the existing law; but the presumption is to the contrary, unless an intent to change it clearly appears. The reasons assigned are that the changes made by the revision may usually be accounted for by the desire to render the provisions more concise and simple, and to bring the laws into some system and uniformity. * * *"

[4] "No rule of statutory construction rests upon better reasoning than that, in the revision of statutes, alteration of phraseology, the omission or addition of words, will not necessarily change the operation or construction of former statutes. The language of the statute as revised, or the legislative intent to change the former statute, must be clear before it can be pronounced that there is a change of such statute in construction and operation." Landford v. Dunklin, 71 Ala. 594, 609 (quoted in Cole v. Sloss-Sheffield Steel, etc., Co., 186 Ala. 192, 65 So. 177, 178, Ann.Cas.1916E, 99).

Appellant relies upon the rule laid down in several California cases, and found in Stockburger v. Jordan, 10 Cal.2d 636, 76 P.2d 671, 675: "Where a statute is revised and some parts omitted, and it is clearly the intention to cover the whole subject by the statute, the omitted parts are considered as repealed or annulled."

That rule was not made in respect to a *recodification* of any of our Codes, and consequently neither section 2 of the Probate Code nor any similar statute was there considered. In the last analysis it is a matter of determining the legislative intent. The Code Commission states that section 125 of the Probate Code was intended to embody former sections of the Civil Code. It was therefore the intent to leave the law just as it had existed for years past. Appellant also relies upon the Estate of Ross, 140 Cal. 282, 73 P. 976, which construed section 1310 of the Civil Code, and holds that the word "devise" as used in that section cannot be applied to a testamentary disposition of personal property. We are of the opinion that said last-named section did not provide a rule of interpretation, but set forth the right of succession in a case where an estate is devised to a child or other relation of the testator, and the devisee dies before the testator, and leaves living descendants. In deciding the case the court used the following language: "It is strange that the Legislature should have limited the application of section 1310 to devises alone, but the limitation has always existed in this state."

[5, 6] *The limitation now contended for by appellant did not exist in this state prior to 1931,* and does not now exist, as we construe the law. The Ross case and the case at bar involve totally different statutes, and are governed by totally different canons of construction. Section 125 of the Probate Code provides a rule for the *construction of wills,* while the section construed in the Ross case created a *right of succession.* It is elementary that there is no natural right to succeed to the estate of a decedent, but that whoever seeks to establish such right must base it on statute. 9 Cal.Jur., p. 450, sec. 4. Concluding this phase of the case, we are of the opinion that section 125 of the Probate Code is applicable, and that the contention of these respondents must be upheld.

[7] Disregarding the effect of section 125 of the Probate Code, let us consider the evidence introduced at the trial with reference to the question as to whether or not the testator Ozro W. Childs, intended to exercise the power given him under the trust agreement, bearing in mind that the will makes no express mention of the trust or any interest which the testator had therein. A number of facts and circumstances surrounding the testator at the time he executed his will appear in the record. In brief, these circumstances are as follows: That his own estate was insolvent; that he was the victim of a heart condition of uncertain prognosis; and that his mother, though elderly, was in good physical condition. It is hardly reasonable to suppose that under such circumstances and conditions the testator would set up an elaborate spendthrift trust for the support and maintenance of his wife and daughter. Numerous authorities have been cited on both sides relating to the law of the case. We have examined them with care, and are of the opinion that the weight of authority is well expressed in 21 R.C.L. sec. 28, page 796, in the following language: "The prevailing doctrine under modern authorities is that the question whether the conveyance is in execution of a power or not depends solely upon the intent. If from the tenor and effect of the deed or will by which title is conveyed the intent to execute the power is inferable, there is a valid execution of the power, or if without referring to the power, the will or deed is not operative as the parties evidently intended it should operate, then it will be held a valid and effective execution of the power. It is not necessary that the power should be referred to in the deed or will where the intent is otherwise manifested. It is sufficient if the power exists and is intended to be executed; and that intent is matter in pais, to be collected from all the circumstances of the case."

[8-12] The only *reasonable* inference to be drawn from the evidence is that the testator thought that he was exercising the power, and that he *intended* to do so. We are not unmindful of the fact that the mother of testator possessed considerable property, but as she was still alive when the will was executed, and as there was no certainty that the testator would succeed to any of her property, such circumstance is not controlling in establishing the fact that the trust set up in the will related to any property which might come from the estate of the mother. It was one of the facts for the trial court to weigh. Under the familiar rule relating to appeals, we are bound by a finding which has any substantial evidentiary support, and such support appears in

this record. It is true, as appellant points out, the court in the Morffew case [107 Cal. 587, 40 P. 815] (referred to later), held that "the intent to execute the power must be clear, so that such intent is not left in doubt". We do not understand from the foregoing language that the intent must be proved without conflicting evidence, or that it applies where only *one* inference may be drawn from the evidence. As we view the evidence, it measures up to the rule stated. It is extremely unreasonable to suppose that the testator, who was insolvent, would have set up such elaborate trust provisions for the support of his wife and daughter if he did not have in mind the power granted in the trust set up by his mother. This is only one of the facts and circumstances which were before the trial court. That portion of the will establishing the trust takes up over six pages of the clerk's transcript. The will would have been wholly inoperative and futile unless the testator intended it to be an exercise of the power of appointment. The case of Reed v. Hollister, 44 Cal.App. 533, 186 P. 819, presents an illustration of a power of appointment which was exercised by a will which made no reference thereto. In that case a testatrix had a power of appointment over a trust fund amounting to approximately $40,000. The issue in the case was whether the making of specific bequests amounting to $38,000 was an exercise of the power when the only estate the testatrix had apart from the trust fund amounted to less than $1,700. The court held that the specific bequests were effective to exercise the power to appoint her interest in the trust, saying at page 538 of 44 Cal.App., at page 821 of 186 P.: "As has been pointed out, Philoclea A. Hollister died leaving no estate whatever, except the interest which had accumulated upon this trust fund, amounting to $1,673, and, unless the third provision of her will shall be held to be an exercise of the power of appointment, there is nothing whatever upon which it could operate, so that it is clear from the terms of the will itself, taken in connection with known facts as to the extent of her estate, that she intended to exercise this power, to the extent of apportioning thirty-eight thousand dollars, by the third paragraph of her will." Thus, because the specific bequests of $38,000 would have been virtually a nullity unless regarded as an exercise of the power, the court held that the power was exercised and that the trust fund over which the testatrix had a power of appointment was disposed of by will, even though it referred neither to the power nor to the property which was the subject of the power. Similarly, if the will of Ozro W. Childs be restricted in effect to disposing only of his own property, it passes nothing into the spendthrift trust, whereas if it be construed as an exercise of the power, it disposes of $77,000, that being the proven value of the 230 shares of stock. It is contended by appellant that the intent of the testator as to whether or not he intended to execute the power, cannot be proven by surrounding facts and circumstances, and that such evidence was admitted here, and that the findings of the trial court are predicated upon such evidence. The record shows, however, that no objection was made to the admission of this testimony. In such case, conceding that the testimony was not admissible, findings may nevertheless be made thereon in the absence of objection made at the trial. Smith v. Golden State Syndicate, 43 Cal.App. 346, 185 P. 209. We might add, however, that such testimony is admissible in this state. In the case of Morffew v. San Francisco & S. R. R. Co., 107 Cal. 587, 40 P. 810, 815, the court held that the intent to execute a power by deed is matter in pais, to be collected from all the circumstances of the case. The following language is pertinent:

"In these authorities we see, at bottom, no more than the familiar principle of evidence now embodied in our Code, and which applies alike to deeds and wills: 'For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret.' Code Civ.Proc. § 1860. This has been said here to be 'the only rule of much value' in the construction of written instruments. Walsh v. Hill, 38 Cal. [481] 487. And we perceive no substantial reason why an instrument which may or may not be construed as the execution of a power by the donee thereof, according as circumstances may unfold the intent, should form even a partial exception to this general principle, and we hold that it does not. It follows that the court below properly admitted evidence of the situation of the parties to the deeds here in question, and of the property described in the same, and of the circumstances under which they were executed."

Appellant relied chiefly upon the case of Thomson v. Ehrlich, 148 S.C. 330, 146 S.E. 149. That case involved the question as to whether or not the testator executed a power when she made her will. The only thing before the court was the *will itself*, no testimony relating to the surrounding facts and circumstances appearing in the record. The court concluded that no intention to execute the power appeared in the will, and that the will was ineffective in disposing of such power. It is thus apparent that the case is not authority in respect to the question under consideration here.

[13] We now come to that portion of the findings which states that Ozro W. Childs, The Third, and Emelie Gertrude Childs, are each the owners of 19⅙ shares of the 230 shares of stock. It is contended by plaintiff that it lacks evidentiary support. The contention of the last-mentioned respondents in respect thereto has already been set forth. Any title they may have must be derived from an agreement made between the beneficiaries under their mother's trust. These respondents are not named as beneficiaries. Their father had not been made a beneficiary. The other five children evidently sought to remove an obvious inequality in the trust, and they agreed in writing that these two respondents, children of a deceased child of the trustor, should each have one-sixth interest in the 1,150 shares of stock, the corpus of the trust. In other words, the original beneficiaries of the trust attempted to modify its terms by adding *other* beneficiaries and reducing proportionately the amount of stock which the original beneficiaries would receive. It is not contended that the trust could thus be altered or modified. These respondents urge that they have a right, arising out of a *contract*. The difficulty confronting them is that the beneficiaries, under the trust agreement, have but one method of transferring their interest in the stock—*by will*. As we view it, the terms of the trust cannot be so modified, and that no right in the stock could be acquired by these respondents, except through an exercise of the power of testamentary disposition. The trial court therefore erred in finding and adjudging that these two respondents had any interest in the stock.

That portion of the judgment which relates to respondents Ozro W. Childs, The Third, and Emelie Gertrude Childs, is reversed, with directions to the trial court to enter findings and judgment in accordance with this opinion in respect to said respondents. In all other respects, the judgment is affirmed. Respondents will pay the costs of appeal.

We concur: PULLEN, P. J.; THOMPSON, J.

41 Cal.App.2d 771

TAFF v. GOODMAN et al.
Civ. 6504.

District Court of Appeal, Third District.
California.
Nov. 29, 1940.

Hearing Denied Jan. 27, 1941.

1. Venue 🔑68

Evidence that added defendant signed an affidavit of registration on September 27, 1939, declaring that she was a resident of county wherein complaint was filed on April 29, 1940, that she voted in such county on May 7, 1940, that she was formerly registered in another county but canceled such registration, and that she actually lived in county wherein action was brought for three years, sustained finding that defendant was a resident of county wherein action was brought so as to justify denying motion for change of venue.

2. Appeal and error 🔑912

Where affidavits on motion for change of venue are conflicting, those favoring prevailing party must be taken as true by reviewing court.

3. Venue 🔑70

Affidavit by added defendant that she was a resident of county other than the county in which action was brought, constituted prima facie showing on question of her residence and unless overthrown in a proper way by a counter-showing by plaintiff, would support an order granting motion for change of venue.

4. Venue 🔑70

The bare allegation in an affidavit by some one other than a party that one of parties is a resident of a certain county is of no value as proof in support of motion for change of venue unless facts are stated from which the court may form a conclusion of its own.

5. Appeal and error ⚿1024(3)

Whether motion for change of venue was properly denied depended not on whether evidence of residence was conclusive but on whether evidence would sustain order denying motion.

6. Venue ⚿28

The act of registering and voting is the most important formal act to be scrutinized in ascertaining a person's domicile for purpose of venue, and while not necessarily conclusive, is usually most persuasive.

7. Venue ⚿68

Evidence that defendant lived in county wherein action was brought for a few months prior to commencement of the action, that she exercised her right to vote therein after action was commenced, and that she canceled her former registration in another county, was sufficient to overthrow prima facie showing of nonresidence in support of a motion for change of venue.

8. Venue ⚿22(1)

Where there are several defendants residing in different counties, plaintiff has option of commencing action in county wherein any one of defendants resides. Code Civ. Proc. § 395.

9. Venue ⚿22(3)

In determining whether a person has been made a defendant solely for purpose of having action tried in county wherein that defendant resides, the test usually applied is whether the complaint states a cause of action against that defendant. Code Civ. Proc. § 395.

10. Venue ⚿22(3)

In action for injuries sustained in automobile accident, evidence did not establish that added defendant was joined for sole purpose of having action tried in county wherein added defendant resided. Code Civ. Proc. § 395.

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Action by Harry Taff against M. A. Goodman and others for injuries allegedly sustained in an automobile accident. From an order denying a motion for a change of venue, two of the defendants appeal.

Affirmed.

Weinmann, Quayle & Berry, of Oakland, for appellants.

Nichols & Richard, of Oakland, and C. Ray Robinson, of Merced, for respondent.

Mr. Justice TUTTLE delivered the opinion of the court.

This is an appeal from an order denying a motion for a change of venue from Merced County to Alameda County. The motion was submitted upon affidavits and oral testimony, and was denied.

On November 16, 1939, plaintiff commenced an action in the Superior Court of Alameda County for the recovery of damages arising from personal injuries alleged to have been inflicted in an automobile accident through the negligence of defendants Goodman and Everett. The action came on regularly for trial and the cause was submitted to a jury, which was unable to agree, and was thereafter discharged. On April 29, 1940, plaintiff's counsel dismissed said action without prejudice, and filed the present action in Merced County, joining as a defendant Catherine Duffy. Defendant Goodman filed a demurrer to the complaint, and at the same time, a notice of motion for change of venue, designating the Superior Court of Alameda County as the proper court for the trial of the action. He also filed an affidavit of merits, and averred among other things that he was a resident of Stanislaus County; that no defendant was a resident of Merced County; and that the alleged injury to plaintiff occurred in Alameda County. Samuel H. Berry, attorney for defendant Goodman, also filed an affidavit in support of the motion in which he set forth the history of the case, and stated that the obvious reason for joining Catherine Duffy as a defendant was to create a simulated basis for the fixing of venue in Merced County; that Catherine Duffy was not a resident of Merced County; and that the interests of justice required the removal of the action from Merced County to Alameda County. Plaintiff's two attorneys filed counter affidavits. Defendant Catherine Duffy also filed a demurrer, a notice of motion for change of venue, and an affidavit of residence and merits. She averred that her residence was in the City and County of San Francisco at the time the action was commenced, and denied that she was a resident of Merced County. She requested that the action be transferred to the City and County of San Francisco.

The motions were consolidated for hearing, and the affidavits were supplemented by oral testimony respecting the residence of defendant Duffy. At the hearing said defendant joined in the request that the action be transferred to Alameda County. All of said motions were denied. No appeal was taken by defendant Duffy.

[1, 2] It appears that the evidence relating to the residence of defendant Duffy is conflicting. She alleges in her affidavit that she was a resident of the City and County of San Francisco at the time of the commencement of the action. On the other hand, it is alleged in the affidavit of C. Ray Robinson, attorney for plaintiff, that said defendant was, at said time, a resident of Merced County. It also appears from the affidavit of said attorney, and from the oral testimony of said defendant, that she signed an affidavit of registration on September 27, 1939, wherein she declared that she was a resident of Merced County, and that she voted in said County on May 7, 1940. The complaint herein was filed April 29, 1940. She further testified that she was formerly registered to vote in the City and County of San Francisco, but that she canceled said registration. It also appears that said defendant had actually lived in Merced County for three years, having taught school during that time.

We are of the opinion that there was sufficient evidence to uphold the finding of the trial court that said defendant was a resident of Merced County at the time of the commencement of the action. The rule governing the situation is thus expressed in the case of Gordon v. Perkins, 203 Cal. 183, 263 P. 231, 232: "'In considering the affidavits used upon the said motion this court is bound by the same rule that controls where oral testimony is presented for review. "If there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true, and the facts stated therein must be considered established." McKenzie v. Barling, 101 Cal. [459], 462, 36 P. 8; Doak v. Bruson, 152 Cal. [17] 18, 91 P. 1001; Henderson v. Cohen, 10 Cal.App. [580] 585, 102 P. 826.' Sourbis v. Rhoads, 50 Cal.App. 98, 100, 194 P. 521, see, also, Smilie v. Smilie, 24 Cal.App. 420, 424, 141 P. 829."

[3, 4] It is contended by appellants that the allegation by Miss Duffy that she was a resident of the City and County of San Francisco when the action was commenced, constituted a prima facie showing upon the question of her residence, and unless overthrown in a proper way by a counter-showing by plaintiff, it will support an order in favor of defendants. This is the law. O'Brien v. O'Brien, 16 Cal.App. 103, 116 P. 692. It is also held in the same case that the bare allegation in an affidavit, made by someone other than a party, that one of the parties is a "resident" of a certain county, is of no value as proof unless some fact or facts are stated by which the court may be aided in forming a conclusion of its own upon the question. As to the latter point, the affidavit of attorney Robinson does state other facts and circumstances to which we have referred.

Taking up the first contention made by appellants in the foregoing paragraph, there was, in our opinion, sufficient evidence to overthrow the prima facie showing made by appellants and to justify the court in denying the motion. They rely upon the following excerpt from the Estate of Spencer, 198 Cal. 329, 245 P. 176, 177: "It has been heretofore held by this court that the mere fact that one is registered in a certain place and has voted therein is not conclusive evidence upon the question of his domicile."

[5, 6] The question here is not whether the evidence is conclusive, but whether such evidence will sustain the order. After an examination of the cases cited by both parties, we believe that the following holding correctly states the law: "Of all the formal acts to be scrutinized in ascertaining a person's domicile, undoubtedly the act of registering and voting is the most important, and, while not necessarily conclusive, it is usually most convincing and persuasive." In re Curtiss' Estate, 1931, 140 Misc. 185, 250 N.Y.S. 146, 155.

[7] It is true that Miss Duffy testified that she never intended to change her residence from San Francisco to Merced County. On the other hand, we have her sworn statement that she actually lived in Merced County a few months prior to the commencement of the action, and there is the additional fact that she also exercised her right to vote after the action was commenced. Furthermore, she canceled her former registration in San Francisco County. The statement, under oath, that one is a resident of a certain county can-

not be brushed aside lightly, with the explanation (given by Miss Duffy) that she made the affidavit so that she could vote. She could still have cast her ballot as an absent voter, while registered in San Francisco. To give no weight to such facts in determining the matter of residence would let down the bars to flagrant violation of our election laws.

[8-10] It is next contended by appellants that the motion should have been granted under the following provision of Section 395 of the Code of Civil Procedure: "If any person * * * has been made a defendant solely for the purpose of having the action tried in the county, city and county, township, city or town where he resides, his residence must not be considered in determining the proper place for the trial of the action."

No authorities are cited in appellants' opening brief. It is not contended by appellants that the complaint fails to state a cause of action against defendant Duffy. It is argued that the history of the proceedings shows that Miss Duffy was made a defendant for the sole purpose of securing a trial in Merced County. They also point out the averment in the affidavit of plaintiff's counsel that the change to Merced County would be more convenient for all parties and lead to a more expeditious disposal of the litigation. The evidence is insufficient to invoke the section quoted. In dismissing the action in Alameda County, where two of the defendants resided, and commencing the action again in Merced County, where one of the defendants resided, plaintiff was pursuing the legal course. Where there are several defendants who reside in different counties, the law gives plaintiff the option and right of commencing the action in the county where any one of the defendants may reside. 25 Cal.Jur. p. 879, sec. 21. An examination of the California cases shows that this question has always arisen where a defendant has not been joined as a party in good faith, and the test usually applied is whether or not the complaint states a cause of action against that defendant. McDonald v. California Timber Co., 151 Cal. 159, 90 P. 548. That test appears to be based upon the premise that the joinder as defendant of a party against whom no cause of action exists, is evidence sufficient to support a finding that such party was so joined for the purpose of having the trial in a certain county. The cases cited by appellants, in their closing brief—Coen v. Watson, 105 Cal.App. 297, 287 P. 525; Miller v. Collins, 8 Cal.App.2d 10, 47 P.2d 334, and Smith v. Smith, 30 Cal.App.2d 70, 85 P.2d 473—all involve a situation where the sole test is based upon a consideration of the allegations of the complaint in respect to whether or not a cause of action is stated against the defendant whose joinder is attacked as an attempt to evade the statute mentioned. The evidence here is sufficient to sustain the finding.

The order is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

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41 Cal.App.2d 671

TILLSON v. PETERS.

Civ. 6360.

District Court of Appeal, Third District, California.

Nov. 26, 1940.

Rehearing Denied Dec. 26, 1940.

Hearing Denied Jan. 23, 1941.

1. Limitation of actions ⇨51(2)

If rent under oral lease for five years became due in monthly installments, right of action accrued upon each installment of rent when it became due, and limitations began to run on each installment from such date. Civ.Code, § 1947.

2. Pleading ⇨193(1)

In action for unpaid rent under lease for five years, complaint which alleged that defendant was indebted to plaintiff for balance of an account for rental of premises was demurrable for uncertainty in absence of allegations showing whether rent was due in monthly or yearly installments, or only at termination of five-year period. Civ.Code, § 1947.

3. Landlord and tenant ⇨217(2)

An action to recover rent for period during which tenant continued to occupy premises after expiration of written lease was an action in assumpsit on an oral lease for the recovery of deferred installments of rent becoming due monthly as under terms of written lease, in definite sums according to terms of oral contract. Civ.Code, § 1945.

4. Limitation of actions ⇨29(2), 51(2)

An action to recover unpaid installments of rent due under either a written or an oral contract, in specified monthly sums, is subject to bar of limitations running from respective dates on which each installment becomes due and in case of action on an oral contract the statute of limitations may not be extended from two to four years by mere device of attempting to convert cause into an action based on an open book account. Civ. Code, § 1945.

5. Limitation of actions ⇨29(2)

Where landlord merely credited to tenant, in his ledger, the payments of certain sums of money when they were made, but ledger contained no history of transaction under which installments of rental were paid and neither nature nor amount of original indebtedness nor amounts of unpaid installments of rental were entered in the book, the entries did not constitute a "book account" on which an action in assumpsit could be based after action to recover installments of rent as such was barred by limitations. Code Civ.Proc. § 337.

See Words and Phrases, Permanent Edition, for all other definitions of "Book Account".

6. Limitation of actions ⇨29(2)

A "book account" may be made the foundation for a suit in assumpsit, within limitation of time prescribed for book accounts, only when the account contains a statement of the debits and credits of the transaction involved completely enough to supply evidence from which it can be reasonably determined what amount is due. Code Civ.Proc. § 337.

7. Account, action on ⇨18

A mere entry of dates and payments of certain sums in the credit column of ledger or cash book in the name of a particular individual, without further explanation regarding the transaction to which they apply, is not a "book account" on which an action in assumpsit may be founded. Code Civ. Proc. § 337.

See Words and Phrases, Permanent Edition, for all other definitions of "Book Account".

8. Limitation of actions ⇨27

An action on oral lease which specified exact installments of rent which became due each month and which expired April 1, 1936, to recover unpaid installments accruing after last payment was made not later than April 1, 1935, was barred by limitations where brought more than two years after termination of lease, notwithstanding that landlord credited tenant in his ledger with payments of installments of rent when they were made. Code Civ.Proc. § 339.

Appeal from Superior Court, Stanislaus County; Roy B. Maxey, Judge.

Action by Warren S. Tillson against Andrew Peters for unpaid rent. Judgment for plaintiff, and defendant appeals.

Reversed with direction to enter judgment for defendant.

Hawkins & Hawkins & Cardozo, of Modesto, for appellant.

Edward T. Taylor, of Modesto, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant has appealed from a judgment of $1,200 which was rendered against him in a suit for unpaid rent of a dairy ranch for the alleged period of five years. The issues were determined on the theory that the suit was founded on "an open book account", although the complaint fails to make any reference to a book account. A special demurrer to the complaint, on the ground of uncertainty regarding the terms of the lease, was overruled. The defendant also pleaded, by means of his demurrer, and in his answer, that the cause was barred by the statute of limitations.

The evidence shows, without conflict, that the plaintiff sought to recover judgment for deferred and unpaid monthly items of rental of a dairy ranch, pursuant to the terms of an oral lease, covering a period of five years which expired more than two years before the action was commenced. At the trial there was an effort to prove that the balance due for unpaid rental was established by a book account which was kept by the plaintiff, the last item of which showed a credit on January 7, 1935, of the sum of $125 in favor of the defendant. The court adopted findings determining that, on August 20, 1938, defendant was indebted to plaintiff in the sum of $1,200, "upon an open book account". Judgment was rendered against the defendant for said sum of $1,200, and interest thereon from the last-mentioned date, at the rate of seven per cent per annum. From that judgment this appeal was perfected.

The complaint does not pretend to state a cause of action based on a book account. It attempts to allege a cause of action for unpaid installments of rent due for a specified period of time from April 1, 1931 to April 1, 1936. It is not alleged whether the contract was written or oral. Paragraph I of the complaint states that:

"Defendant is indebted to plaintiff in the principal sum of $1625.00, together with interest thereon in the further sum of $700.-00, for the balance of an account for rental of premises of plaintiff, rented and occupied by defendant from April 1, 1931 to April 1, 1936; the whole of said principal rental due between said dates was and is $9140.00, no part of which has been paid except the sum of $7515.00; the balance of said account first above aforesaid in the principal sum of $1625.00 still being unpaid, together with interest thereon in the sum of $700.00."

The defendant demurred to that complaint on the ground that the cause of action is barred by the statute of limitations, and that the pleading is uncertain for the reason that it can not be ascertained therefrom whether the rental was due monthly, annually or at the termination of the full period of five years for which the premises were leased.

[1, 2] We are convinced the complaint is uncertain in that regard. It is uncertain from the allegations of the pleading whether the property was rented for an aggregate sum which became due under the contract for the entire term of five years, ending April 1, 1936, or whether the rent became due in monthly or annual installments. That is an important issue which should have been pleaded. If the rent became due in monthly installments, which the uncontradicted evidence shows that it did, the right of action accrued upon each installment of rent when it became due, and the statute of limitations began to run on each monthly installment of rent from such dates. Lee v. De Forest, 22 Cal.App.2d 351, 360, 71 P.2d 285; sec. 1947, Civ.Code; 15 Cal. Jur. 723, sec. 133. The plaintiff, no doubt, alleged that $1,625 rental for the premises was due for the five-year period from April 1, 1931 to April 1, 1936, so as to avoid the effect of the statute of limitations. If that were all that he alleged, the complaint might be deemed to state a good cause of action in assumpsit, on the theory that the rent was really not due until the end of the term specified. But he further alleges that there was $700 interest due on deferred installments of rent, which refutes the theory that the rent was due only at the termination of the contract. Those conflicting statements in the pleading created an uncertainty as to whether the rent was due under the contract in monthly, or yearly installments, or only at the termination of the five-year period mentioned in the complaint. That issue is material and the special demurrer should have been sustained.

The defendant answered the complaint, denying the material allegations thereof, and affirmatively pleaded that the cause was barred by the statute of limitations.

At the trial the plaintiff sought to avoid the effect of the statute of limitations by attempting to prove that the action was founded on a balance of rental shown to be due upon an open book account. It appears that the plaintiff kept an account book and ledger in which he credited the defendant only with certain sums of money, representing installments of rent, on the respective dates when they were paid. The history of the transaction was not recorded in the books. Neither the original indebtedness nor unpaid installments of rent were charged to the defendant or entered in the books. The books were not offered in evidence. It is impossible to determine from the testimony of the contents of the book entries which were adduced what the transaction was about, or whether any balance was thereby shown to be due to the plaintiff. Evidently the books do not disclose those facts.

[3, 4] It appears without conflict that the defendant rented a dairy ranch from the plaintiff for a term of years, under a written lease providing for installments of rental of $200 payable each month; that the written lease expired about 1930, and was not renewed; that the defendant, by mutual consent, continued to hold possession of the premises for several years thereafter under an oral lease upon the same terms and conditions contained in the former written lease, except that the rental was first reduced to the sum of $175 per month, and finally to the sum of $125 per month; that no rent was paid after January 7, 1935, at which date the plaintiff's ledger merely shows that the defendant paid him the sum of $125. The

complaint infers that the lease terminated April 1, 1936. It is not contended the defendant held possession of the premises after that date. This action was not commenced until August 31, 1938.

Clearly this suit is founded on an oral contract for the leasing of real property. Sec. 1945, Civ.Code. It is a suit in assumpsit to recover deferred installments of rent which became due monthly at specified times and in definite sums according to the terms of the oral contract. It has been held that the fulfillment of the terms of either a written or an oral contract, similar to the one which is here involved, may not be avoided by attempting to convert the suit for breach of the specific terms of a contract into an action based on an open book account. A suit to recover unpaid installments of rental due according to the terms of either a written or an oral contract, in specified monthly sums, is subject to the bar of the statute of limitations from the respective dates when each installment becomes due. In such an action upon an oral contract the statute of limitations may not be extended from two to four years by the mere device of attempting to convert the cause into a suit based on an open book account.

In the case of Lee v. De Forest, supra, [22 Cal.App.2d 351, 71 P.2d 290], it is said, with respect to a similar installment contract, in which a claim upon an open book account was specifically alleged: "We think that plaintiff's attempt to recover by alleging an open book account when his right of action is based upon the terms of an express contract ought not to be allowed. * * * As to installment contracts generally, the weight of authority is to the effect that an action to recover any unpaid installment must be brought within the period of limitations after the particular installment becomes payable under the contract. 82 A.L.R. 316; Bissell v. Forbes, 1 Cal.App. 606, 82 P. 698; People v. California Safe Deposit & Trust Co., 41 Cal.App. 727, 183 P. 289; Vatcher v. Grier, 50 Cal.App. 39, 195 P. 75; Mason v. New York, 28 Hun. (N.Y.) 115."

In the De Forest case the court quoted approvingly from the case of Connor Livestock Co. v. Fisher, 32 Ariz. 80, 255 P. 996, 998, 57 A.L.R. 196, as follows: "An express contract, which defines the duties and liabilities of the parties, whether it be oral or written, is not, as a rule, an open account. * * * Were the only basis of plaintiff's action the rent due on the three oral leases, we do not think it could be successfully contended that it constituted an 'open account.' The amount of rent due and the time of payment under the leases was fixed, and the fact that the tenant was at times behind in his rent, or that the leases might be terminated at any time on notice, do not, we think, affect the character of the contracts. We have been cited to no authority holding a contract of this nature creates an open account. * * * We do not think the items of rent constitute either an open account or any part thereof, and the plea of the statute of limitations was therefore available to defendant."

In the case of Stewart v. Claudius, 19 Cal.App.2d 349, 65 P.2d 933, 935, the court held that the provisions of a contract were controlling with respect to the application of the statute of limitations, and that the transaction did not constitute a book account upon which a suit in assumpsit might be based under section 337 of the Code of Civil Procedure, even though all of the credits and debits of the respective parties were entered in an account book. It is there said: "The provisions of the contract are controlling as to the running of the statute; and even though the plaintiff keeps a memorandum book in which he charges the accounts accruing under the contract and credits therein the several payments made, the entries in the book account do not fix a new date for the running of the statute."

[5] Moreover the entries which were made in his books by the plaintiff in the present case do not constitute a "book account" which may furnish the foundation for a suit in assumpsit under the provisions of section 337 of the Code of Civil Procedure. The plaintiff merely credited to the defendant, in his ledger, the payments of certain sums of money, when they were made. The books contain no history of the transaction of the leasing of the ranch under which the installments of rental were paid. Neither the nature or amount of the original indebtedness, nor any unpaid installments of rental were entered in the books. The book entries did not purport to record the nature of the transaction, nor the debits and credits of the respective parties. They contained

no information from which it could be ascertained what amount, if any, was due to the plaintiff.

[6] A book account may be deemed to furnish the foundation for a suit in assumpsit, within the limitation of time prescribed by section 337 of the Code of Civil Procedure, only when it contains a statement of the debits and credits of the transactions involved completely enough to supply evidence from which it can be reasonably determined what amount is due to the claimant. Wright v. Loaiza, 177 Cal. 605, 171 P. 311. The mere entry in a cash book or ledger of the amounts and dates when a debtor makes certain payments, without further information regarding the transaction which is involved, does not constitute a book account within the contemplation of section 337. The term "account", as it is used in the statute, clearly requires the recording of sufficient information regarding the transaction involved in the suit, from which the debits and credits of the respective parties may be determined, so as to permit the striking of a balance to ascertain what sum, if any, is due to the claimant. Webster's New International Dictionary, at page 15, defines the term "account" as follows: "A reckoning of money transactions; a register of pecuniary transactions; a written or printed statement of business dealings, or debts and credits, or of a certain class of them, or of other things subject to a reckoning or review; hence a right or claim, the items of which make up such a statement."

In 11 Corpus Juris Secundum, at page 518, a "book account" is defined as:

> "A book in which a detailed history of business transactions is entered; a record of goods sold or services rendered; a statement in detail of the transactions between parties, including prices made contemporaneously with the transaction and entered in a book. It has been said that a 'book of account' consists of entries made in the regular course of business showing the transactions which have actually occurred in the business, and not of orders, executory contracts, things to be done subsequent to the entries, or of methods and principles according to which the business must be conducted and entries made."

[7] It is apparent that the mere entry of dates and payments of certain sums in the credit column of a ledger or cash book under the name of a particular individual, without further explanation regarding the transaction to which they apply, may not be deemed to constitute a "book account" upon which an action in assumpsit may be founded. In the present case there were deferred installments of rent, which are the very foundation of this suit, none of which were entered in the book or charged to the defendant. We are therefore of the opinion the record does not constitute a book account in contemplation of law.

The case of Bailey v. Hoffman, 99 Cal. App. 347, 278 P. 498, is not in conflict with what we have previously said regarding the necessary entries which may constitute a book account. It is true that the court determined in that case the entries which were made by the plaintiff in his books under the heading "Dr. Hoffman job at Emerald Lake", charging to the defendant several specified items on designated dates, constituted a book account although there were no credits entered in the book. The court did say "No credit appears, and none was claimed". Clearly no payments were made on account of that transaction. The court was therefore justified in holding that the book account did adequately include a complete history of the transaction involved.

[8] Since this action is founded on an oral contract of lease specifying the exact installments of rent which became due each month during the term of lease, the statute of limitations ran on each monthly installment in two years from the date when it became due. Sec. 339, Code Civ.Proc. That two-year limitation of time within which this action could be commenced, under the undisputed evidence of this case that the claim for unpaid rental is necessarily founded on an oral lease payable in monthly installments, may not be extended by the mere fact that the plaintiff credited the defendant in his ledger with payments of certain installments of rent when they were made. Since it is alleged that the lease expired April 1, 1936, and it appears the last payment was made not later than April 1, 1935, and more than two years elapsed since the termination of the lease before this action was commenced, the defense of the statute of limitations, which was specifically pleaded in the answer, bars all unpaid installments of rent. It is there-

fore useless to remand the cause for further trial.

The judgment is reversed, and the court is directed to render judgment for the defendant.

We concur: PULLEN, P. J.; TUTTLE, J.

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41 Cal.App.2d 581

BUTTNER v. AMERICAN BELL TELEPHONE CO. et al.

Civ. 12112.

District Court of Appeal, Second District, Division 1, California.

Nov. 22, 1940.

1. Appeal and error 🔑854(3)

Where order sustaining demurrer to complaint did not specify grounds on which it was based, and plaintiff did not avail himself of opportunity to amend his complaint, if demurrer was properly sustainable on any of grounds therein set forth, the judgment of dismissal because of plaintiff's failure to amend his complaint would be affirmed.

2. Workmen's compensation 🔑2084

Under Workmen's Compensation Act, the Industrial Accident Commission is given exclusive jurisdiction over matters of compensation for any injury arising out of employment. St.1917, p. 831, as amended; St.1937, p. 265 et seq., § 3201 et seq.; Const. art. 20, § 21.

3. Workmen's compensation 🔑2093

The superior court was without jurisdiction of employee's action for injuries sustained as result of employer's alleged deceit in misrepresenting to employee nature of carbon tetrachloride, which substance was used by employee in his work, notwithstanding that employee founded his cause of action upon deceit allegedly practiced by employer, since Industrial Accident Commission had exclusive jurisdiction regardless of cause of accident or injury. St.1917, p. 831, as amended; St.1929, p. 430, § 6; St.1937, p. 265 et seq., § 3201 et seq.; Const. art. 20, § 21.

4. Workmen's compensation 🔑511

The constitutional provision giving to Legislature plenary power to create and enforce a complete system of workmen's compensation by appropriate legislation, and legislation enacted pursuant thereto, are intended to include all injuries incurred in course of employment, irrespective of manner in which they might occur. St.1917, p. 831, as amended; St.1937, p. 265 et seq., § 3201 et seq.; Const. art. 20, § 21.

5. Workmen's compensation 🔑248, 2084

In determining whether relationship of employer and employee existed between parties, so that Industrial Accident Commission would have exclusive jurisdiction of claim for injury, the relationship of parties at time injuries were sustained, and not at time of commencement of action, is controlling. St. 1917, p. 831, as amended; St.1937, p. 265 et seq., § 3201 et seq.; Const. art. 20, § 21.

6. Workmen's compensation 🔑2093

The right of employee to bring independent action against employer for deceit, in so far as compensation for injuries was concerned, was curtailed by Legislature in exercise of police power through enactment of Workmen's Compensation Act. St.1917, p. 831, as amended; St.1937, p. 265 et seq., § 3201 et seq.; Const. art. 20, § 21.

* * *

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Ernest J. Buttner against the American Bell Telephone Company and others, for injuries sustained by plaintiff as result of an alleged deceit practiced upon him by defendants and for recovery of compensation alleged to have been agreed to be paid to plaintiff by defendants for work performed. From a judgment dismissing the action because of plaintiff's failure to amend his complaint after demurrer thereto was sustained, the plaintiff appeals.

Affirmed.

A. Brigham Rose, of Los Angeles, for appellant.

Lawler, Felix & Hall and John W. Holmes, all of Los Angeles, for respondents.

DORAN, Justice.

This is an appeal from a judgment dismissing an action on motion of defendants because of plaintiff's failure to amend his complaint after demurrer thereto was sustained with ten days' leave to amend.

Plaintiff's complaint contains two counts, one for damages for injuries sustained by plaintiff as the result of an alleged deceit practiced upon him by defendants and the other for recovery of compensation alleged to have been agreed to be paid to plaintiff by defendants for work, labor and services performed.

According to the complaint, the deceit for which damages are sought consisted in the defendants (respondents here) having misrepresented to plaintiff (appellant) the nature of carbon tetrachloride, which substance was used by appellant in his work in the employ of respondents, respondents having suggested in fact that said substance was harmless, whereas it is a highly dangerous fluid, and as a result of respondents thus misleading appellant, appellant suffered certain injuries while using the carbon tetrachloride in his work. The complaint alleges that at all times mentioned therein appellant was employed by respondents.

To this complaint respondents interposed a demurrer on the grounds that the first count thereof failed to state a cause of action, that the court had no jurisdiction of the subject-matter of said count, that said count was uncertain, ambiguous and unintelligible, and that the causes of action in said complaint were improperly joined. Appellant declined to avail himself of the opportunity afforded him to amend his complaint after the demurrer was sustained and judgment of dismissal was thereafter entered as above mentioned.

[1] The order sustaining the demurrer did not specify the grounds on which it was based. Since appellant did not avail himself of the opportunity to amend his complaint, if the demurrer was properly sustainable on any of the grounds therein set forth the judgment of dismissal herein should be affirmed.

Appellant raises but one question here, namely, whether the provisions of article XX, section 21, of the California Constitution, creating the industrial accident commission, "bar an individual who has formerly been in the employ of the defendant, from bringing any action in the Superior Court, regardless of the nature of the action". The question thus attempted to be raised, properly stated, is whether, in view of the said constitutional provisions and those of the Workmen's Compensation Act (now embodied in the Labor Code), the superior court has jurisdiction over a cause of action such as that alleged in appellant's first count in his complaint herein. As seen above, this is one of the questions raised by respondents' demurrer.

There can be no question that said cause of action is one for damages for personal injuries. It also affirmatively appears that the injuries sustained arose out of and in the course of appellant's employment by respondents. The distinction attempted to be drawn by appellant between this case and the ordinary workmen's compensation case is that here appellant bases his cause of action upon the alleged deceit of respondents in misrepresenting the nature of a substance used by appellant while in respondents' employ. In other words, the proximate cause of appellant's injuries is stated to be a willful act of his employer.

[2, 3] It appears that appellant's injuries were sustained prior to the enactment of the pertinent provisions of the Labor Code and at a time when the Workmen's Compensation Act was in force. Section 21 of article XX of the California Constitution gives to the legislature plenary power to create and enforce a complete system of workmen's compensation, by appropriate legislation. To that end the legislature enacted the provisions of the Workmen's Compensation Act, now contained in the Labor Code. Stats.1917, p. 831, as amended; Act 4749, Deering's Gen.Laws; now contained in division IV of the Labor Code, St.1937, p. 265 et seq., § 3201 et seq. Under those provisions the industrial accident commission of the state is given exclusive jurisdiction over matters of compensation for any injury arising out of employment, such as that of appellant here. It is not claimed that appellant's employment was of a type excluded by such provisions, and while it appears that respondents are all part of the "Bell System" of telephone service, it does not appear, nor is it claimed that appellant was engaged in work in interstate commerce, but on the contrary, it affirmatively appears from the complaint that appellant was employed at work in the county of Los Angeles, state of California. The exclusive jurisdiction of the industrial accident commission over such claims as that presented by appellant's first cause of action is well settled, and a de-

murrer on the ground, among others, that the court had no jurisdiction of the subject-matter of the action was properly sustained. Burton v. Union Oil Co., 129 Cal.App. 438, 19 P.2d 9. See, also, Alaska Packers' Ass'n v. Industrial Accident Com., 200 Cal. 579, 583, 253 P. 926, citing De Carli v. Associated Oil Co., 57 Cal.App. 310, 207 P. 282; Fitzpatrick v. Fidelity & Casualty Co., 7 Cal.2d 230, 233, 60 P.2d 276; Tipton v. Atchison, T. & S. F. R. Co., 298 U.S. 141, 154, 56 S.Ct. 715, 80 L.Ed. 1091, 104 A.L.R. 831.

[4] The fact that appellant founds his cause of action upon the deceit allegedly practiced by respondents is immaterial. It cannot be disputed that the jurisdiction of the industrial accident commission prevails regardless of the cause of the accident or injury. Compensation for injuries caused by the serious and willful misconduct of the employer is expressly provided for in section 6 of Workmen's Compensation Act, now section 4553 of the Labor Code. It is clear that section 21 of article XX of the Constitution and the legislation enacted pursuant thereto are intended to include all injuries incurred in the course of employment, irrespective of the manner in which they might occur. Sarber v. Ætna Life Ins. Co., 9 Cir., 23 F.2d 434.

It should be noted that the Sarber case, supra, concerned an action in damages for deceit on the part of the employer's insurance company in concealing from plaintiff the fact that a fragment of steel had not been removed from his leg following an accident in the course of his employment. A demurrer was interposed on the ground of the lack of jurisdiction of the court over the subject-matter, which demurrer was sustained. Plaintiff was an employee within the contemplation and under the provisions of the California Workmen's Compensation Act, and the Federal Circuit Court of Appeals for the Ninth Circuit upheld the ruling on the demurrer on the ground of the exclusive jurisdiction of the industrial accident commission over such matters, even where disability has been aggravated by the intervening negligence or carelessness of the employer's physician. It follows that if negligence or carelessness which aggravates the injury does not affect the jurisdiction of the commission, then the willful misconduct or other act which caused the injury is likewise unimportant in that respect. The Sarber case is directly in point here, and should be controlling if further authority were needed.

[5, 6] It should be pointed out that the relationship between appellant and respondents at the time of the commencement of the action is also immaterial since the controlling factor is the relationship of appellant and respondents at the time the injuries were sustained. Moreover, appellant's contention that he had a right as a citizen to avail himself of any independent action for deceit, statutory or otherwise, is untenable in so far as compensation for injuries is concerned since any such right has been curtailed by the legislature in the exercise of the police power of the state through the above-mentioned provisions of the Workmen's Compensation Act, the constitutionality of which is too well settled to bear further consideration here. See cases cited in Sarber v. Ætna Ins. Co., at page 435 of 23 F.2d supra.

Appellant does not argue, nor does it appear from the complaint, that his action is one for exemplary damages. From all that appears on the face of the complaint appellant seeks compensation for his injuries; there is no allegation as to punitive or exemplary damages, and none are prayed for. The question of jurisdiction over an action for exemplary damages for the alleged deceit does not arise in the instant case. For a discussion of this question see E. Clemens Horst Co. v. Industrial Acc. Comm., 184 Cal. 180, 192, 193, 193 P. 105, 16 A.L.R. 611.

Since the demurrer was properly sustained on the ground above discussed it is not necessary to consider the further grounds, although an examination of the complaint reveals it to have been defective in other respects reached by the demurrer.

For the foregoing reasons the judgment is affirmed.

We concur: YORK, P. J.; WHITE, J.

41 Cal.App.2d 705

KING v. SAN JOSE PACIFIC BUILDING & LOAN ASS'N.

Civ. 11278.

District Court of Appeal, First District,
Division 2, California.
Nov. 27, 1940.

Hearing Denied Jan. 23, 1941.

1. Building and loan associations ⚿41(1)

As regards whether assignee of building and loan association's depositors who had sold their certificates of deposit at a discount after association ceased to pay withdrawals could maintain action for money had and received and recover difference between amount of certificates and amount received by depositors, as a written contract existed between each of depositors and association, right of a depositor to sue on a common count was not unlimited. St.1931, p. 500.

2. Building and loan associations ⚿41(2)

An assignee of building and loan association's depositors who, after association ceased to pay withdrawals, sold to third parties their certificates of deposit at a discount, was not entitled to a judgment against the association on a common count as for moneys had and received for the difference between amount of certificates and amount received by depositors, where depositors did not give written notice of intention to withdraw as required by statute and association did not waive compliance with such requirement. St.1931, p. 500.

3. Building and loan associations ⚿41(2)

An assignee of building and loan association's depositors who, after association ceased to pay withdrawals, sold their certificates of deposit to third parties at a discount, could not recover from association on a count as for moneys had and received the difference between amount of certificates and amount received by depositors where, upon sale outright of depositors' certificates, all contractual obligations of association in favor of depositors passed by such sale from the depositor to such third parties and it was not shown that such sales or certificates of membership had been rescinded. St.1931, p. 500.

4. Building and loan associations ⚿41(1)

An assignee of building and loan association's depositors who, after association ceased to pay withdrawals, sold their certificates of deposit to third parties at a discount, could not recover from association on a count as for moneys had and received the difference between amount of certificates and amount received by depositors, on ground of alleged wrongful acts committed by the association, since such acts constituted grounds for actions ex delicto but were not contractual and did not support a count in indebitatus assumpsit, and assignee's action, if any, should have been for damages. St. 1931, p. 500.

5. Trial ⚿169

Where building and loan association's depositors' assignee sued association on a count as for moneys had and received to recover difference between amount of certificates of deposit which depositors sold at a discount and the amount received, and alleged wrongful acts committed by association constituted ground for actions ex delicto but did not support a count in indebitatus assumpsit, case was governed by statute providing that when allegation of claim to which proof is directed is unproved in its general scope and meaning, it is not to be deemed a case of "variance", but a "failure of proof", and hence trial court properly ordered a judgment for the association on ground that there was a total "failure of proof". St.1931, p. 500; Code Civ.Proc. § 471.

See Words and Phrases, Permanent Edition, for all other definitions of "Failure of Proof" and "Variance".

6. Appeal and error ⚿172(1)

An assignee of building and loan association's depositors who sold their certificates of deposit to third parties at a discount could not claim, on appeal from judgment in favor of association in action for money had and received, that association wrongfully broke down its financial obligation to depositors for purpose of benefiting association's stockholders where such questions were not pleaded, there were no findings on them and they did not enter into the judgment. St.1931, p. 500.

7. Appeal and error ⚿1071(6)

In action against building and loan association by assignee of association's depositors who, after association ceased to pay withdrawals, sold their certificates of deposit to third parties at a discount, to recover on a count as for moneys had and received the difference between amount of certificates and amount received by depositors, court's failure to make findings on question whether as-

sociation broke down its financial obligation to depositors for purpose of benefiting association's stockholders was not prejudicial where, if trial court had made findings thereon, such findings must necessarily have been adverse to the assignee. St.1931, p. 500.

Appeal from Superior Court, Santa Clara County; H. S. Shaffer, Judge.

Action by Wesley King against the San Jose Pacific Building & Loan Association for money had and received. From a judgment for defendant, plaintiff appeals.

Affirmed.

Raymond Perry, of San Francisco, for appellant.

Faber L. Johnston, of San Jose, and Harold C. Holmes, Jr., of Oakland, for respondent.

STURTEVANT, Justice.

The plaintiff has appealed from a judgment in favor of the defendant in an action pleading several counts as for money had and received. In support of his appeal he has brought up a bill of exceptions.

Each cause of action represented a claim of a different person and such claims were assigned to the plaintiff who sued thereon as assignee. Prior to July 1, 1931, the defendant was, and has continued to be, a building and loan association. Prior to that date it had obtained many depositors including all of said assignors. No one of the assignors was a stockholder. On February 1, 1932, the defendant ceased to pay withdrawals. During the year 1934 the assignors sold to third parties their certificates of deposit for about fifty cents on the dollar. Claiming that in refusing to pay withdrawals the defendant breached its contract, the plaintiff asserted that he was entitled to recover, as money had and received, the difference between the amount of the deposit claim of each of his assignors and the amount each of them received from his or her vendee.

Before we proceed to discuss the evidence it is necessary to consider the pleadings and findings. As stated above, the plaintiff's complaint alleged in each count a cause of action for money had and received. It also contained a formal allegation that plaintiff's assignors had fully performed. The defendant's answer contained some admissions, but denied many material allegations contained in plaintiff's complaint. The answer set up the statute of limitations. Sec. 338, sec. 337, and sec. 343, Code Civ.Proc. The findings, in effect, find that all the allegations of the plaintiff's complaint are untrue and all the allegations of defendant's answer are true. There are no other findings. The complaint was filed August 20, 1938.

[1-3] As a written contract theretofore existed between each of the assignors and the defendant, the right of an assignor to sue on a common count was not unlimited. In Castagnino v. Balletta, 82 Cal. 250, at page 258, 23 P. 127, 128, the court quotes with approval as follows: "(1) So long as the contract continues executory, the plaintiff must declare specially; but when it has been executed on his part, and nothing remains but the payment of the price in money by the defendant, which is nothing more than the law would imply against him, the plaintiff may declare generally, using the common counts, or may declare specially, on the original contract, at his election. If the mode of payment was any other than in money, the count must be on the original contract. And if it was to be in money, and a term of credit was allowed, the action, though on the common counts, must not be brought until the term of credit has expired. This election to sue upon the common counts, where there is a special agreement, applies only to cases where the contract has been fully performed by the plaintiff." And in section 6.01 of the Building and Loan Act, St.1931, p. 500, it is provided that each association must prescribe by its by-laws or prescribe in its contracts the period of intention to withdraw and that a notice of intention to withdraw must be in writing and served on the association. The record shows that said by-laws were adopted, also that the contract specified in the statute was entered into. However, the record shows no written notice was given by any single one of the assignors. The plaintiff asserts that the defendant waived compliance with the requirement to give notice. Watson v. Stockton Morris Plan Co., 34 Cal.App.2d 393, 407, 93 P.2d 855. That case rested on the facts there involved. Here the trial court by its judgment, in effect held there was no waiver. Plaintiff quotes no part of the record showing that the court's implied finding is not sustained by the record. We find no evidence to the

contrary. It follows such assignors never fully performed their contracts and the plaintiff did not prove a case which entitled him to a judgment on a common count as for moneys had and received. Furthermore, on the trial it soon transpired that the plaintiff's assignors had, as early as 1934, sold outright their certificates to third persons. All contractual obligations of the defendant in favor of said vendors arising out of said certificates passed by such sale from said assignors to said third parties. The regularity of the issuance of said certificates to plaintiff's assignors is not questioned. It is not claimed that the sales of said certificates or the certificates of membership have been rescinded. These additional facts show other reasons why the plaintiff was not entitled to recover on a count as for moneys had and received.

[4, 5] As will presently appear the plaintiff complains of certain wrongful acts committed by the defendant. Such wrongful acts constituted grounds for actions ex delicto but they were not contractual and in no manner supported a count in indebitatus assumpsit. Plaintiff's action, if any, should have been for damages. 12 Cal. Jur. 786; Hallidie v. Enginger, 175 Cal. 505, 509, 166 P. 1. Under these circumstances the present case is governed by the provisions of section 471 of the Code of Civil Procedure and the trial court did not err when it ordered a judgment for the defendant. There was a total failure of proof. Code Civ.Proc. sec. 471; 21 Cal. Jur. 267 "Pleading", sec. 185.

[6, 7] The briefs recite certain facts which the plaintiff claims tend to show the defendant wrongfully broke down its financial obligation to the plaintiff's assignors for the purpose of benefiting the stockholders of the defendant. Ralph A. Badger & Co. v. Fidelity Building & Loan Ass'n, 94 Utah 97, 75 P.2d 669. It is sufficient to state that the record in the present case does not present such questions. They were not pleaded, there are no findings on them, and they did not enter into the judgment. Nevertheless the plaintiff introduced evidence to establish the theory set forth in the case of Ralph A. Badger & Co. v. Fidelity Building & Loan Ass'n, supra. We have carefully read that evidence. If the trial court had made findings thereon such findings must necessarily have been adverse to the plaintiff. It follows the plaintiff was not prejudiced by the failure of the court to make findings thereon. 24 Cal.Jur. 994.

Again the plaintiff makes many contentions to the effect that the defendant made borrowings not authorized by law from banks and made payments to the banks in violation of its obligations to its depositors. If those claims were well founded they should have been communicated to the building and loan commissioner, who, no doubt, would have caused proper proceedings to have been commenced against the defendant. Sec. 13.11, Building and Loan Act. But, as shown above, such matters are not before us and we express no opinion thereon.

We find no error in the record. The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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41 Cal.App.2d 955

Wesley KING, Appellant, v. GUARANTY BUILDING & LOAN ASSOCIATION, Respondent.

Civ. 11461.

District Court of Appeal, First District,
Division 2, California.
Nov. 27, 1940.

Hearing Denied Jan. 23, 1941.

Appeal from a judgment of the Superior Court of Santa Clara County, H. S. Shaffer, Judge. Affirmed.

Raymond Perry, of San Francisco, for appellant.

Urban A. Sontheimer and Vernon E. Perren, both of San Jose, and John L. Reith, of Oakland, for respondent.

STURTEVANT, Justice.

This is a companion case to King v. San Jose Pacific Building & Loan Association, a Corporation, 107 P.2d 442, this day filed. The pleadings, evidence, and findings are practically the same. On the authority of the case above mentioned the ruling should be the same.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

DRUZANICH v. CRILEY et al.*

Civ. 12146.

District Court of Appeal, Second District, Division 1, California.

Nov. 26, 1940.

Rehearing Denied Dec. 23, 1940.

Hearing Granted Jan. 23, 1941.

1. Automobiles 🔑181(2)

A "passenger relationship" arises when a motor journey is undertaken not as an act of hospitality nor as a favor but as a real and vital part of one's business with an eye to his own profit not as a means of obtaining free transportation, but as an integral part of a business transaction.

See Words and Phrases, Permanent Edition, for all other definitions of "Passenger Relationship".

2. Automobiles 🔑181(1, 2)

Where labor union delegates desired to attend a union conference and arrangement was made whereby husband of one delegate furnished automobile and all delegates agreed to share in driving and to be responsible for the automobile, the arrangement created a "host and guest relationship" necessitating proof of willful misconduct on part of automobile owner's wife before she could be required to respond in damages for the injuries sustained by another delegate in automobile accident. Vehicle Code, § 403, St. 1935, p. 154, § 403.

See Words and Phrases, Permanent Edition, for all other definitions of "Host and Guest Relationship".

3. Automobiles 🔑244(20)

Even if automobile occupant was a passenger for compensation, he could not recover damages for personal injuries sustained in accident where there was total lack of evidence regarding condition of highway at point where accident occurred, the type of curve which driver failed to negotiate, the manner in which shoulder had been constructed, or how it appeared to one approaching curve. Vehicle Code, § 403, St. 1935, p. 154, § 403.

4. Negligence 🔑121(2)

Under the "res ipsa loquitur" doctrine when a thing which causes an injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

5. Automobiles 🔑242(2)

The burden rested upon automobile occupant seeking damages for injuries sustained in automobile accident, to establish negligence on part of driver, the mere fact that accident occurred not being sufficient.

6. Automobiles 🔑242(2)

Even if facts regarding automobile accident in which automobile guest was injured presented proper case for application of "res ipsa loquitur" doctrine, it was still incumbent on guest to assume burden of proof and establish willful misconduct of driver before guest was entitled to recover damages. Vehicle Code, § 403, St.1935, p. 154, § 403.

◆

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Personal injury action by George Druzanich against Dorothy Criley and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Edward M. Raskin and Belmore D. Goulden, both of Los Angeles, for appellant.

Joe Crider, Jr., of Los Angeles (John J. Ford, of Los Angeles, of Counsel), for respondents.

YORK, Presiding Justice.

The instant action was brought against the operator and owners of an automobile by an occupant thereof to recover damages for personal injuries alleged to have been sustained by him when the operator lost control of the automobile causing it to go over an embankment.

This appeal is prosecuted from the judgment in favor of defendants which was rendered by the trial court sitting without a jury.

The record herein reveals that appellant, respondent Dorothy Criley, Messrs. Hinman and Lehman, all of whom were connected in some manner with the Cannery Workers' Local Union No. 11 at Sunnyvale, California, desired to attend a union conference in Los Angeles. Accordingly, on

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* Subsequent opinion 115 P.2d 810.

September 2, 1937, a conversation took place between them and respondent Richard Criley (Dorothy Criley's husband) at which time it was suggested by Mrs. Criley that her husband allow her to use an automobile registered in his name in order to make the trip to Los Angeles. Mr. Criley agreed to the plan and "asked them all to share in driving and to be responsible for the car"; to which "there was a general agreement on the part of all (of them)".

The party left Sunnyvale around the hour of 9 o'clock in the evening of September 2, 1937, respondent Dorothy Criley driving to King City. Appellant drove from King City to Santa Maria; and Mr. Hinman from that point to Santa Barbara, where they arrived between 5:30 and 6 o'clock on the morning of September 3d. At that time, because Mr. Lehman had a headache and was due to attend a conference that morning, it was decided that he should sleep and that respondent Dorothy Criley should drive the automobile from Santa Barbara to Los Angeles. When near Calabasas, Mrs. Criley "was driving about 50 or 55 miles an hour and came to a curve. I was sleepy because we had not slept all night and I blinked my eyes on the curve * * *, a left-hand curve." She failed to negotiate the turn "because when I went around the curve there was a soft shoulder and I hit that and the car skidded and went out towards the center of the road and I lost control of it and went over the embankment". After turning over several times, the automobile came to rest about seventy feet "down in a sort of a gulch".

Appellant alleged in his third amended complaint that he "was a passenger and guest riding in said automobile * * * operated by defendant Dorothy Criley * * * in a wilful, wanton and reckless manner * * * with the intent that harm should result therefrom; that as a proximate result thereof plaintiff was injured * * * suffered a fracture of all six ribs on the left side of his body; a fracture of the left clavicle; a fracture of the left shoulder and socket; concussion of the brain; serious lacerations, bruises and contusions about the head, body and extremities; serious internal injuries * * * and has been permanently injured, all to his damage in the sum of Fifty Thousand Dollars".

Except for appellant's testimony and the depositions of respondents, no other evidence was presented at the trial of this cause. At the end of the trial counsel for appellant conceded that the evidence was insufficient to show wilful misconduct and narrowed the issues to a contention "that plaintiff was a passenger for compensation, so as not to be bound by section 403 of the Motor Vehicle Code", St.1935, p. 154.

The trial court found that "it is true that on or about the 3rd day of September, 1937, at about the hour of 7:00 a. m., plaintiff was riding in said automobile, but it is not true that he was riding as a 'passenger', and in this regard the Court finds that plaintiff was riding in said automobile as a guest without giving compensation for such ride, and that it is not true that defendants recklessly or carelessly or negligently drove or operated said automobile so as to cause the same to drive over the right embankment of said road. That it is true that plaintiff was injured while riding as a guest in said automobile, but that it is not true that said collision was due proximately to the negligence of defendants, or either of them, in operating said automobile.

"That it is true that the accident occured and that plaintiff was injured, but inasmuch as the Court finds that plaintiff is not entitled to recover against defendants, the Court does not make any finding as to the nature or the extent of the injuries, or as to the amount of plaintiff's damages."

Section 403 of the Vehicle Code provides: "No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of such vehicle or against any other person legally liable for the conduct of such driver on account of personal injury to or the death of such guest during such ride, unless the plaintiff in any such action establishes that such injury or death proximately resulted from the intoxication or wilful misconduct of said driver."

Upon this appeal, appellant urges that he was not a guest within the scope of said section for the reason that "the parties were engaged on a business venture, to-wit, the attending of a union conference in Los Angeles, for their mutual advantage and business as union officials and employees, and as duly elected delegates"; and that he "accepted the ride at the request of defendants to assist the latter in operating the automobile and to fulfill the object of the journey".

As was said in McCann v. Hoffman, 9 Cal.2d 279, 284, 70 P.2d 909, 912: "* * *

the courts have quite uniformly held one to be a passenger and not a guest who embarks upon a joint venture of a business nature rather than of a merely social aspect. A case which falls into this category is Jensen v. Hansen, 12 Cal.App.2d 678, 55 P.2d 1201, wherein three appraisers made joint use of the automobile for the purpose of inspecting and appraising property. The same conclusion would follow in the case of an attorney and client traveling on the latter's business. Thompson v. Farrand, 217 Iowa 160, 251 N.W. 44. Likewise in this category fall such cases as Bree v. Lamb, 120 Conn. 1, 178 A. 919, wherein employees of Sears-Roebuck & Company were en route to attend a company meeting which it was their duty to attend and their superior requested them to ride in one automobile. * * *

"The great weight of authority is to the effect that the sharing of the cost of gasoline and oil consumed on a trip, when that trip is taken for pleasure or social purposes, is nothing more than the exchange of social amenities and does not transform into a passenger one who without such exchange would be a guest, and consequently is not payment for the transportation or compensation within the meaning of the statute. It is obvious that if a different result obtained under any construction of the statute its purposes would be defeated and its effect annulled. The relationships which will give rise to the status of a passenger must confer a benefit of a tangible nature and are limited. Chaplowe v. Powsner, 119 Conn. 188, 175 A. 470, 472, 95 A.L.R. 1177. * * * The mere fact that the parties in making the pleasure trip together have a like purpose in mind does not constitute it a joint venture wherein compensation is deemed to have been given. 'A host and a guest may, and often do, have a common objective, in point of time or place; yet their relationship as such is not thereby necessarily changed. There may still be lacking a community of interest or an engagement to effect a common purpose as that term is understood in the law of joint adventure.' Eubanks v. Kielsmeier, 171 Wash. 484, 18 P.2d 48, 49. The community of interest is lacking even though the plaintiff paid for some of the gasoline. * * *

"Therefore, where a special tangible benefit to the defendant was the motivating influence for furnishing the transportation, compensation may be said to have been given. But it is not given where the main purpose of the trip is the joint pleasure of the participants. The payment of a portion of the expense, as for gasoline and oil consumed on the trip, is merely incidental and does not constitute the moving influence for the transportation. The provocation for the offer of transportation remains the joint social one of reciprocal hospitality or pleasure. The same conclusion was announced in Rogers v. Vreeland, 16 Cal.App.2d 364, 60 P.2d 585, under similar facts, and we perceive no necessity for adopting a different rule in construing the language employed by the Legislature." See, also, Stephen v. Spaulding, 32 Cal.App.2d 326, 89 P.2d 683.

[1] A review of the cases cited indicates, as was aptly stated by the court in Duclos v. Tashjian, 32 Cal.App.2d 444, 450, 90 P.2d 140, 143, that the relationship of passenger arises when a journey is undertaken not as an act of hospitality nor as a favor, "but as a real and vital part of his business, with an eye to his own profit * * * not as a means of obtaining free transportation, but as an integral part of a business transaction".

[2] A conference of union delegates and employees differs little, if any, from a delegation of lawyers attending a bar conference, or a group of delegates attending a political convention, and it cannot be said with reason that either of the latter named groups would fall in the category of a business venture. In the circumstances presented by the record herein, it would appear that when the journey from Sunnyvale to Los Angeles was undertaken, the arrangement whereby respondents were to furnish the automobile and appellant agreed to assist in the driving, amounted to nothing more than an "exchange of social amenities" and created the relationship of host and guest, necessitating proof of wilful misconduct on the part of respondent Dorothy Criley before she could be required to respond in damages for the injuries sustained by appellant.

[3] Since it was conceded by appellant that the evidence was insufficient to establish the wilful misconduct of said respondent, the judgment in her favor was proper. Moreover, considering the total lack of evidence with respect to the condition of the highway at the point where the accident occurred, the type of curve, the manner in which the shoulder had been constructed or how it appeared to one approaching the curve, the trial court cor-

rectly found that the accident was not proximately due to any negligence on the part of respondents. Accordingly, even though it were established that appellant was a passenger for compensation, he would not be entitled to recover damages.

It is also urged by appellant that the doctrine of res ipsa loquitur is applicable to the instant case and that the explanation offered by respondent Dorothy Criley as to how the accident happened was insufficient to rebut the inference of negligence raised by the application of said doctrine.

[4] The theory upon which automobile accidents may properly involve the doctrine of res ipsa loquitur is that "the passenger may have no knowledge of what caused the accident, while the operator, who has the sole management of the machine, is in a better position to determine and explain the cause thereof". *Ellis v. Jewett, 18 Cal.App.2d 629, 636, 64 P.2d 432, 436. Moreover, "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." O'Connor v. Mennie, 169 Cal. 217, 223, 146 P. 674.

[5, 6] However, the burden rested upon appellant to establish negligence on the part of respondents. "The mere fact that the accident occurred is not sufficient." Lake v. Churchill, 20 Cal.App.2d 411, 415, 67 P.2d 107, 109. If it be conceded that the facts herein present a proper case for the application of the doctrine of res ipsa loquitur, it was still incumbent upon appellant to assume the burden of proof and establish the wilful misconduct of respondent before he was entitled to recover. Respondent Dorothy Criley explained to the court that she was sleepy because neither she nor her companions had slept all night, and that she blinked her eyes on the curve. Appellant testified that about an hour before the accident he "thought the car was moving pretty fast, and I leaned over and I noticed that she was going about 50 miles an hour; so that I said to her to slow down", which she did, showing the willingness of respondent Dorothy Criley to rely upon the judgment of her companions.

Under the facts and circumstances which were shown by the evidence adduced at the trial, the court correctly found that appellant was a guest of respondents, and that the accident was not proximately caused by any negligence on their part.

The judgment is affirmed.

We concur: DORAN, J.; WHITE, J.

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41 Cal.App.2d 956

LA FOND v. RATH PACKING CO. et al.

Civ. 12916.

District Court of Appeal, Second District, Division 2, California.

Nov. 27, 1940.

Appeal and error 🔑799

An appeal would be dismissed, where respondents' motion to dismiss was supported by certificate of clerk of superior court setting forth facts required by court rule, and all grounds stated in motion were supported by certificate and by authorities cited. Rules of District Court of Appeal, rule 6.

Appeal from Superior Court, Los Angeles County.

Action by Frank A. La Fond against the Rath Packing Company and others. From the judgment, Frank A. La Fond appeals.

Appeal dismissed.

Parker & Stanbury and Hansen & Sweeney, all of Los Angeles, for appellant.

Irving E. Read, of Los Angeles, for respondents.

PER CURIAM.

The respondents having filed a motion to dismiss the appeal in the above-entitled matter, supported by a certificate of the clerk of the superior court setting forth the facts required by rule VI of this court, and it appearing that all of the grounds stated in the motion are supported by the said certificate and by the authorities cited,

It is hereby ordered that the appeal be, and the same hereby is, dismissed.

41 Cal.App.2d 715

SAWYER et al. v. STERLING REALTY CO.

Civ. 11160.

District Court of Appeal, First District, Division 1, California.

Nov. 27, 1940.

Hearing Denied Jan. 23, 1941.

1. Judgment 🔑951(2)

In determining effect of judgment in quiet title action as res judicata, the judgment roll speaks for itself and may not be modified or enlarged by the contents of a brief. Code Civ.Proc. § 670.

2. Judgment 🔑951(2)

In purchasers' action to recover money paid on realty purchase contract, brief filed by purchasers in previous quiet title action against them, apparently after submission of the case, was not part of the "judgment roll" and was not admissible as showing what was actually determined in the quiet title action as affecting defense of res judicata, or as constituting a "disclaimer". Code Civ.Proc. § 670.

See Words and Phrases, Permanent Edition, for all other definitions of "Disclaimer" and "Judgment Roll".

3. Vendor and purchaser 🔑101

Where vendor has accepted payments after their due date, if he wishes thereafter to insist upon punctual payment, he must give purchaser reasonable notice thereof before attempting to declare forfeiture.

4. Vendor and purchaser 🔑101

Where vendor had accepted delinquent payments in the past, but long period of time had elapsed since any payment had been made, and purchasers were unable to make further payments and so advised vendor, advising purchasers that forfeiture would be declared unless payments were made punctually would have been an idle act and was not necessary as basis for forfeiture.

5. Quieting title 🔑39

The former rule that in action to quiet title a purchaser could not, by cross-complaint, seek money judgment even though both complaint and cross-complaint arose out of the same transaction, has been changed under statutes governing counterclaims and cross-complaints. Code Civ.Proc. §§ 438, 442.

6. Judgment 🔑622(2)

Since claim by purchasers for amounts paid under realty purchase contract, if made in quiet title suit by vendor, should have been made by cross-complaint, failure to assert it did not bar later action on it unless an issue essential to such money recovery was determined in the quiet title suit adversely to purchaser's interest. Code Civ. Proc. §§ 438, 439.

7. Judgment 🔑725(6)

A finding in vendor's quiet title suit that purchasers willfully failed and refused to perform the contract was impliedly a finding that vendor did not wrongfully terminate the contract, and hence judgment for vendor in such suit was "res judicata" against maintenance of subsequent action by purchasers to recover money paid under the contract. Code Civ.Proc. §§ 438, 439.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

8. Vendor and purchaser 🔑335

Purchasers' nonperformance of the condition of payment constituted total breach of realty purchase contract, and vendor could retain money already paid by purchasers under the contract, in absence of agreement for abandonment and rescission. Civ.Code, §§ 1670, 1671, 3275.

9. Vendor and purchaser 🔑97

Where, as shown by purchasers' answer in vendor's quiet title suit, purchasers had no means with which to pay the purchase price, vendor was not required to perform the idle acts of tendering a deed or awaiting 15-day expiration period before declaring forfeiture, notwithstanding that vendor waited until all installments were due and had accepted payments after the due dates.

10. Vendor and purchaser 🔑335

The doctrine of unjust enrichment was not applicable to purchasers' action against vendor to recover amounts paid under subsequently terminated realty purchase contract.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Frank W. Sawyer and others against the Sterling Realty Company, to recover payments made under terminated real estate purchase contract. From a judgment for defendant, plaintiffs appeal.

Affirmed.

Frank W. Sawyer, of Los Angeles, for appellants.

Phil F. Garvey, of San Francisco, for respondent.

WARD, Justice.

Plaintiffs, vendees in a contract for the purchase and sale of real property, sue to recover payments made by them under the terminated contract. Judgment was rendered for the defendant vendor, and plaintiffs appeal. The action follows a quiet title suit by the vendor against vendees as the result of which the vendor's title was quieted as against any demands of the vendees.

The contract, dated March 10, 1931, covered unimproved property. It provided for a cash payment of $1,000 on the execution and delivery of the agreement and monthly instalments of interest and principal in the sum of not less than $125, commencing May 1, 1931, and continuing until the total purchase price, together with interest, should have been paid. The vendees made the down payment and subsequently eleven instalment payments, each of which, however, with the exception of the first, was made after its due date. The last payment, made on June 17, 1932, was due in March of that year. After all of the instalment payments had become due, the vendor, on October 14, 1935, through its attorney, made demand for all sums owing under the contract and gave notice that unless payment was made within fifteen days from the date of the letter all of the vendees' rights under the contract would be forfeited. Four days after the demand and notice, a second communication signed by the president of the vendor corporation was sent to the vendees wherein they were notified that by reason of their default in the payment of instalments "all of your rights, and each of you under the said agreement are hereby forfeited and the said agreement is hereby terminated". On October 24, 1935, the corporation brought a quiet title action against the vendees and obtained a judgment and decree on the 28th day of September, 1936. No appeal was taken therefrom and that judgment has become final.

[1, 2] The present action by vendees to recover all amounts paid by them under the contract was filed on April 14, 1936, and resulted in a judgment for the vendor on September 12, 1938. The appellants contend that the respondent vendor could not lawfully terminate the contract until the fifteen-day period, specified in its letter of October 14, 1935, had elapsed. They declare that where a vendor attempts without right to terminate a contract, the vendee may treat it as at an end and recover instalments theretofore paid, and that in this case, since the demand was not made until the full price was due, it should have been accompanied by a tender of a deed. Respondent's theory, sustained by the trial court, is that it had lawfully terminated the contract for the vendees' default in making the payments, and accordingly was entitled to retain instalments paid prior to forfeiture. Respondent further contends that the lawfulness of the forfeiture was established in the quiet title suit heretofore referred to. As an excuse for failure to await the full fifteen-day period, respondent claims that one of the vendees, prior to the expiration of the fifteen-day period, wrote to the vendor as follows: "I cannot, at this time, pay in full, and I do not see that I can in the future." This letter is likewise respondent's justification for not tendering the deed. The letter was not introduced in the present case except for identification, and the above has been quoted at this point because of the part it plays in further consideration of the case. However, as stated, the letter, standing alone, was not even offered in evidence. The facts are as follows: At the request of respondent herein, the judgment roll in the quiet title action was introduced in evidence in the present case. Appellants sought to show the purport and sphere of the quiet title decree by offering a brief, in the form of a letter, which was presented to the trial court in the quiet title action, and they now contend that the rejection thereof in this case constituted error. The judgment roll in the quiet title action speaks for itself and may not be modified or enlarged by the contents of a brief. As a statement of legal principles, with citation of authorities, and in some instances quotations therefrom, which the writer claimed sustained such principles as applied to certain evidentiary matter with reference to written instruments or oral testimony, the brief was not admissible as evidence in the present action. It was not part of the judgment roll in the quiet title action. Code Civ.Proc. sec. 670. It was merely an argument on the law and evidence in the prior action.

Appellants contend that the brief contained a "disclaimer". This contention is predicated upon the views expressed in the brief—a portion of which is quoted below—which are to be read with the fact in mind that the plaintiff in the quiet title suit is the defendant and respondent herein. "By this notice of termination of the contract the plaintiff, and vendor under the contract, placed itself within the force and liability of the law to return to the defendants all the money it has received from the defendants under the contract with interest. The contract having been terminated by the plaintiff it ceased to exist. It cannot now be enforced by the parties nor by this court. The defendants have no further interest or claim in or to the land, as the only interest and claim they had was created and existed by virtue of the contract. There now being no contract all such interest and claim also ceased." The brief, from which the above is quoted, was given the court after all evidence in the quiet title suit had been taken and during the period awaiting determination of action by the court. Appellants urge that it was filed prior to the submission of the cause and before judgment. The record is silent relative to the date of the submission of the quiet title suit. Assuming, but not conceding, that the so-called disclaimer should have been or was considered in the quiet title suit, we are confronted with the pleadings, findings and the judgment in that case which has become final. The answer set forth: "Owing to, after and during said financial depression, which still exists, defendants reported to said plaintiff that they could not make any further payments to the plaintiff on account of the purchase price of said lands and property and that said defendants were ready and willing to resell said lands and property as understood and agreed and as alleged herein and in response thereto said plaintiff agreed and reaffirmed its understanding and agreement with said defendants to hold and maintain the respective interest in said lands and property as herein alleged until such time said property and lands could be resold for a price to fully repay the defendants as alleged herein reiterating and repeating to said defendants that the plaintiff would not permit the defendants to suffer a loss of one cent because of said purchase." The court found that: "The defendants, and each of them, have not any estate or interest, whatsoever in or to said lands or premises, or any part thereof. * * * That defendants, and each of them, willfully failed and refused and now refuses to perform the matters and things required to be performed by them, under the terms of the said above mentioned Agreement."

Upon the theory that it was evidentiary matter in the previous case and that it sheds light upon what was actually determined in that case, appellants claim error in the refusal of the court to admit the brief, including the so-called disclaimer, this upon the theory that it was filed with the trial judge before the submission of the quiet title suit. The record herein does not indicate that it was "filed"; however, it may be assumed that it was presented to the trial court. Relative to the date of "submission" of the former action, the first paragraph of the "brief", which reads as follows, is interesting as it seems to have assumed that the case was already submitted: "Dear Judge: I have forgotten just how this matter was submitted. However, I have received a copy of the letter dated April 6th, 1936, by Mr. Garvey, addressed to you, stating, therein, plaintiff's points and authorities, and I assume that my ten days to reply runs from that date. If I am wrong, in this, may I ask, that this be accepted and considered as my reply, just the same?" We can find no error in the refusal of the trial judge in the present action to admit the brief or any part of its contents. The brief, having been signed by both vendees, if admitted, might have been construed as an admission against interest.

[3, 4] Leaving for a moment the question of the degree of importance of the former decree and judgment, and considering other points raised on this appeal, we find the rule is well settled that where a vendor has accepted payments after their due date, if he wishes thereafter to insist upon punctual payment he must give the vendee reasonable notice thereof before attempting to declare a forfeiture. In this case, however, although delinquent payments had been accepted in the past, a long period of time had elapsed since any payment had been made, and since, according to the pleadings, vendees were unable to make further payments and so advised the vendor, it would have been an idle act to have advised the vendees that a forfeiture would be declared unless payments on the contract were made punctually.

Practically the only difference between the former and the present suit is that the vendees in the quiet title proceeding did not ask for a money judgment. In this action they pray for the return of all amounts paid, with interest.

[5-7] In the answer to the complaint in the quiet title suit, the vendees alleged that they had an understanding with the vendor that if they were unable to complete payments the vendor would endeavor to sell the property and return to them the amounts they had paid under the contract; that the depression made it impossible to sell the property, and that the vendor was holding title subject to such alleged understanding. The prayer, in effect, was that the respective interests should be ascertained and the rights of the parties protected. According to appellants, all evidence of this oral modification of the contract was excluded. The record does not disclose the filing of or a request to file a counterclaim to diminish or defeat the recovery, or a cross-complaint for the return of the amounts paid on the theory that a wrongful forfeiture had been declared. The vendees evidently held and still hold to the view that the return of such amounts could not be had in the quiet title suit. The rule formerly prevailing, that in an action to quiet title a vendee could not, by cross-complaint, seek a money judgment even though both complaint and cross-complaint arose out of the same transaction, has been changed. Code Civ.Proc., secs. 438, 442; Hanes v. Coffee, 212 Cal. 777, 300 P. 963; California Trust Co. v. Cohn, 214 Cal. 619, 7 P.2d 297; Luse v. Peters, 219 Cal. 625, 28 P.2d 357; Martin v. Hall, 219 Cal. 334, 26 P.2d 288; Nevada Land & Inv. Corp. v. Sistrunk, 220 Cal. 174, 30 P.2d 389; Thorpe v. Story, 10 Cal.2d 104, 73 P.2d 1194; Haro v. Southern Pacific R. R. Co., 17 Cal.App.2d 594, 62 P.2d 441; Eastin v. Roberts, Carpenter Co., 19 Cal.App.2d 567, 66 P.2d 224; California Trust Co. v. Gustason, Cal. Sup., 101 P.2d 74. However, since the money claim in this case, if made in the former suit, should have been by cross-complaint, the failure to there assert it does not bar a later action, Code Civ.Proc. secs. 438, 439, unless in the quiet title suit an issue, essential to plaintiffs' money recovery in this case, was therein determined adversely to vendees' interest. The vendees' right of recovery is dependent upon the vendor's wrongful termination of the contract. The finding in the quiet title suit that the vendees willfully failed and refused to perform the contract is impliedly a finding that the vendor did not wrongfully terminate the contract, and we must assume that had the court made a direct finding it would have been to that effect. The answer in the quiet title suit alleged that the foreclosing of defendants' interest and "wrongfully forfeiting and appropriating to itself the entire amount" was to the detriment of the vendees. The court found the exact amount due the vendor by the vendees. It did not merely find that the vendor was the owner and entitled to possession, and that the vendees were without interest in the property, but it also found that the vendees had willfully failed and refused to perform the contract, and this was the basis of the judgment in favor of the vendor. It was an express finding upon the essential fact involved in both suits, namely, ownership in the vendor and lack of interest in the vendees. Appellants could have litigated in the quiet title suit any right to the payments made. They did not file a cross-complaint demanding the return of the money paid on the contract, but raised issues which necessitated a determination of any right they might have in the property by virtue of amounts paid. The question is res judicata. Burdick v. Kerkovecz, 81 Cal.App. 786, 254 P. 684. Heilig v. Parlin, 134 Cal. 99, 66 P. 186, relied upon by appellants, is not in point. In that case it was held that the vendee acquiesced in the rescission of the contract by permitting the judgment in the first action to be taken by default. In the second action, a rescission was alleged in the complaint, without denial in the answer. In the instant case the complaint alleges in paragraph three that the vendor abandoned and repudiated the contract. An issue was raised by the answer which generally and specifically denied that allegation. The court found the allegation to be untrue. The judgment and decree in the quiet title suit provides that the vendees "and each of them, have not any right, estate, interest or title whatsoever in or to the said land or property".

The contract provided that in the event the vendees failed to comply with the terms thereof, the vendor should be released from all obligations thereunder, and for forfeiture of any rights of the vendees, and that "all moneys theretofore paid hereunder shall be treated as liquidated damages for the non-fulfillment of this contract". Appellants contend that although in the absence of any provision therefor, the vendor would be entitled to such payments, it cannot claim them by reason of designating them as "liquidated damages", contracts for such damages being void. Civ.Code, secs. 1670, 1671; Drew v. Pedlar, 87 Cal. 443, 25 P. 749, 22 Am.St.Rep. 257. The case of Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 P. 713, 43 L.R.A. 199, 69 Am.St.Rep. 17, is similar in its facts to the present case except that in that case a tender of the amount due was made by the vendee. Therein the case of Drew v. Pedlar is discussed. At pages 10, 13, 14, of 123 Cal., at page 716 of 55 P., 43 L.R.A. 199, 69 Am.St.Rep. 17, the court said: "* * * after the vendee's breach of the covenant to pay, what are the vendor's rights? First, to stand upon the terms of his contract, and sue for its breach under section 3307 of the Civil Code; second, still resting upon the contract, he may remain inactive, yet retain to his own use the moneys paid by the vendee, so that it is of no moment whether or not the contract declares that such moneys shall upon the breach be forfeited as liquidated damages; third, going into equity, still upon his contract, he may seek specific performance; or, finally, if his generosity prompts him so to do, he may agree with the vendee for a mutual abandonment and rescission, in which last case, and in which last case alone, the vendee in default would be entitled to a repayment of his money. * * * It has been said that after the vendee's breach the vendor may agree to a mutual abandonment and rescission, in which last instance, and in which alone, the vendee in default would be entitled to a repayment of his money. Such was the precise condition of affairs pleaded, and not denied, in Drew v. Pedlar [supra], where it is said: 'Both the complaint and answer admitted that the agreement had been rescinded and annulled by the parties, and, as the judgment on the pleadings partly rests upon this fact, it is conclusive evidence of the fact.' And again: 'From the time the defendants elected to rescind the contract, or to consider and treat it as rescinded, it was their duty to refund the money they had received under the contract, and no demand before suit was necessary.' Such, indeed, is the law, and, if Drew v. Pedlar [supra] be confined to cases in the condition thus represented,—that is to say, to cases where the vendor has rescinded after vendee's breach,—then no misunderstanding need arise, and no confusion will result. What is there said as to the covenant for liquidated damages being void is, as we have seen, of no consequence in contracts such as that and the one at bar, where the liquidated damages are expressed as the moneys paid by the vendee; for in all such cases, as has been shown, the vendor is entitled to retain these moneys, whether designated as liquidated damages or not."

[8] In the instant case there was no agreement for abandonment and rescission. The nonperformance of the condition of payment constituted a total breach. There are a few decisions, notably Ebbert v. Mercantile Trust Co., 213 Cal. 496, 2 P.2d 776, which in effect hold that recovery of instalments after default and notice of forfeiture may be obtained under the provision of Civil Code, sec. 3275. But in the Ebbert case the court was dealing with a condition subsequent. The holder of the promissory note in that case had not been guilty of the misconduct described in section 3275. In the instant case the vendees had been grossly negligent in performance of their part of the contract. For over three years there was a failure to pay anything on the contract, even sufficient to cover taxes. Until overruled by the Supreme Court, the Glock case must stand as authority in cases wherein there is a violation of a condition for the payment of instalments at designated times, and the vendee, as in this case, is guilty of gross negligence.

[9] What has been said herein is applicable to appellants' contention that the vendor, having waited until all of the instalments were due, should have tendered a deed, and that, having accepted payments after the due dates, it should have waited the full fifteen days before declaring a forfeiture. The answer of the vendees in the quiet title suit set forth that there was no means, money or property with which to pay the purchase price. This is in consonance with the letter quoted in vendees' brief. It was not required that the vendor should perform the idle act of tendering a deed. Mistake, surprise or fraud may under certain circumstances excuse a breach and relieve a party of a forfeiture (Henck v. Lake Hemet Water Co., 9 Cal.2d 136, 69 P.2d 849), but no such fact appears in this case. To await the fifteen-day expiration period, if in fact the vendees were unable to pay, would likewise be an idle act. In the quiet title suit, the court found that the vendees "now refuse to perform the matters and things required to be performed by them under the terms of the * * * agreement".

[10] The cause of appellants for the return of the moneys paid on the contract is without merit in equity or right in law. The vendor suffered a detriment in retaining the property during a depression period,

paying taxes thereon, etc. No duty, moral or legal, which the law impliedly created, rests upon respondent to return the amounts paid. The doctrine of unjust enrichment relied upon by appellants is not applicable to this case.

The judgment is affirmed.

We concur: PETERS, P. J.; KNIGHT, J.

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41 Cal.App.2d 957

PEOPLE v. CLOUTIER.

Cr. 3407.

District Court of Appeal, Second District, Division 2, California.

Nov. 27, 1940.

Criminal law 🔑1182

Where transcripts on appeal were filed in appellate court but time for filing briefs had elapsed, and no appearance on behalf of appellant either by brief or otherwise was made on return day of order to show cause why appeal should not be dismissed, judgment and order of trial court denying motion for new trial were affirmed. Pen.Code, § 1253.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Proceeding between the People of the state of California and Roy Cloutier. From an adverse judgment, the latter appeals.

Affirmed.

Roy J. Farr, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., for respondent.

PER CURIAM.

October 3, 1940, the transcripts on appeal were filed in this court. Thereafter, the time for filing briefs having elapsed, an order to show cause why the appeal should not be dismissed was issued, returnable November 27, 1940. On the latter date there was no appearance on behalf of appellant, either by brief or otherwise.

Therefore, pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order of the trial court denying motion for new trial are, and each of them is, affirmed.

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41 Cal.App.2d 956

O'REILLY et al. v. CONTINENTAL BAKING CO.

Civ. 12912.

District Court of Appeal, Second District, Division Two, California.

Nov. 27, 1940.

Appeal and error 🔑799

Where respondent filed motion to dismiss appeal, supported by certificate of clerk of superior court setting forth facts required by court rule, and grounds stated in motion were supported by certificate and authorities cited, appeal was dismissed. Rules of District Court of Appeal, Second District, rule 6.

Appeal from Superior Court, Los Angeles County.

Action by Larry S. O'Reilly and others against the Continental Baking Company. From an adverse judgment, plaintiffs appeal. On motion to dismiss appeal.

Motion granted.

Bingham Gray, of Los Angeles, for appellants.

Lyndol L. Young, of Los Angeles, for respondent.

PER CURIAM.

The respondent having filed a motion to dismiss the appeal in the above-entitled matter, supported by a certificate of the clerk of the Superior Court setting forth the facts required by Rule VI of this court, and it appearing that all of the grounds stated in said motion are supported by the certificate and the authorities cited, it is hereby ordered that this appeal be, and the same hereby is, dismissed.

41 Cal.App.2d 586

PEOPLE v. CHAN CHAUN.

Cr. 2155.

District Court of Appeal, First District,
Division 1, California.

Nov. 22, 1940.

Hearing Denied Dec. 19, 1940.

1. Criminal law 🔑563

The "corpus delicti" is established by proof that a crime has been committed.

See Words and Phrases, Permanent Edition, for all other definitions of "Corpus Delicti".

2. Criminal law 🔑561(1)

In a criminal prosecution, the fact that a crime has been committed must be proven beyond a reasonable doubt, but it is sufficient if the case is submitted to the jury upon substantial evidence.

3. Poisons 🔑9

The fact that possession of narcotics was with unlawful intent was demonstrated by the character of the narcotics found in apartment, and by presence in apartment of paraphernalia used in smoking opium. St.1939, pp. 756, 765, §§ 11036, 11531.

4. Poisons 🔑9

In prosecution for possession of narcotics, defendant's connection with the narcotics need not be proved in order to establish the "corpus delicti". St.1939, pp. 756, 765, §§ 11036, 11531.

5. Criminal law 🔑409

In prosecution for possession of narcotics, evidence that opium and paraphernalia used in smoking opium were found in apartment, that letters addressed to the defendant as well as discarded batteries for electrical hearing device similar to one used by defendant were also found therein, that defendant when brought to apartment used key in his possession for gaining entrance, and that upon leaving apartment defendant took with him an overcoat which had been hanging in a closet, established the "corpus delicti" as basis for admission of statements and admissions by defendant. St.1939, pp. 756, 765, §§ 11036, 11531.

6. Criminal law 🔑412(1), 1153(6)

The admissibility of statement by accused from which inference of guilt may be drawn is primarily for the trial court, and a reviewing court will not reverse conviction because of such admission unless its inadmissibility appears as a matter of law.

7. Criminal law 🔑412(2), 519(4)

The fact that statements were made in response to questions of officers of the law while accused was under arrest does not render an admission or confession involuntary, but it may be a circumstance to consider.

8. Criminal law 🔑412(2)

All circumstances surrounding the making of statements by accused should be considered in determining whether the statements are inadmissible because involuntary.

9. Criminal law 🔑412(2)

An accused should be informed that his replies to questions of officers of the law may be used against him, but if the statements are not made under oath or under conditions requiring such warning, failure to so specifically instruct accused does not affect admissibility of a statement which he makes.

10. Criminal law 🔑412(2)

Statements by accused, who was of Chinese extraction but who was American born and had been in business for a long period and had catered to American customers, were not inadmissible as "involuntary" in absence of evidence that force, violence, threats, duress, or intimidation were used or that offers of reward or leniency were made, notwithstanding accused was in custody, and that he was not informed that statements he made might be subsequently used against him.

See Words and Phrases, Permanent Edition, for all other definitions of "Involuntary".

11. Poisons 🔑9

In prosecution for possession of narcotics, whether accused was in active or constructive possession of the narcotics was for the jury. St.1939, pp. 756, 765, §§ 11036, 11531.

12. Criminal law 🔑814(16)

Where accused as a witness did not testify that so-called confession had been made against his will, and no other testimony to that effect was pointed out, instruction relative to threats, violence, duress, etc., was properly refused.

13. Criminal law 🔑781(1), 1173(2)

Instruction that proof, independent of statements by accused, was necessary to prove the corpus delicti, should have been given, but, where there was evidence proving the corpus delicti irrespective of such statements, failure to so instruct was not reversible error.

14. Criminal law ⚷516, 814(16)

In prosecution for possession of narcotics, where possession was admitted but no statement was made that the narcotics were in avoirdupois weight in excess of that prohibited by statute, the statements of accused were not a "confession" and instructions dealing with so-called "confessions" were properly refused. St.1939, pp. 756, 765, §§ 11036, 11531.

See Words and Phrases, Permanent Edition, for all other definitions of "Confession".

15. Criminal law ⚷406(1), 516

An "admission" is something less than a confession and is but an acknowledgment of some fact or circumstance which in itself is insufficient to authorize conviction and which tends only toward the proof of the ultimate fact of guilt, whereas a "confession" leaves nothing to be determined in that it declares defendant's intentional participation in a criminal act, and it must be a statement of such nature that no other inference than that of guilt may be drawn therefrom.

See Words and Phrases, Permanent Edition, for all other definitions of "Admission".

16. Criminal law ⚷913(1), 1186(4)

If the court fails to pass on motion for new trial, to defendant's prejudice, the new trial should be thereafter granted, but judgment should be pronounced unless miscarriage of justice appears. Pen.Code, §§ 1191, 1202; Const. art. 6, § 4½.

17. Criminal law ⚷913(1), 977(3)

Failure to pronounce judgment within prescribed time does not automatically entitle defendant to new trial, nor does such delay render judgment void for lack of jurisdiction, in absence of prejudice.

18. Criminal law ⚷913(1)

Postponement of entry of judgment beyond prescribed time as result of motion by defendant for probation, at instance of the court, was not ground for new trial, notwithstanding that twenty-four days of incarceration pending denial of motion for probation would allegedly in effect be added to any sentence imposed, since no prejudice appeared therefrom. Pen.Code § 1191.

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Chan Chaun was convicted of the crime of possession of certain narcotics, and he appeals.

Affirmed.

Leland J. Lazarus, and James E. Prisinzano, both of San Francisco, for appellant.

Earl Warren, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for respondent.

WARD, Justice.

Following a trial by jury, appellant was convicted of the crime of possession of certain narcotics in violation of section 11036 of the Health and Safety Code, St. 1939, p. 756. He contends upon appeal that the verdict is unsupported by the evidence and is contrary to law; that the court erred in the admission of certain evidence, in the giving of certain instructions to the jury and the failure to give others, also in refusing to grant appellant's motion for a new trial.

On December 19, 1939, two officers of the San Francisco police department and two inspectors of the federal narcotics detail entered an apartment in or near Chinatown by means of a pass key. Appellant was not present in the apartment at the time, but a man and woman, both Chinese, were asleep on a mat on the kitchenette floor. In a secret compartment, the officers found opium and other narcotics as well as opium smoking equipment. Letters addressed to the appellant at his place of business were also found in the apartment, as were discarded batteries for an electrical hearing device similar to one used by appellant to assist him in hearing. Several hours later, two of the officers having in the meantime remained at the apartment, appellant was arrested on the street and brought to the apartment which he and the officer entered by the use of a key which appellant had with him. When the officers left the apartment some time later, with appellant, he took with him an overcoat which had been hanging in a closet, and loose change laying on a chiffonier.

[1-5] The defendant was charged with having in his possession a preparation containing more than two grains of opium to the avoirdupois ounce. The corpus delicti is established by proof that a crime has been committed; the fact must be proven beyond a reasonable doubt. It is sufficient,

however, if this essential is met to the extent that the case is submitted to the jury upon substantial evidence. It is for the jury to say whether the proof is "beyond a reasonable doubt". People v. King, 213 Cal. 89, 1 P.2d 15, 22. The evidence shows that there were found in the apartment jars and packages or containers of opium or its derivatives in quantities of two hundred seventy-six grains, forty-two grains, sixty-two grains, thirty-seven grains, three hundred eighty-five grains, three grains, five hundred forty-seven grains, four hundred three grains. To this extent the evidence showed the illegal possession in some one of narcotic preparations, to-wit, opium or its derivatives, in illegal quantities. Health and Safety Code, sec. 11531. That the possession was with unlawful intent is demonstrated by the character of the narcotics, and the finding in the apartment of paraphernalia used in smoking opium. It is not necessary to prove a defendant's connection with the narcotic in order to establish the essential elements necessary to prove the corpus delicti. However, the use of the key by appellant in entering the apartment, the letters, the discarded batteries and the overcoat were evidence indicating some form of proprietorship or occupancy by him of the apartment. In People v. Selby, 198 Cal. 426, 437, 245 P. 426, 431, the court in the following language approved the rule laid down in People v. Gonzales, 72 Cal.App. 626, 237 P. 812: "'The proof of the *corpus delicti*, which must be produced before admissions or confessions of the defendant may be allowed to be put in evidence, need not be sufficient to satisfy the minds of the jurors beyond a reasonable doubt of the *corpus delicti*. It is sufficient if the preliminary proof be of a substantial character tending to establish the *corpus delicti*. * * * *Such substantial evidence may be corroborated and strengthened by admissions and confessions of the defendant, and the proof beyond a reasonable doubt required by the law thus supplied*. * * *'" People v. Cannizzaro, 138 Cal.App. 28, 31 P.2d 1066; People v. Baker, 25 Cal.App.2d 1, 76 P.2d 111. In People v. Mason, 37 Cal.App.2d 407, 99 P.2d 567, wherein a defendant was charged with occupancy of a room containing paraphernalia for the purpose of recording bets on horses, in considering a claim of error in the admission of a confession before proof of the corpus delicti, the court said (37 Cal.App.2d page 409, 99 P.2d page 568): "The presence of all of the paraphernalia for operating a bookmaking establishment together with the telephones and headpiece in a small bungalow in a remote residential portion of the city, were sufficient to establish the body of the crime. The presence of the markers and scratch sheets constitutes the major element of the offense charged." We conclude that the corpus delicti, to satisfy the test in People v. King, supra, was proven in this case and that thereupon statements and admissions of the appellant were admissible.

[6] It is claimed that the statements made by appellant were not free and voluntary. Appellant appeared as a witness at the trial in his own behalf. The record fails to disclose any testimony by him that force, violence, threats, duress or intimidation were used, or that offers of reward or leniency were made, or that any conduct on the part of the officers, in obtaining the admission of ownership of the narcotics, was unlawful or even unfair. The claim is made that appellant was in custody; that he was hard of hearing and unfamiliar with the English language and that he was not informed that the statements he made might be subsequently used against him. It is primarily within the province of the trial court to determine the admissibility of statements made by an accused from which an inference of guilt may be drawn, and a reviewing court will not reverse a conviction because of such admission unless its inadmissibility "appears as a matter of law from the record presented". People v. Lehew, 209 Cal. 336, 287 P. 337, 340.

[7-9] The fact that the statements were made in response to questions of officers of the law while the accused was under arrest does not render an admission or a confession involuntary or inadmissible, but it may be a circumstance to consider. All of the circumstances surrounding the making of the statements should be considered in each case and hence no definite rule of admission or exclusion may be formulated. People v. Siemsen, 153 Cal. 387, 95 P. 863. It is better and safer practice to inform an accused that his replies may be used against him, but if the statements are not made under oath, or under conditions requiring such a warning, the failure to specifically so instruct an accused does not

affect the admissibility of the statement as evidence. People v. Aguilar, 140 Cal. App. 87, 35 P.2d 137, 142.

[10] Appellant relies upon People v. Quan Gim Gow, 23 Cal.App. 507, 138 P. 918. In that case the opinion holds that the answers to questions were unwillingly given by an accused who did not "savey" or understand and who "appeared afraid". There is no such testimony in this case, not even from the appellant who is American born and a registered voter in San Francisco. He testified that he had been in business for a long period and catered to American customers. He was hard of hearing but used a contrivance that assisted him in that respect. Assuming that he had no Chinese friends to advise him, it has not been shown that he needed advice. On the contrary, the evidence shows that he had been arrested before. Upon a previous occasion, when requested to permit an officer to search the same apartment, he used his own key to admit the officer and stated in substance that "you won't find any stuff in the rooms, sergeant". Sufficient foundation was laid for the reception of the statements of appellant made at the time of his arrest. The transcript of testimony reads in part as follows:

"Q. Well, did you ask him any further questions or was there any further conversation? A. Yes, he asked me if I was going to arrest the man and the woman, and I told him I was, that it would be necessary. He said 'They have nothing to do with it,' that it was his goods. I asked him how much he was paying for the apartment, and he said he was paying thirty-seven and a half a month rent."

"Well, the defendant was asked if he rented the apartment and he said that he did. I asked him what was the idea of using the name of Yung Fat, and he said 'Oh, he not be here for four or five years.' Inspector Manion ordered the other two persons to get dressed. The defendant stated that there is no use of taking them down there; that they had nothing to do with it; that the stuff belonged to him. He said 'They know nothing about this stuff.' He said, 'Why lock them up? It is my stuff.' That conversation went on for a period of five or ten minutes. He repeatedly stated we should not remove the other two people."

[11] On behalf of appellant, the record discloses that other persons had keys and access to the apartment; that rent receipts found there and telephone service were in the name of Yung Fat; that appellant was not the man known as Yung Fat, although the latter did not appear as a witness; that appellant lived in the rear of one of his places of business located elsewhere than in the apartment house; that he visited the apartment for the purpose of playing Mah Jong and occasionally to cook a meal. On behalf of the prosecution it was shown, for the purpose of proving proprietorship, that a revolver found in the apartment was admitted by appellant to be his property. At the trial, however, he denied such admission. He admitted that when he was arrested previously on another charge, he had given the apartment as his residence, and that he had also given that address in connection with an income tax return filed. From all of this testimony it was for the jury to determine the question of active or constructive possession of the narcotics.

Appellant contends that the court erred in refusing to give instructions requested by him, and in failing to give on its own motion instructions on general principles of law pertinent to the cause.

The instructions given seem to cover the general principles of law bearing upon the case. However, appellant quotes eight refused instructions relating to proof of corpus delicti, to the matter of statements attributed to him as a confession being made freely and voluntarily, without threats or physical force; to statements made without an interpreter, and an instruction that caution should be observed relative to oral admissions. Repetition appears in some of the proposed instructions. The jury was instructed "that it is their duty to view with caution evidence of the oral admission of the defendant"; that the possession of the narcotics must have been an immediate and exclusive possession; in substance that if the jury was not satisfied to a moral certainty and beyond a reasonable doubt that such possession was under the dominion and control of the defendant he should be found not guilty.

[12, 13] Since appellant as a witness did not testify that the so-called confession had been made against his will, and no other testimony to that effect has been called to our attention, we must conclude that the trial court properly refused to instruct relative to threats, violence, duress, etc. The court should have instructed that proof, independent of the statements of ap-

pellant, was necessary to prove the corpus delicti, but in this case, irrespective of such statements, there was evidence proving the corpus delicti. The failure to instruct on this question is therefore not reversible error. People v. Roganovich, 77 Cal.App. 158, 246 P. 132; People v. Hopper, 42 Cal. App. 499, 183 P. 836; 16 C.J., p. 1003, sec. 2421.

[14, 15] Seven of the eight refused instructions deal with so-called "confessions". The statements made by appellant did not constitute a confession within the legal definition of that word and the instructions therefore were properly refused. Appellant's statements do not admit all the elements of the offense. Possession was admitted but no statement was made that the narcotics were in avoirdupois weight in excess of that prohibited by the statute. In other words, there was no statement made from which an inference could be drawn that the possession was without legal justification. "An admission as applied to criminal law is something less than a confession, and is but an acknowledgment of some fact or circumstance which in itself is insufficient to authorize a conviction, and which tends only toward the proof of the ultimate fact of guilt. On the other hand, a confession by a defendant leaves nothing to be determined, in that it is a declaration of his intentional participation in a criminal act, and must be a statement of such a nature that no other inference than the guilt of the defendant may be drawn therefrom." People v. Ferdinand, 194 Cal. 555, 568, 569, 229 P. 341, 346.

[16] Immediately after the jury returned a verdict against appellant, he made a motion for a new trial, which was denied eight days later, following which, on the same date, a motion for probation was made. This motion was denied a month later, immediately following which a second motion for a new trial was made and denied, and judgment pronounced. Appellant contends that since the enactment of Health and Safety Code, section 11715.6, probation may not be granted for the offense of which he was convicted; that his motion for probation did not extend the time for the pronouncement of the judgment, and that the delay of thirty-nine days from the date of the verdict to the pronouncement of the judgment entitled him to a new trial. If the court fails to pass upon a motion for a new trial as provided in Penal Code, section 1191, and the convicted defendant is prejudiced thereby, a new trial under section 1202 of the same code should be granted. In re Rothrock, 14 Cal.2d 34, 92 P.2d 634. However, unless a miscarriage of justice appears, judgment should be pronounced. Const.California, Art VI, section 4½; People v. French, 12 Cal.2d 720, 87 P.2d 1014; People v. Stroff, 134 Cal. App. 670, 26 P.2d 315; People v. Pollock, 31 Cal.App.2d 747, 89 P.2d 128 and cases cited.

[17, 18] In the instant case, the postponement resulted from the presentation by defendant of a motion for probation. It is contended that the court compelled him to make the motion. The record discloses that the court suggested the motion for probation for the purpose of enabling the court to obtain information and consider matters that might be called to its attention in the report of the probation officer. Technically appellant is correct, that the judgment should have been pronounced within the time allowed by section 1191 of the Penal Code, but he acquiesced in the suggestion of the court of a continuance for this period. The procedure is not to be approved and is rather dangerous from the standpoint of protection of the state's rights, but no injury resulted to appellant such as appeared from the record in the Rothrock matter.

The failure to pronounce judgment within the time prescribed by law "does not automatically entitle the defendant to a new trial * * * nor does such delay render the judgment void for lack of jurisdiction". People v. Pollock, supra, 31 Cal. App.2d page 761, 89 P.2d page 134. Appellant in this case has failed, except in one instance, to point out wherein the failure to conform to procedure has or will result in prejudice to his legal rights. He claims that the twenty-four days of incarceration in jail pending the denial of the motion for probation would in effect be added to any sentence imposed. If appellant objected to the period of incarceration during the time the trial court was examining the record to determine the place of confinement, habeas corpus proceedings would have been a proper remedy. The Board of Prison Terms and Paroles fixes the period of incarceration in the state prison. The record does not disclose that such body will add to or subtract from the period, or that it will refuse to take into consideration the twenty-four days spent by appellant in the county jail. We are not convinced that any prejudice has or will result to appellant in this connection.

We find no error in this case that would justify a reversal. The judgment and order are affirmed.

We concur: PETERS, P. J.; KNIGHT, J.

41 Cal.App.2d 709

DALUISO v. NICASSIO et al.

Civ. 2431.

District Court of Appeal, Fourth District, California.

Nov. 27, 1940.

1. Release 🔑57(1)

In action for materials and services, finding that agreement made by parties after auditing their books, providing that "this is to satisfy both party of the first part and party of the second part, and there shall be no more claims made," constituted a complete release from each party to the other, *held* sustained either by unambiguous language of the agreement or by evidence adduced concerning intention of parties.

2. Judgment 🔑720

A judgment in action for dissolution of partnership and accounting, that agreement between the parties constituted a release of claims between the alleged partners, was "res judicata" against maintenance of subsequent action by one alleged partner against the other for materials and labor furnished.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

3. Appeal and error 🔑1071(1)

Where trial court's findings with respect to settlement agreement between the parties and effect of prior judgment for defendant as precluding recovery were sustained by the record, they sufficiently supported judgment for plaintiff, and any possible technical defects in other findings became immaterial.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Ferdinand Daluiso against Nick Nicassio and another for labor and materials furnished. From a judgment for defendants, plaintiff appeals.

Affirmed.

Martin C. Casey, of San Bernardino, and A. V. Falcone, of Los Angeles, for appellant.

S. S. Hahn and W. O. Graf, both of Los Angeles, for respondents.

BARNARD, Presiding Justice.

In this action the plaintiff sought to recover for certain services and materials alleged to have been furnished to the defendants during a part of 1933 and a part of 1934. The court found in all respects in favor of the defendants, and the plaintiff has appealed from the judgment. The court's finding that the defendant Cimmarusti was not a party to the transaction in question is not attacked. We will, for convenience, refer to the defendant Nicassio as the respondent.

It appears from the evidence, as well as from the findings, that in March, 1933, the appellant gave to the respondent an option to purchase certain real property owned by him and suggested that the respondent build a building thereon, to be used as a winery. It was agreed that if the option was not exercised the appellant would repay to the respondent the cost of the building. To secure the respondent the appellant gave him a note for $4,000, secured by a mortgage on the premises. The respondent advanced to the appellant some $6,000, of which about $2,800 was used in the erection of the building. The appellant also purchased some grapes for the respondent and furnished him with other materials and services. The appellant also operated a store on the premises, in which he sold some wine obtained from the winery operated by the respondent.

In July, 1934, the respondent informed the appellant that due to a lack of water on the premises it was impossible for him to continue to operate this winery and that he would not exercise his option for the purchase of the property. The respondent then constructed a building for a winery on other land purchased by him, using certain cement blocks which were made for him by the appellant. Thereafter, the appellant and the respondent "audited" their respective books and it was ascertained that the appellant owed the respondent a balance of $714. The respondent then employed the appellant to work in the new winery at a salary of $20 a week, $5 of which was to be paid in cash and the balance applied on the appellant's indebtedness. After he had worked three weeks the appellant was discharged by the respondent.

Thereafter, the appellant went to the respondent and requested him to return the $4,000 note and mortgage, offering to permit the respondent to remove the building which had been erected upon the appellant's property. A written agreement was prepared under date of October 27, 1934, in which it was agreed that the "possession and control" of the appellant's property, upon which the first winery had been erected, should be delivered to him and that the respondent should have the right to remove that building therefrom. Before this agreement was signed the appellant told the respondent that he wanted a clause inserted therein releasing each of the parties from all obligations of every kind and nature, stating that "I am afraid that some time in the future you might sue me for the money which I still owe you". Thereupon, a further clause was added to the agreement reading: "This is to satisfy both party of the first part and party of the second part, and there shall be no more claims made", and the agreement was signed by both parties with a witness to their signatures. The respondent then returned to the appellant the $4,000 note with a release of the mortgage securing the same.

In September, 1935, this appellant filed an action in the superior court of Los Angeles county, alleging in the complaint that he and this respondent had orally agreed to go into partnership in the building and operation of the winery, and that he had furnished services and materials, and asking for "an adjudication of the existence of the said copartnership and of the respective rights" of the parties therein, for a dissolution and accounting, and for such other and further relief as was proper and just. This respondent filed an answer in that action denying all of the allegations of the complaint and setting up an affirmative defense in which, among other things, he alleged the execution of the written agreement to which we have referred, that the same constituted a full satisfaction of all claims against him on the part of this appellant, and that the appellant was thereby estopped, with the further allegation that this agreement constituted a full satisfaction of all claims on the part of the plaintiff "whether as set forth in the complaint or otherwise or at all against the defendant". The court, in that action, found that every allegation in this affirmative defense was true, found that this appellant was entitled to take nothing in the action, and under a cross-complaint also filed by this respondent found and adjudged that he was entitled to remove the building which had been constructed upon this appellant's real property. The judgment in that action has long since become final.

On September 8, 1936, the present action was filed in which the appellant sought to recover about $8,000 for services and materials furnished between March, 1933, and October, 1934. In one cause of action it was alleged that such goods and services had been furnished by the appellant upon his mistaken belief that he was a partner of the respondent. In another, that they had been furnished in reliance upon the respondent's representation that he was a partner, and in a third, that they had been furnished in reliance upon the false representation that if he furnished such goods and services the respondent would make him a partner. Other causes of action sought the recovery of the same amount upon quantum meruit, upon an account stated, upon a book account, and upon a mutual, open and current account. Among other things, the court found that, after balancing their accounts, the appellant was indebted to the respondent; that the parties had so discovered by "auditing" their books; that the written agreement above referred to had been entered into by the parties with the intention that each was thereby releasing the other from all claims of any nature up to the date thereof; that by reason of said agreement the appellant is estopped from asserting the claims here made; and that the judgment in the Los Angeles county action is res adjudicata and a bar to the prosecution of this action.

The appellant has raised innumerable questions in briefs containing 320 pages, a large part of which are devoted to conflicts in the evidence. It is also contended that the findings of fact are defective and conflicting, that there was one error in rejecting evidence, that the written agreement was not intended by the parties as a full settlement of their affairs, and that the judgment in the other action is not res adjudicata. It would be impracticable to consider all of the points raised by the appellant, and the same is unnecessary since one or two of the issues and findings are sufficient to sustain the judgment.

[1] The main, and a controlling, issue here is as to whether the parties intended to fully settle and release all claims each against the other by the execution of the written agreement dated October 27, 1934, which contained the clause: "This is to satisfy both party of the first part and party of the second part, and there shall be no more claims made". The evidence is that this clause was inserted at the request of the appellant for the reason, as stated by him, that he was afraid that the respondent might sue him for the money he still owed the respondent, the parties having theretofore audited their accounts. The appellant contends that the entire agreement, including this clause, is unambiguous and that it was therefore error to admit certain oral evidence to explain the intended meaning of the language used. However, the appellant himself contends that "the very objects of the contract" were to provide that the respondent would surrender to him the $4,000 note and mortgage which he had given him, and that the respondent would be allowed to remove the building which had been erected on the mortgaged premises. The agreement, however, makes no provision for the return to the appellant of this note and mortgage and he is forced to rely on oral evidence to disclose the meaning of the contract and the real intention of the parties in that regard. Taken literally, the language used in this clause of the contract clearly means that no further claim shall be made by either party. Taken as it stands, it means that all matters and transactions between the parties are fully settled and that neither shall make a further claim. The language used in the agreement was either ambiguous or it was not. In either event, the court's finding that the agreement was a complete release from each party to the other is fully sustained. If it is unambiguous that is the only effect that can be given it. If it is ambiguous, the evidence received supports the court's finding as to what the parties intended the contract to mean.

[2] Moreover, the meaning and effect of that agreement has been adjudicated in another action where the same result was reached. In Price v. Sixth Dist. Agricultural Ass'n, 201 Cal. 502, 258 P. 387, 390, the court quotes with approval from Freeman on Judgments as follows: "If the existence, validity or construction of a contract, lease, conveyance or other obligation has been adjudicated in one action it is res judicata when it comes again in issue in another action between the same parties, though the immediate subject-matter of the two actions be different." The court then said: "In other words, when an issue has been litigated all inquiry respecting the same is foreclosed, not only as to matters heard, but also as to matters that could have been heard in support of or in opposition thereto."

The Los Angeles county action, in which the judgment has become final, not only involved the same services and materials for the furnishing of which the appellant here seeks to recover, but this respondent then directly raised the issue as to whether he was indebted to this appellant in any manner other than alleged in the complaint therein, and further raised the issue as to the validity, construction and effect of the written agreement dated October 27, 1934, which question was adjudicated. In that action the court found that the parties had entered into this agreement, that it constituted a full satisfaction of all claims on the part of this appellant against this respondent, and that this appellant was estopped to assert any claims against this respondent for the period in question whether they were set forth in the complaint in that action or not.

[3] Since the court's findings with respect to the settlement agreement between the parties and the effect of the prior judgment are sustained by the record, they sufficiently support the judgment and any possible technical defects in other findings become immaterial. Palmer v. Fix, 104 Cal.App. 562, 286 P. 498.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

41 Cal.App.2d 614

PEOPLE v. PEARSON.

Cr. 3361.

District Court of Appeal, Second District, Division 2, California.

Nov. 22, 1940.

Hearing Denied Dec. 19, 1940.

1. Robbery 🔑24(1)

Evidence sustained conviction of robbery.

2. Robbery 🔑24(1)

Evidence sustained conviction of attempted robbery.

3. Assault and battery 🔑92

Evidence sustained conviction of assault with deadly weapon.

4. Homicide 🔑257(1)

Evidence sustained conviction of assault with deadly weapon with intent to commit murder.

5. Kidnapping 🔑5

Evidence sustained conviction of kidnapping.

6. Kidnapping 🔑5

Evidence sustained conviction of kidnapping for the purpose of robbery.

7. Automobiles 🔑355(10)

Evidence sustained conviction of theft and unlawful driving or taking of automobile. Vehicle Code, § 503, St.1935, p. 174.

8. Automobiles 🔑355(10)
Robbery 🔑24(1)

Where evidence established that motorist prevented completion of robbery by accused by striking accused and that, after motorist departed, accused entered motorist's automobile and drove it away, jury could reasonably infer that separate offenses of attempted robbery and theft and unlawful driving or taking of automobile had been committed. Vehicle Code, § 503, St.1935, p. 174.

9. Indictment and Information 🔑191(9)

The crime of theft and unlawful driving or taking of an automobile is not included in the crime of robbery or attempted robbery, since elements necessary to be proved are different for each offense.

10. Criminal law 🔑1177

Even if acts shown in evidence were so connected as to constitute one offense, the fact that two sentences were imposed against accused, for different offenses, did not require reversal, where the sentences were made to run concurrently.

11. Indictment and Information 🔑196(7)

Where accused who was charged with several offenses was informed of his constitutional rights but elected to proceed without an attorney and entered pleas of not guilty, the accused by failing to present a demurrer "waived" right to object to inclusion in one information of the various counts charging the offenses. Pen.Code, §§ 954, 1012; § 1004, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Waived".

12. Criminal law 🔑1166(1)

In prosecution for robbery and offenses connected therewith, denial to accused, who had been convicted of felonies on three prior occasions, of motion for separate trial on each group of offenses for which he was tried, if error, did not require reversal, since trial court in any event could properly have placed accused on trial on counts charging robbery, and in presenting evidence on these counts prosecution could have offered all evidence admitted, and accused suffered no prejudice because he was convicted of charges other than robbery in view of prior convictions which compelled trial court to adjudge him an habitual criminal and order that he be punished by life imprisonment. Pen.Code, § 954; Const. art. 6, § 4½.

13. Criminal law 🔑641(1)

Accused had right to discharge attorney who had been appointed for him but could not complain of any shortcomings in his defense which were thereby brought about.

14. Criminal law 🔑1186(4)

Where the trial court at beginning of trial clearly admonished jury concerning duty not to converse among themselves or form or express any opinion until cause was finally submitted to them, fact that on one occasion the court informed jury that it might retire for the afternoon recess having in mind the usual admonition, and did not repeat the admonition, was not prejudicial. Pen.Code, § 1122; Const. art. 6, § 4½.

15. Witnesses 🔑40(2)

Whether a child is of sufficient age and maturity to become a witness rests in the discretion of the trial judge.

16. Witnesses ⚿40(2)

The receiving of testimony of child of the age of nine years was not abuse of discretion.

17. Criminal law ⚿1186(4)

Where trial court failed to remember that accused had testified that he first saw weapon which was introduced in evidence in the hospital, and instructed jury to disregard statements of accused which he had made in his arguments and concerning which there was no evidence, and stated that accused had referred to an exhibit of a gun handed to him in the hospital and that the court did not have any recollection of any such evidence, trial court's error did not require reversal in view of fact that no other verdict could have been returned. Const. art. 6, § 4½.

18. Criminal law ⚿625

Where accused entered plea of not guilty by reason of insanity and court appointed three alienists to examine accused and one of the alienists was from medical staff of a state hospital, accused who stipulated that, if the other two alienists should agree in their report, an examination by alienist from state hospital would not be necessary, "waived" an examination and report by such alienist and could not complain of failure of all three alienists to report on accused's mental condition. Pen.Code, § 1027.

19. Criminal law ⚿1186(4)

Where prosecution proved by eyewitnesses that accused committed crimes of which he was found guilty, failure to give instruction that in case of circumstantial evidence jury must not only be satisfied beyond reasonable doubt that all circumstances proved are consistent with accused having committed the act, but must be satisfied that facts are such as to be inconsistent with any other rational conclusion than that the accused is guilty person, did not require reversal. Const. art. 6, § 4½.

◆

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Clarence Pearson was convicted of offenses, and he appeals.

Affirmed.

Clarence Pearson, of Placerville, in pro. per.

Earl Warren, Atty. Gen., and Lewis Drucker, Deputy Atty. Gen., for respondent.

WOOD, Justice.

In the information it is charged that defendant robbed Conrad C. Oferman on November 15, 1939; that he robbed Mary Walston on November 18, 1939; and that he robbed Alexander Afonin on December 8, 1939. In addition to the three charges of robbery the information contains a number of other counts, making a total of thirteen. In the first four counts defendant is charged with the commission of several offenses connected in their commission with the main charge of robbery of Oferman, these offenses being kidnaping for the purpose of robbery, assault with a deadly weapon with intent to commit murder and the violation of section 503 of the Vehicle Code, St.1935, p. 174. In counts V to IX, inclusive, in addition to the charge of robbery, defendant is accused of several crimes connected in their commission with robbery of Mary Walston, these crimes being assault with a deadly weapon with intent to commit murder, assault with a deadly weapon and two charges of kidnaping. In counts X to XIII, inclusive, in addition to the charge of robbery, defendant is accused of several crimes connected in their commission with the robbery of Afonin, these crimes being kidnaping for the purpose of robbery, assault with a deadly weapon with intent to commit murder and the violation of section 503 of the Vehicle Code. It is also charged in the information that defendant had previously been convicted of felonies on three separate occasions and had served terms of imprisonment therefor in state prisons. Defendant admitted the charges of prior convictions. Defendant entered a plea of not guilty by reason of insanity but the jury by its verdict found that he was sane at the time of the commission of the offenses. At the trial count VI, in which the charge is assault with a deadly weapon with intent to commit murder, was dismissed on motion of the district attorney for lack of proof. Defendant was acquitted on counts I to IV, inclusive, centering around the alleged robbery of Oferman, and was convicted on all the other counts, except that on count XI he was convicted of attempted robbery. Defendant has appealed from the judgments of conviction and from the order denying his motion for a new trial.

[1-7] The evidence of defendant's guilt appears to be overwhelming. Defendant entered a restaurant at 222 West Ninth street in the city of Los Angeles on November 18, 1939, at about 7:15 p. m., and with a "gun" forcibly took approximately $200 from the cashier, Mary Walston. She "had a good look at his face" and identified defendant at the trial as the man who robbed her. As the robber left the cashier screamed and Clifton M. Lemmon, who was seated in the restaurant, gave chase. The robber began to run and Lemmon followed him through an auto park. An attendant at the auto park identified defendant in the courtroom as the man who was chased through the auto park. Lemmon saw the robber go into a garage and reappear with a gun in his hand. Lemmon then called the police from a drug store at Tenth street and Grand avenue and as he left the drug store he came face to face with the robber, who was walking by. The robber turned west on Tenth street and went to a service station at the corner of Tenth and Hope streets. At about this time Arthur Watts, accompanied by Jewel Lauritzen, was parking his car near the corner of Tenth and Hope streets, when a man, whom they identified as the defendant, pointed an automatic pistol at Mr. Watts and ordered him to "move over and get going". The robber forced Watts to drive the car to Seventh and Soto streets and during the drive told him that he had committed robbery.

The Afonin robbery occurred between 8 and 8:30 p. m. on December 8, 1939, at Eighth and Soto Streets in Los Angeles. Afonin was traveling alone. He testified: "As I stopped, the defendant, Mr. Pearson, got in from the left hand side and stuck a gun in my left hand side and told me to pull over to the curb." Afonin drove a short distance to the curb, the robber being on the running board of his car. The robber demanded money but Afonin told him that he had none, whereupon the robber ordered him to move over to the right hand side. Mr. Afonin testified: "I told him I wasn't moving over for him. I told him, 'If you want the car, you can take the car, but I am getting off right here.'" Notwithstanding the weapon was still at Mr. Afonin's ribs he got out of the car and as the robber started to enter the car Afonin "took a swing at him", hitting him on the back of the head. At this instant "the gun went off". As Afonin started away the robber fired, the bullet striking Afonin on the side of the forehead.

Police officers arrived at the scene of the shooting shortly after and at 9 o'clock in the same evening they arrested defendant in a house about six or eight blocks from Eighth and Soto streets. They found him with a fresh bullet wound through the forearm. The officers found an automatic pistol in a blood-stained pillow slip on the top of the garage of the premises where defendant was arrested. A ballistic expert testified that the two empty cartridge shells found at the place where Afonin was shot had been fired from the pistol found on the premises where defendant was arrested.

[8-10] Defendant contends that since he was found guilty of attempted robbery, an offense included within the crime of robbery of an automobile, the charge in count XI, he cannot be guilty of violating section 503 of the Vehicle Code, the charge contained in count XIII. When Afonin got out of the automobile it was standing by the curb. At that time he struck defendant and prevented the completion of the robbery. After Afonin departed defendant entered the automobile and drove it away. The jury could reasonably infer that two separate offenses were committed. The crime of violating section 503 of the Vehicle Code is not included in the crime of robbery or attempted robbery, the elements necessary to be proved being different in each offense. In any event, regardless of the conclusion to be reached on the point under consideration, it is apparent that defendant has not suffered prejudice for the reason that the sentence on count XIII was ordered to run concurrently with the sentence on count XI. It has been held that where the acts shown in evidence were so connected as to constitute one offense the fact that two sentences were pronounced for different offenses did not require a reversal where the sentences were made to run concurrently. People v. Anderson, 75 Cal.App., 365, 371, 242 P. 906.

[11] Before the commencement of the trial defendant's counsel asked the court for a separate trial on each group of charges, the Oferman group, the Walston

group, and the Afonin group. The court denied the motion and the defendant now contends that it erred in so doing. Defendant was arraigned on February 5, 1940, and although informed of his constitutional rights, he elected to proceed without an attorney and entered pleas of not guilty. By failing to present a demurrer he waived the right to object to the inclusion of the various counts in one information. Section 1004, subd. 3, of the Penal Code provides that a defendant may demur to the information when it appears upon the face thereof "that more than one offense is charged, except as provided in section nine hundred and fifty-four", and section 1012 provides that when the objections mentioned in section 1004 appear on the face of the information "they can only be taken by demurrer * * *." By section 954 discretion is placed in the trial court to order separate trials for different charges or groups of charges.

[12] Even if defendant had not waived the "objection" by his failure to demur, the action of the trial court in denying the motion would not require a reversal of the judgments. It is provided in section 4½ of article VI of the Constitution of California that no judgment shall be set aside "for any error as to any matter of pleading" unless after an examination of the entire cause the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. The court in any event could properly have placed defendant on trial on the three counts charging robbery and in presenting evidence on these three counts the prosecution could properly have offered all of the evidence which was in fact received by the court in substantiation of the charges upon which defendant was tried. All of the evidence was material to show that defendant was the party who actually committed the robberies. Defendant suffered no prejudice because of the fact that he was convicted of the charges other than robbery for the reason that in view of the three prior convictions the court was compelled to adjudge him an habitual criminal and to order that he be punished by imprisonment for life without being eligible for release on parole. Sec. 644, Pen. Code. Manifestly the "error" in the "matter of pleading" did not result in a miscarriage of justice.

[13] Upon defendant's request made on March 4, 1940, for the appointment of an attorney to represent him the court appointed the public defender. He now complains that the public defender did not represent him properly. It appears from the record that the public defender represented the defendant during the presentation of the evidence upon eight of the counts of the information, that defendant was acquitted on four of these counts and that another count was dismissed. Defendant became dissatisfied with the services of the public defender and thereafter conducted his defense alone. The trial court, in response to a complaint made by the defendant during the trial, stated that the public defender had handled the case in a "creditable manner". The record before us substantiates the statement of the trial judge. Defendant had the right to discharge the attorney who had been appointed for him but he is not now in position to complain of any shortcomings in his defense which were thereby brought about. It is to be noted, however, that the record shows that defendant demonstrated marked ability in conducting his own defense, both in the trial court and in this court.

[14] Defendant charges that the court erred on one occasion when at the afternoon recess the court admonished the jury: "You may retire, ladies and gentlemen, for the afternoon recess having in mind the usual admonition." Defendant asserts that this is a violation of the requirement of section 1122 of the Penal Code that the jury must at each adjournment be admonished concerning their duty not to converse among themselves or to form or express any opinion until the cause be finally submitted to them. At the beginning of the trial the court at considerable length admonished the jury on the subject of this code provision and said to them in part: "The law provides that the court admonish the jury in substantially the manner I have just done, upon each recess occasion, so if you hear me repeat this from time to time, you will know that it is one of the things I have to do. At the same time I wouldn't want you to think that because I repeat it so often that it doesn't really mean anything. It may be that I will refer to it generally in our recesses during the morning or afternoon session, but it is a very necessary thing, as you can well imagine, because you are called upon to settle a serious matter, and you are not to form

premature opinions or listen to casual remarks or read anything about it in the newspapers. * * *" No prejudice was shown here. It has been held that failure to give the admonition does not require a reversal. People v. Coyne, 116 Cal. 295, 48 P. 218.

[15, 16] Defendant contends that the court committed error in receiving the testimony of a child of the age of nine years and argues that the questions and answers of the witness show that the child was not competent to testify. The determination of the question whether a child is of sufficient age and maturity to become a witness rests in the discretion of the trial judge. People v. Valenti, 103 Cal.App. 249, 284 P. 485. We find no indication of abuse of discretion on the part of the judge.

[17] In giving its instructions the court told the jury that they should disregard statements of defendant which he had made in his argument and concerning which there was no evidence. In so doing the court stated that defendant had referred to an "exhibit" of a "gun" handed to him in the hospital and that the court did not have any recollection of any such evidence. From the record it appears that in answer to the question, "The first time you ever saw the gun that is in evidence was after you were arrested?" defendant answered, "In the hospital, yes sir." The court also instructed the jury that they were the sole and exclusive judges of the value and effect of the evidence and that it was their function to determine all questions of fact arising from the evidence. The court told the jury that any comment that the court might make would not be binding on the jury. In view of all the circumstances surrounding the commission of the crimes, and defendant's denial of his participation therein, it is difficult to see how he could have suffered prejudice by the court's error in failing to remember that defendant had testified that he first saw the weapon which had been introduced in evidence in the hospital. It is unreasonable to argue that any other verdict would have been returned by the jury if the error had not been made. Section 4½ of article VI of the Constitution of California is applicable to the situation.

[18] When defendant entered the plea of not guilty by reason of insanity the court appointed three alienists to examine him pursuant to section 1027 of the Penal Code. One of these alienists was from the medical staff of a state hospital and it was stipulated that if the other two alienists should agree in their report an examination by the alienists from the state hospital would not be necessary. Defendant now complains that he was prejudiced because of the fact that neither of the two alienists who reported that he was sane was a member of the staff of a state hospital. By his own stipulation defendant waived an examination and report by an alienist from the medical staff of a state hospital and is not now in position to complain of the failure of all three alienists to report on his mental condition.

[19] Defendant contends that the court erred in refusing to give to the jury an instruction that in cases of circumstantial evidence the jury must not only be satisfied beyond a reasonable doubt that all the circumstances proved "are consistent with the defendant having committed the act, but they must also be satisfied that the facts are such as to be inconsistent with any other rational conclusion than that the defendant is the guilty person". Since the prosecution proved by eye-witnesses that defendant committed the crimes of which he has been found guilty a reversal may not be demanded for failure of the court to give this instruction.

Other points presented by defendant are not of sufficient importance to justify a discussion herein. We are satisfied from an examination of the record that defendant was fairly tried and that there has not been a miscarriage of justice.

The judgments and the order are affirmed.

We concur: MOORE, P. J.; McCOMB, J.

FRY v. BOARD OF EDUCATION OF CITY AND COUNTY OF SAN FRANCISCO et al.*

BEEBE v. SAME.

Civ. 11156.

District Court of Appeal, First District,
Division 1, California.
Nov. 26, 1940.

Hearing Granted Jan. 23, 1941.

1. Schools and school districts ⚷144(4)

Within the limits fixed by the School Code, board of education has discretionary control over the salaries of teachers.

2. Schools and school districts ⚷144(4)

Legislative limitation requiring boards of education to apply principle of uniformity of treatment concerning salaries for those performing like services with like experience does not prevent board from making reasonable classification.

3. Schools and school districts ⚷144(4)

In fixing salaries of school teachers, board of education of city could reasonably classify between teachers with teaching experience in the city and those with teaching experience outside the city.

4. Schools and school districts ⚷144(4)

Resolution of board of education that, in setting salary ratings for incoming teachers, no credit for outside experience should be granted, was within power of board.

5. Schools and school districts ⚷144(4)

Where newly appointed school teachers were granted leaves of absence to end of school year, and while they were on their leaves of absence the board of education adopted resolution that in setting salary ratings for "incoming teachers" no outside experience would be credited, the newly appointed teachers were not "incoming teachers" within the resolution and were entitled to advanced rating based on outside experience, since at the time the resolution was passed they were in the employ of the board of education.

See Words and Phrases, Permanent Edition, for all other definitions of "Incoming Teachers".

6. Schools and school districts ⚷144(4)

Resolution of board of education that, in setting salary ratings for incoming teachers, no outside experience would be credited, could not be construed as applying to teachers who had been employed but were on leaves of absence.

7. Schools and school districts ⚷144(4)

Where, after appointment of six teachers, two of whom were granted leaves of absence to end of school year, June, 1932, board of education adopted resolution that in setting salary ratings for incoming teachers no outside experience would be credited, and in May, 1932, all six were dismissed but were re-employed in August, 1933, action of board of education in refusing to consider outside experience of the two teachers and denying them advance ratings but in restoring the other four to their original advance ratings based upon their outside experience was arbitrary, unreasonable, violated rules of uniformity, and was not justified by the resolution.

8. Schools and school districts ⚷133

A teacher employed but on leave of absence is an "employee" of the board of education.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee".

9. Schools and school districts ⚷136

The relation between board of education and teacher is that of "employer" and "employee" and the relationship is created by contract.

See Words and Phrases, Permanent Edition, for all other definitions of "Employer".

10. Schools and school districts ⚷136

The rules and regulations of board of education and resolutions of board of education fixing status of teachers are integral parts of contract between board and teacher.

11. Schools and school districts ⚷136

The contract between board of education and teacher is contained in statute, rules and regulations of board of education, resolution appointing teachers, and resolutions of board.

12. Schools and school districts ⚷144(4)

Where resolution of board of education provided that in setting salary ratings for incoming teachers no outside experience would be credited was inapplicable to school teachers appointed before adoption of resolution, but assistant director of personnel erroneously informed teachers that resolution applied to them, the fact that teachers thereupon accepted employment without credit for outside experience did not defeat right to advance rating based on outside experience.

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* Subsequent opinion 112 P.2d 229.

13. Action ⚿63

Question of laches must be determined by all facts and circumstances of each case.

14. Action ⚿63

Lapse of time short of period provided by statute of limitations will not bar an action unless prejudice to defendant is shown.

15. Mandamus ⚿187(9)

Where resolution of board of education adopted February, 1932, provided that in setting salary ratings for incoming teachers no outside experience would be credited, was improperly applied to teachers appointed prior to adoption of resolution but who were on leaves of absence, and who did not commence teaching until after August, 1933, in mandamus proceeding instituted in October, 1937, to compel board of education to give teachers advance ratings based on outside experience, whether teachers acted seasonably and whether board of education and Superintendent of Schools were prejudiced by the delay were questions of fact for the trial court.

16. Mandamus ⚿143(2)

Where resolution of board of education adopted February, 1932, provided that in setting salary ratings for incoming teachers no outside experience would be credited, was improperly applied to teachers appointed prior to adoption of resolution but who were on leaves of absence, and who did not commence teaching until after August, 1933, trial court's determination that teachers' mandamus proceeding instituted in October, 1937, to compel board of education to grant advance ratings based on outside experience was not barred by "laches", was justified where record disclosed that prior to commencement of proceedings the matter was under discussion and it was hoped by all that a compromise could be effected.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

17. Limitation of actions ⚿34(2)

Where teachers reappointed in August, 1933, were not given advance salary ratings to which they were entitled because of outside experience, but teachers did not institute mandamus proceedings to enforce right to advance ratings until October, 1937, board of education contending that proceedings were barred by statute of limitations could not complain of trial court's action awarding teachers back salary and advance ratings for three-year period prior to commencement of proceedings and in holding that balance of teachers' claims was barred.

WARD, J., dissenting.

◆

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Mandamus proceedings by Clarence G. Fry and by Wallace B. Beebe against the Board of Education of the City and County of San Francisco and others, to compel defendants to classify and rate the plaintiffs, high school teachers, at a rating and salary in excess of that granted them by defendants and to compel payment of back salary. Judgments for plaintiff, and defendants appeal. The cases were tried together and were consolidated on appeal.

Affirmed.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco (Irving G. Breyer, of San Francisco, of counsel), for appellants.

Daniel R. Shoemaker, of San Francisco, for respondents.

PETERS, Presiding Justice.

The defendants, the Board of Education and its members, and the Superintendent of Schools of the City and County of San Francisco, appeal from judgments of the trial court in two mandamus proceedings ordering defendants to classify and rate the two plaintiffs, both high school teachers, at a rating and salary in excess of that granted them by defendants, and awarding both plaintiffs back salary for a designated period at the higher rating. The two cases were tried together, and have been consolidated on appeal.

The facts are not in dispute. Plaintiffs Fry and Beebe were appointed high school teachers in the San Francisco school department on November 3, 1931, and January 4, 1932, respectively, each being given at that time, in accordance with the then existing rules and regulations of the school department, an advanced rating predicated upon previous teaching experience outside the city and county of San Francisco. Not only were plaintiffs so appointed and rated, but, at that time, they were assigned to particularly designated schools. At the time of their appointment, at their request, they were granted leaves of absence to the end of that school year—June of 1932. The salary schedule then applicable to plaintiffs was one that had been duly adopted by the Board of Education, and which is still in effect. This salary schedule provides for an increase of salary dependent upon years of service. After the leaves of absence were granted, substitutes were appointed to teach in the place of plaintiffs for the balance of that school year.

While plaintiffs were on their respective leaves of absence, but while they were in the employ of defendants, the board, on February 16, 1932, adopted the following resolution: "Resolved: That the Personnel Department be and is hereby advised that it is the policy of the Board of Education, at present, that in setting salary ratings for incoming teachers, no outside experience will be credited. (This regulation also applies to persons on existing eligible lists not appointed to positions in the San Francisco Public Schools to date.)"

On February 24, 1932, the plaintiffs were informed by letter from the assistant director of personnel of the school department, Mr. Irving W. Snow, that the resolution had been passed, and that it applied to them, and asking the plaintiffs whether they wanted an assignment on those terms. Both plaintiffs replied that they would accept employment at the reduced salary, but expressed the hope there would be an adjustment.

On May 4, 1932, both plaintiffs were notified in writing that, effective at the end of that school year, they were discharged from the school department, and they were notified that they would be placed on the eligible list. On August 9, 1933, effective on the 14th of that month, both plaintiffs were again appointed to positions in the school department without credit for their outside experience.

At the time that plaintiffs were first appointed in 1931, four other teachers were also appointed and assigned to positions in the school department. These four teachers, like Fry and Beebe, had no teaching experience in San Francisco, but like them, were given an advanced rating for outside teaching experience. Unlike Fry and Beebe these four teachers did not take leaves of absence but taught from the date of their respective appointments until June 30, 1932. These four teachers, just as were plaintiffs, were dismissed in May of 1932. They were likewise reappointed at the same time as were plaintiffs. These four teachers, however, were not re-employed at a first year's salary rating as were plaintiffs, but were given an advanced rating predicated upon their outside experience. For all practical purposes the only difference between these four teachers and the plaintiffs is that they taught in San Francisco during the period the plaintiffs, although appointed and assigned, were on leaves of absence.

After the appointment of these four teachers some question arose as to whether, under the resolution of February 16, 1932, they were entitled to the advanced rating predicated solely on outside experience. On August 29, 1934, the board adopted a resolution interpreting its former resolution. This so-called "interpretation" was adopted to determine whether these four teachers were legally entitled to advanced ratings. It stated that the resolution "was not intended to cover, and did not refer to teachers who were already in the department, and who had been given a rating as in the case of the teachers above mentioned; but applied to incoming teachers."

The trial court found, on competent evidence, that plaintiffs, ever since their respective reappointments, continuously and by diligent means, have endeavored to be restored to their original ratings and to be placed in the same classification as the four teachers above-mentioned.

Based on these admitted facts, the trial court found that plaintiffs were entitled "under the rules and regulations of respondents then in full force and effect," to be classified at the advanced rating. The court also concluded that the failure of defendants to so classify plaintiffs "was arbitrary and unreasonable and that said conduct violated the rule of uniformity".

Based on these findings, the trial court ordered defendants to classify plaintiffs at the advanced ratings, and gave judgment for plaintiffs for back salary for a period of three years prior to the commencement of these proceedings.

Defendants discuss at some length the question as to whether the board could have legally classified the plaintiffs differently from the four teachers who actually taught in the San Francisco schools after their first appointment. That is not the real issue in these cases. The real issue is whether the board did so classify the plaintiffs. In other words, the real issue is whether, under the rules and regulations of the board, the plaintiffs were entitled to an advanced rating. The arbitrary action of the board, as found by the trial court, did not consist in classifying plaintiffs in a different group than the other four teachers, but in interpreting their rules, regulations and resolutions so as to place plaintiffs in a different classification. It is our conclusion that the board was not justified in refusing to grant to plaintiffs an advanced rating; that under the resolution of February 16, 1932, its interpretation of August 29, 1934, and the rules and regulations of the board, plaintiffs were legally entitled to the advanced rating.

[1-4] It must be conceded that, within the limits fixed by the School Code, the board has discretionary control over the salaries of teachers. Fidler v. Board of Trustees, 112 Cal.App. 296, 296 P. 912; Abraham v. Sims, 2 Cal.2d 698, 42 P.2d 1029. However, it must also be conceded that the legislature has enjoined on such boards, within reasonable limits, the principle of uniformity of treatment as to salary for those performing like services with like experience. This same limitation exists in the rules and regulations of the appellant board. This limitation, however, does not prevent the board from making reasonable classifications. There can be no doubt that the board may reasonably classify between teachers with teaching experience in San Francisco and those with teaching experience outside. There can be no doubt that the resolution of February 16, 1932, was well within the power of the board in so far as it provided that as to all incoming teachers no credit for outside experience should be granted. It might also be conceded that the board could, by proper action, classify as between teachers employed, but on leave of absence, and teachers employed and actually teaching. It may be that the board could have lawfully classified the four teachers who had actually taught in San Francisco prior to June of 1932, in one group, and could lawfully have placed the plaintiffs, who were similarly employed but who were on leaves of absence, in another group. But, as already pointed out, the point is that the board did not do this. It is our opinion that, under this resolution, and the rules and regulations of the board, both groups were placed in the same classification. Thereafter, by a purported interpretation of the resolution by the assistant director of personnel, the board without changing its resolutions, sought to discriminate against plaintiffs, and arbitrarily refused to grant to plaintiffs the salary rating fixed for them by the rules and regulations.

[5-7] The resolution of February 16, 1932, is not ambiguous on the basic question here involved. The resolution states that it is to apply only to "incoming teachers", and that as to them, and as to them alone, "no outside experience will be credited". Then, apparently, so that no confusion would result, it was added in parenthesis that the regulation applies to persons on eligible lists "not appointed to positions in the San Francisco Public Schools to date". Obviously, the plaintiffs were not "incoming teachers", because at the time the resolution was passed they were in the employ of the board. If they became "incoming teachers" by virtue of their subsequent dismissal and their later reemployment, so did the four other teachers who were likewise subsequently dismissed and later reemployed. There is not one word in the resolution indicating that it was intended to apply to teachers who had been employed but were on leave of absence. To interpret the resolution as do defendants, is to write into the resolution something that is not there. That this interpretation of the resolution is the proper one, is strengthened, if not conclusively demonstrated, by three other factors:

[8] 1. The explanatory clause added to the resolution states that the resolution not only applies to "incoming teachers", but also "to persons on existing eligible lists not appointed to positions in the San Francisco Public Schools to date". In this case the record shows, and the trial court found, that not only had plaintiffs been appointed, but also that they had been assigned to particularly designated schools at the time the resolution was passed. The explanatory clause definitely eliminates plaintiffs from the operation of the resolution. A teacher employed but on leave of absence

is, nevertheless, an employee of the board. Fairchild v. Board of Education, 107 Cal. 92, 40 P. 26; Kennedy v. Board of Education, 82 Cal. 483, 22 P. 1042. It has been held that in determining a teacher's seniority rights, the relation of employer and employee continues to exist although the teacher is on leave of absence, and that a teacher on leave of absence is within the terms of a resolution retaining "the 'present staff of teachers.'" Ryan v. Burk, 25 Cal.App.2d 342, 77 P.2d 224, 225.

2. After the resolution had been passed, and after plaintiffs and the other four teachers had been reemployed, the board, on August 29, 1934, attempted to "interpret" the resolution. At that time the board approved the interpretation of the chairman of the legal committee that the resolution "was not intended to cover, and did not refer to teachers who were already in the department, and who had been given a rating as in the case of the teachers above mentioned; but applied to incoming teachers". The teachers "above mentioned" were the four teachers who were appointed at the same time as respondents. This interpretation was undoubtedly correct. But, in applying it, the board discriminated against plaintiffs, who, so far as the resolution is concerned, were placed in the same class with the four other teachers.

3. The legal adviser of the board, in June of 1937, in a formal opinion to the board dealing with this controversy, gave it as his opinion that "the facts as disclosed by the records conclusively show that as a matter of equity and justice, this teacher [Mr. Fry] has a valid claim. There appears to be no authority whatsoever for Mr. Snow's interpretation of the February 16, 1932, resolution, which he interpreted to mean that a teacher who has been *appointed* to the department on a definite rating based on creditable outside experience and granted a leave of absence, was to come within the purview of the February 16th resolution. To so hold would be reading into that resolution something which was not mentioned.

"There is no doubt that Mr. Fry was 'appointed' to the San Francisco School Department in November, 1931; that the resolution of February 16, 1932, abolishing previous teaching experience was expressly applicable to teachers not as yet 'appointed'; that teachers on leaves of absence were already in the School Department. Therefore, Mr. Fry should not have been reduced in his rating. * * *" These conclusions of the legal adviser are sound.

[9-11] Defendants contend that the ordinary rules of contract apply to a teacher, and that, since plaintiffs accepted their reduced rating, they are barred from now questioning its validity. While it is true that the relation between the board and a teacher is that of employer and employee, and that this relationship is created by contract, the terms of that contract are to be found in the authority granted the board by law. Martin v. Fisher, 108 Cal.App. 34, 291 P. 276. The rules and regulations of the board, and the resolutions of the board fixing the status of teachers, are integral parts of that contract. The contract is contained in the statutes, the rules and regulations of the board, the resolutions appointing plaintiffs, and the resolutions of the board. Certainly, it cannot be contended that the board can fix the status of a teacher by its rules and regulations, and by resolution, and then by a letter from an employee improperly interpreting the resolutions, claim that the status is different from that fixed by the rules and regulations and by the resolution. In this case, when plaintiffs were first employed, they were properly given advanced ratings. It is admitted that, under the then existing rules and regulations, plaintiffs were lawfully entitled to such ratings. If we are correct in our conclusion that the resolutions of February 16, 1932, and of August 29, 1934, did not apply to plaintiffs, then it must be a fact, as found by the trial court, that, under existing rules and regulations, plaintiffs were entitled to the advanced ratings. These rules and regulations constitute, and are part of, the contract of the parties, and under them plaintiffs were entitled to the advanced ratings.

[12] The fact that Snow, the assistant director of personnel, erroneously informed plaintiffs that the resolution of February 16, 1932, applied to them, and that plaintiffs stated that, if that were necessary, they would accept the lower ratings, cannot serve to change the terms of the contracts of the parties as fixed by the rules and regulations. Snow erroneously interpreted the resolution, informed plaintiffs of his erroneous conclusion, and on that basis the plaintiffs "accepted" the reduction. Their rights were fixed not by that correspondence but by the rules and regulations of the board.

[13-16] Defendants also urge that plaintiffs' claims for back salary are barred by laches, and by the statute of limitations. The trial court awarded plaintiffs back salary for three years prior to October 29, 1937, the date this proceeding was instituted. So far as laches is concerned, the question must be determined by all the facts and circumstances of each case. Lapse of time short of the period provided by the statute of limitations will not bar an action unless prejudice to the defendant is shown. The applicable principles are exhaustively considered, and the cases cited by defendants are distinguished, in La Shells v. Hench, 98 Cal.App. 6, 276 P. 377. Whether plaintiffs acted seasonably, and whether defendants were prejudiced by such a delay, were questions of fact for the trial court. The record shows that prior to the commencement of these actions the matter was under discussion, and that it was hoped by all concerned that a compromise could be effected. It was after all hope of a compromise had failed that these actions were brought.

[17] It is also urged that plaintiffs' causes of action were barred by the statute of limitations. The trial court awarded plaintiffs back salary at the advanced ratings for a period of three years prior to the commencement of the actions, and held that the balance of their claim was barred. This was the minimum period that the court could have awarded. Rosborough v. Shasta River Canal Co., 22 Cal. 556; Raymond v. Christian, 24 Cal.App.2d 92, 74 P.2d 536.

The judgments appealed from are affirmed.

I concur: KNIGHT, J.

WARD, Justice (dissenting).

I dissent.

The facts are stated concisely and fairly in the majority opinion. However, it may not be amiss to mention that the petitioners delayed bringing this proceeding until the statutory period had elapsed and their probationary period as teachers had passed, thereby placing themselves in a more advantageous position to the detriment of the Board of Education of the City and County of San Francisco. In other words, they accepted the salary terms offered by the board in connection with their reappointments and then waited until they were reasonably secure from dismissal before bringing suit.

If the theory enunciated in the majority opinion is correct, there can be no criticism of the finding of the trial court that the actions are barred by the statute of limitations except for the three-year period immediately preceding the date of their filing. The financial loss to petitioners for the years prior thereto, as the result of being classified under the lower salary rating schedule, was considerable, but it was far outweighed by the monetary advantage resulting to them from the higher rating for the three-year period, namely, $2,910.33 and $3,027.31 to Fry and Beebe respectively, in addition to the security of being placed beyond the probationary period and so obtaining the benefit of certain employment and increases in salary from year to year.

When petitioners were informed in February, 1932, that they would not receive credit for previous outside experience, a legal remedy was available. After acceptance of the terms offered by the board, and the receipt of their first salaries, a proceeding similar to the instant one might have been instituted without, as at this time, embarrassing and confusing the City and County of San Francisco and the board in respect to budgetary requirements. For the period wherein the money judgment was allowed, this case differs from the line of decisions holding that if the board is not a monetary loser, the defense of laches is unavailable. In this case the board is not only a monetary loser, but it would probably have permanently terminated the services, during the probationary period, of any employee who entered into an agreement fully advised as to the amount he was to receive for services rendered, and thereafter embarrass the board by such an attempt as this, setting a precedent that must of necessity prejudice not only this but every board of education of the state with possible similar litigation.

A trial court's finding, either disallowing or sustaining a plea of laches, must be determined upon the facts of each case. The period of lapse of time is not always controlling; it is, however, sometimes persuasive if changed conditions occur from which injury "necessarily must be presumed". La Shells v. Hench, 98 Cal.

App. 6, 16, 276 P. 377, 381. In Harby v. Board of Education, 2 Cal.App. 418, 83 P. 1081, it was held that a period of three and one-half years constituted laches. The delay in the instant case was unreasonable and prejudicial to the interests and the proper conduct of the affairs of the board.

The only question to be considered is, was a sufficient explanation made legally or factually justifying the delay? Petitioners contend that they had many conversations with various employees of the board relative to the matter. Some refused to advise; one advised commencing legal action; the advice of the others may be epitomized to the effect that the fixing of petitioners' salaries was the result of retrenchment due to the depression and that it was unwise to press the matter while so many other suits were pending in the courts. The advice of the employees could not bind the board. The excuses were insufficient. The first communication addressed to the board was dated after petitioners had obtained permanent tenure. A change to the higher rating would have resulted in advancing petitioners a number of years, based upon their teaching experience. The communications were referred to the board's legal assistant, who advised that in his opinion petitioners had a valid equitable claim, but that it could not be sustained by reason of the statute of limitations, the doctrine of laches, and the circumstances surrounding the original appointment. Whatever the opinion of the attorney may have been, it is not binding on this court. As a matter of fact, the same attorney has changed his opinion, and this is certainly permissible after a further study of the case. The attorney argues that not only is this proceeding barred by the statute of limitations and laches, but he strenuously urges that the writ should not be granted unless the action of the board was arbitrary; that "A public school teacher is an employee and the ordinary rules of the law of contracts are applicable in so far as salary is concerned." The last principle is well established.

It should be noted that, unlike many other school districts, that of the City and County of San Francisco has not adopted the system of executing writing contracts between the board and probationary employees. Whatever contracts may have existed were based upon the communications which passed between the board and petitioners. But, assuming that there was an intention to employ Fry and Beebe, was that in fact done? "Employment implies a contract on the part of the employer to hire, and on the part of the employe to perform services; and, until such a contract is mutually entered into, it can have no binding obligation upon either party." Malloy v. Board of Education, 102 Cal. 642, 646, 36 P. 948, 949. According to the foregoing, as applied to the facts in this case, the contract was never consummated. Petitioners did not perform services, and accordingly appellants did not and could not pay therefor.

As a matter of fact, the record shows without conflict that originally petitioners applied to the San Francisco Board of Education for employment. They were assigned to schools and notified to report. Thereupon each requested a leave of absence, which at the time was reluctantly granted. This necessitated placing other teachers in the schools to which petitioners had been assigned. During the leave of absence, Fry and Beebe were under other contracts with, and under the actual jurisdiction of, school districts outside of the City and County of San Francisco, and they were actually performing their part under such contracts. They were teaching at Willits and Parlier, and the San Francisco Board of Education had no control over them. During the hearing of this proceeding, the relation of petitioners with the San Francisco school department, while they were teaching elsewhere, was referred to as "technical employment". Such employment was not fundamentally legal; it bore all the earmarks of being artificial. There was no actual employment. The negotiations in the first instance resulted in placing the names of petitioners on an eligible list, from which they might be stricken at any time. If any agreement was entered into in 1931, it was terminated by the dismissal of petitioners at the end of that school year. It is this orginal assignment to schools in San Francisco that the majority opinion holds to be the basis of petitioners' right to an advanced rating.

The board gave petitioners employment the second time, effective August, 1934. This second employment was subject to terms and conditions distinct and separate from the first employment. There is no contention made that either petitioner was deceived or misled by the terms of employment offered by the board either on the first, the second, or any subsequent occasion.

Assuming, though I do not so find, that the board deceived petitioners, or that the rule in effect is in accordance with the view held in the majority opinion, namely, that petitioners are entitled to the advanced ratings, the fixing of such rating could only be effective until the next contract period, namely, the following term, when the board was privileged to reduce or modify the salaries without impairing a vested right. Butterworth v. Boyd, 12 Cal.2d 140, 82 P.2d 434, 126 A.L.R. 838. This condition would exist until there was an automatic attainment of permanent status by the selection of petitioners for the fourth consecutive year. School Code, Div. 5, Part 3, Chap. 3, Art. 1, sec. 5.500. Prior to that time they were only probationers. Incidentally, it may be remarked that during the first term, the period selected in the majority opinion upon which is based the conclusion that petitioners are entitled to advanced rating, the petitioners were not even probationers. To be classified as a probationer, the teacher must serve for the periods and under conditions provided by statute. School Code, secs. 5.521, 5.510 and 5.503. During the 1931-32 period, petitioners did not serve at all.

A salary paid in any year is only a circumstance to be considered in fixing that for a subsequent year. The financial ability of the board may play a part in decreasing or increasing a teacher's salary. A board of education may ordinarily, using reasonable discretion, reduce salaries unless such action in relation to a statute governing the matter is discriminatory and arbitrary. Abraham v. Sims, 2 Cal.2d 698, 42 P.2d 1029; Hodge v. Board of Education, 22 Cal.App.2d 341, 70 P.2d 1009; Emerson v. Board of Trustees, 23 Cal.App.2d 432, 73 P.2d 935; Merman v. Calistoga Joint U. H. S. Dist., 5 Cal.2d 438, 55 P.2d 195; Fidler v. Board of Trustees, 112 Cal.App. 296, 296 P. 912; Div. V, Pt. 3, Chap. VIII, Art. 1, sec. 5.731 of the School Code.

Prior to the reappointing of Fry and Beebe in 1933-34, each in writing had acquiesced in the reduction in salary. A public school teacher is an employee. Anderson v. Board of Education, 126 Cal.App. 514, 15 P.2d 774, 16 P.2d 272. The Board of Education consented to pay, and the employee agreed to accept, a certain salary. The ordinary rules of contract are applicable. It is admitted that petitioners knew the rating to be given them, but it is claimed they accepted the positions without knowledge that the four other teachers referred to in the majority opinion would receive advanced ratings. They contend they were "entitled, under the rules and regulations of defendants then in full force and effect to receive and be classified under the salary schedule" as fixed for the other four teachers, and that a teacher's contract is dependent for its terms and conditions upon the authority granted the board by law, and the limitations placed by the law upon its powers to contract. Martin v. Fisher, 108 Cal.App. 34, 291 P. 276.

Petitioners call attention to School Code sections 5.730, 5.731 and 5.734. The first section merely provides that females shall receive the same salaries as males. The second empowers the board to fix and order paid compensation. The third (5.734) provides: "In cities teachers of beginners shall be ranked in the salary schedule with the highest salaried teachers in the elementary grades of equal training and experience. Uniform allowance may be made in any schedule of salaries for years of training and for years of service." The allowance for years of service, as provided in this section, is confined to teachers of beginners and has no application to the parties involved in the present proceeding.

The next question to consider is whether, based upon the rules of the board, and irrespective of direct statutory provision on the subject, the board discriminated between the two groups of teachers.

Following the first appointment of Fry and Beebe, but prior to their dismissal, the board, in the following rather indefinite and uncertain resolution, set forth its policy with reference to the ratings to be given teachers notwithstanding experience gained elsewhere than in San Francisco: "Resolved: That the Personnel department be and is hereby advised that it is the policy of the Board of Education, at present, that in setting salary ratings for incoming teachers, no outside experience will be credited. (This regulation also applies to persons on existing eligible lists not appointed to positions in the San Francisco Public Schools to date.)" That this resolution was ambiguous is best illustrated by the attempt of the Board of Education, at its meeting of August 29, 1934, to interpret and construe it. At that time, in referring to the February 16, 1932, resolution, the chairman of the legal committee expressed his views, which were concurred in by the other members of the board and passed as a resolution, that it "was not intended to cover, and did not refer to teachers who were already in the department, and who had been given a rating as in the case of the teachers above mentioned; but applied to incoming teachers". It appears in testimony upon the mandate proceedings that "teachers above mentioned" referred to the four who had actually taught in the San Francisco schools during the period in which Fry and Beebe were on leave of absence. Neither the resolution, nor its interpretation, is definite, but from all the surrounding circumstances it appears that the board intended to and actually did grant to the four teachers the benefit of a rating based upon teaching experience elsewhere, but denied such benefit to Fry and Beebe upon the second offer of employment. Was this a discrimination between the two groups? There is a distinct difference between them, one group having had San Francisco teaching experience, and the other not having had such experience. Each group had been appointed and subsequently dismissed. Upon reappointment, those in each group might properly be designated as "incoming teachers". The question then arises, is there a difference as the result of the leave of absence granted Fry and Beebe upon their request. Their employment in the first instance was merely nominal in that they did not give "service"; it was not actual. It was without teaching experience in the San Francisco schools by them, and without opportunity on the part of the board to note the degree of their proficiency in teaching, or their adaptability to conditions in the San Francisco schools. It was without an effective contract at the time. The group of four to this extent can reasonably be placed under a higher classification than petitioners. The four proved their eligibility based upon teaching experience elsewhere, and, by actual service, demonstrated their ability under the observation of the local board. The board did not have this opportunity as to petitioners, who were in fact incoming teachers.

The board had a right to change its rules, but of course only to be effective thereafter. This is exactly the situation with respect to petitioners herein. They contend, however, in support of their position, that the resolutions should be construed strictly. Assuming, but not conceding, that their contention is correct, our attention has not been called to any statute that made it mandatory for appellants, upon reappointing Fry and Beebe, to give them the advanced rating of 1931-32. Petitioners must therefore rely upon the resolutions. In Ryan v. Burk, 25 Cal.App.2d 342, 77 P.2d 224, it was held that minutes are prima facie but not conclusive evidence of the contents. At pages 345-346, of 25 Cal.App.2d, 77 P.2d at page 226, the court said: "There are particularly good reasons for applying such a rule to the actions taken by the boards of trustees of smaller school districts. The clerks of such boards are often, if not usually, unskilled in keeping such records and the proceedings of such boards are frequently carried on in a more or less informal manner. Regardless of any such informality no good reason appears, in the absence of a law requiring it, for upsetting a definite action taken by such a board when such action can be established by clear and convincing proof." The resolution in this case seems to have been passed "in a more or less informal manner".

What did the second resolution mean when it used the words "already in the Department"? From the testimony it is found that the disallowance of an advanced rating for outside teaching experience was a depression period measure; that it was hoped there would be an adjustment at some indefinite date; that the second resolution was to take precedence over any previous plan or rule, and that there was an exception to the rule, namely, that it should not apply to the group of four. Witness McDonald, deputy superintendent in charge of personnel, testified: "Well, the reason that these four teachers were brought before the board was that they had actually served in the system; and that went through the whole discussion before the board * * * whoever may have framed that resolution, may have failed to put that part of it in; but those were the facts when it was discussed before the board; that they actually served and were different from other people coming back into the department; and it was the recommendation of the superintendent, since they had actually served in the department, that the board pass this resolution. * * *"

The construction placed by the board upon the resolution should have great weight with the courts. Riley v. Forbes, 193 Cal. 740, 227 P. 768. In substance, the distinction that the board made was that the rule was to apply to incoming, including former nominal nonservice employees, but not to active employees. In hiring teachers, the board had the right to make different classifications where based upon differences in previous teaching experience. It appeared to the board that the separation into classes, as above referred to, was reasonable. This court should not therefore substitute a contrary construction. In Emerson v. Board of Trustees, supra, the court (23 Cal.App.2d at page 436, 73 P.2d at page 937), said: "Moreover, a court is without jurisdiction to decide what salary is reasonable and fix the same. The fact that a certain salary was paid for the previous year does not necessarily show that it is the reasonable and proper salary for the ensuing year. A discretion rests upon the Board of Trustees which can neither be arbitrarily exercised nor assumed by a court."

Ryan v. Burk, supra, cited by petitioners, was a proceeding to reinstate a teacher who had been on a leave of absence. The facts differ in that the teacher had previously actively served. She had never been dismissed as were Fry and Beebe in the present proceeding and therefore was not an "incoming teacher".

In an application for a pension following a period of employment, it may be a just rule to permit an applicant to include in his length of service, time granted as a leave of absence on account of illness. Likewise, after a period of service, time granted a teacher for travel for educational purposes, or to attend some special course of study, may be substituted for, or included with, time consumed in actual teaching, but no case has been called to our attention holding that a leave of absence granted immediately upon appointment may be considered as a part of service in obtaining a higher rating in salary. If such a rule should be followed, any consecutive number of leaves of absence could be granted until the applicant was eligible for permanent tenure. Each case should, of course, be decided upon its own facts.

The record in this case shows that immediately upon their appointment, petitioners were each granted a leave of absence upon his own request; that each was dismissed and subsequently rehired; that prior to the time of rehiring a contract was entered into with notice of the reduced salary, taking into account a change in the board rules. No deception was practiced and no arbitrary action taken. In Maxwell v. Civil Service Commission, 169 Cal. 336, 339, 146 P. 869, 871, the court said: "Courts should let administrative boards and officers work out their problems with as little judicial interference as possible. They may decide a particular question wrong—but it is their question. Such boards are vested with a high discretion, and its abuse must appear very clearly before the courts will interfere."

It is my opinion that the judgments directing the issuance of writs of mandate to compel the reclassification of petitioners, and awarding Fry and Beebe the sums of $2,910.33 and $3,027.31 respectively, should be reversed.

41 Cal.App.2d 750

In re DURLEWANGER'S ESTATE.

HOLMAN v. BOYES.

Civ. 6451.

District Court of Appeal, Third District, California.

Nov. 28, 1940.

Hearing Denied Jan. 27, 1941.

1. Wills ⚷1

The right to dispose of property by will is entirely statutory and is a privilege that must conform to the conditions imposed by the legislature.

2. Wills ⚷289

In determining whether a will has been executed in conformity with statutory requirements, a court will construe a will as valid in preference to holding it void.

3. Wills ⚷132

The mere presence, on stationery used by a person for the purpose of writing his holographic will, of printed matter which forms no part of the instrument, and to which no reference directly or indirectly is made in the instrument, will not destroy the effect of the instrument as a holographic will. Civ. Code, § 1277, now Probate Code, § 53.

4. Wills ⚿132

The fact that decedent in executing a holographic will used stationery with the figures "19" printed thereon and inserted the figures "38" after the printed figures "19", did not prevent the instrument from being a valid "holographic will" under statute, where the figures "19" were neither expressly nor impliedly referred to in the will. Civ.Code, § 1277, now Probate Code, § 53.

See Words and Phrases, Permanent Edition, for all other definitions of "Holographic Will".

5. Wills ⚿130

Substantial compliance with the statute dealing with holographic wills, and not absolute precision, is all that is required. Civ.Code, § 1277, now Probate Code, § 53.

JONES, Justice pro tem., dissenting.

◆

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Proceeding in the matter of the estate of Frank Durlewanger, deceased. From an order of the Superior Court refusing to admit to probate a certain instrument as the last will and testament of Frank Durlewanger, deceased, Mrs. George Holman, opposed by Florence Boyes, Public Administrator, etc., appeals.

Order reversed.

Hearing denied; CURTIS and EDMONDS, JJ., dissenting.

Ira B. Langdon, of Stockton, for appellant.

Foltz & Rendon, of Stockton, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This appeal is from an order refusing to admit to probate a certain instrument as the last will and testament of Frank Durlewanger, deceased, upon the ground that the proffered document, presented as an holograph will, was not entirely written, dated and signed by the hand of the testator.

The document consisted of one sheet of the stationery of the United States Hotel, upon which the deceased attempted to dispose of his property. No point is made that upon this paper appeared near the top in rather large type the name of the hotel, but just above the space reserved for correspondence appeared in printing, "Stockton, Calif. ——— 19—", and the testator in dating his will, wrote in the first space, "May 3", and after the printed figures "19", he inserted the figures "38".

The vital portion of the order refusing to admit this instrument to probate recited in effect that Frank Durlewanger died a resident of the county of San Joaquin and left property therein, and "that said document purporting to be the last will and testament of Frank Durlewanger, deceased, is one that is not entirely written, dated and signed by the hand of said Frank Durlewanger, deceased, and that the printed figures '19' appearing in the date of said document offered for probate, namely 1938, are the only portions of said alleged will not in the handwriting of said deceased".

The question here involved is, therefore, whether or not this instrument, otherwise valid as an holographic will, is invalid because of the printed numerals "19" in the date May 3, —38.

Originally section 1277 of the Civil Code defined an holographic will as one that was entirely written, dated and signed by the hand of the testator himself, and was not subject to any other form and required no witnesses. When the Probate Code was compiled in 1931 this definition of an holographic will was reenacted as section 53 of that code, and there was then added the following: "No address, date or other matter written, printed or stamped upon the document, which is not incorporated in the provisions which are in the handwriting of the decedent, shall be considered as any part of the will."

[1] The right to dispose of property by will is neither an inherent nor a constitutional right but is entirely statutory and is a privilege that must conform to the conditions imposed by the legislature. Estate of Carpenter, 172 Cal. 268, 156 P. 464, L.R.A. 1916E, 498. Early in the judicial history of our state the courts adopted a literal interpretation of section 1277 of the Civil Code and required that an instrument to be admitted as a holographic will must, in its entirety, be written, dated, including the day, month and year, and signed by the testator himself in his own handwriting.

One of the first cases in California considering a holographic will held that one who wrote "April 1", on a line where was printed "Sacramento" and "1880", had failed to comply with the terms of the statute, and that "the words 'April 1st' do not constitute a date,—do not show on what

April 1st, the paper was written,—there being, as was suggested on the argument, many days 'April 1st' in the life of any man". Estate of Billings, 64 Cal. 427, 1 P. 701. So, also, to the same effect is Estate of Maguire, 14 Cal.App.2d 388, 58 P.2d 209, where March, 1850, was the only date given, and Estate of Schiffman, 16 Cal.App.2d 650, 61 P.2d 331, where Tues. Aug. 20, was written. These are instances of the failure to give the day, month or year as required by the statute. Further illustrations of this defect are found in Robertson's Succession, 49 La.Ann. 868, 21 So. 586, 62 Am.St.Rep. 672, where the testator filled out the printed date 189—. The same thing is found in In re Noyes Estate, 40 Mont. 190, 105 P. 1017, 26 L.R.A.,N.S., 1145, 20 Ann.Cas. 366, where a printed 190— was filled in, and this instrument was held invalid. These cases, however, are not in point here.

A sufficient date may, however, be all in figures as "4–14–07" (Estate of Chevallier, 159 Cal. 161, 113 P. 130), and "Nov. 22/97" as used in Estate of Lakemeyer, 135 Cal. 28, 66 P. 961, 87 Am.St.Rep. 96, was recognized as a sufficient compliance with the statute.

[2] A review of the more recent expressions of our Supreme Court and the last enactment of the legislature in section 53 of the Probate Code seem to indicate a tendency toward a greater liberality in accepting a writing as a holographic will, and brings California more nearly in line with the rule applied in other states where statutes similar to ours are in effect. In re Noyes' Estate, 40 Mont. 190, 105 P. 1017, 26 L.R.A., N.S., 1145, 20 Ann.Cas. 366. In Estate of Vance, 174 Cal. 122, 162 P. 103, L.R.A.1917C, 479, an instrument dated "22nd day of March in the year of our Lord one thousand" was held to be not dated and inadmissible as a holographic will, although in Estate of Fay, 145 Cal. 82, 78 P. 340, 104 Am.St.Rep. 17, a will was dated "1859", which the court construed to mean "1889", and in Estate of Wilkinson, 113 Cal.App. 645, 298 P. 1037, the instrument was dated "December—fourth, nine hundred and twenty-eight", and admitted. In these latter two cases the courts relied, in part at least, upon the rule long declared the policy of the courts of this state that in determining whether a will had been executed in conformity with statutory requirements it would construe wills as valid in preference to holding them void.

Appellant here makes some contention also that the date is an essential, but not an integral part of the will, and finds some support in the Estate of Fay, supra [145 Cal. 82, 78 P. 341, 104 Am.St.Rep. 17], where the court, in commenting upon the importance of the date, said: "The date is not the material thing, although made necessary by the statute. It is a means of identification, and aids in determining the authenticity of the will * * *", and also in Estate of DeCaccia, 205 Cal. 719, 273 P. 552, 554, 61 A.L.R. 393, where it is said, "After the words 'Los Angeles, Calif.', the testator wrote the date the document was to bear, *and then proceeded to write out his will.*" (Emphasis added.)

Turning from the informalities in the dating of the instrument and looking at the presence of printed words upon the face of the paper we find in Estate of Soher, 78 Cal. 477, 21 P. 8, that the mere presence of words, written or printed, upon the paper, does not necessarily make such words a part of the will. There, a codicil to the will contained an attestation clause at the end, but such a clause was held not a part of a holographic will, and therefore immaterial.

In Estate of Thorn, 183 Cal. 512, 192 P. 19, a document of a testamentary character, wholly in the handwriting of the deceased, except the name of a park inserted with a rubber stamp as a part of the description of land devised, is not an holographic will, notwithstanding the property was sufficiently identified without the stamped words, the reviewing court holding that where the testator himself deemed the name of the tract essential to a description of the property, such descriptive words must be held to constitute a part of the will.

Following this rule, the court, In Estate of Francis, 191 Cal. 600, 217 P. 746, rejected an instrument offered as an holographic will where the first two figures in the date 1919 were printed. In this case, Mr. Justice Myers, later a distinguished chief justice of our Supreme Court, reluctantly concurred in the opinion solely because of the rule expressed in Estate of Thorn, supra, and stated if a change were to be made it should be by legislative enactment.

Closely following the Francis case in point of time is Estate of Bernard, 197 Cal. 36, 239 P. 404. There probate was refused a document holographic in form, all in the handwriting of the deceased, except the words in the date line, "Long Beach, California". Above these printed words, however, appeared in the handwriting of the deceased, "the following 4 sheets of paper included". This instrument terminated near the middle of the last page without a signature. The court considered at some length the effect of a sufficient signature with respect to its place in the instrument, and held the will was not signed by the testator. What is later said as to the presence of the printed words, "Long Beach, California", is therefore not necessary to the order refusing the instrument to probate. However, we need not devote much attention to the Thorn, Francis or Bernard cases, as the Supreme Court, speaking through Mr. Justice Curtis, in Estate of Oldham, 203 Cal. 618, 265 P. 183, and Estate of DeCaccia, 205 Cal. 719, 273 P. 552, 61 A.L.R. 393, has so treated these cases as to make them of little weight in solving the problem here presented, and furthermore, the court, in Estate of Bower, 11 Cal.2d 180, 78 P.2d 1012, has clearly pointed out the factual differences between the Thorn and Bernard cases and the Oldham and DeCaccia cases, which distinction is also applicable to the case at bar.

In the Oldham case, supra, the decedent attempted to write his holographic will. The printed words, "Los Angeles, Calif." appeared on the face of the paper used, and it was claimed that the instrument was not entirely in the handwriting of the testator. The court held, however, that although the words "Los Angeles, Calif." were followed on the same line by the written date, such was a circumstance so slight as not to warrant the conclusion that the deceased thereby intended to make such printed words a part of his will.

This decision was followed a few months later by Estate of DeCaccia, supra. There the printed words "Oakland, California" appeared upon a document otherwise in the handwriting of the deceased. The court again referred to the several decisions that had been previously before it upon the question of holographic wills, and again held that there was nothing in the instrument indicating any intention to make the printed words "an essential part of the document".

[3] Quite in point on the question here before us is what the court there said: "The mere fact that the decedent placed the date immediately after and upon the exact line with the printed words in the instrument is not in itself sufficient to show that he thereby intended to make said printed words a part of said instrument. Nowhere in said instrument is there any reference made to the printed words upon the sheet of paper used by said decedent for the purpose of writing his will. The printed words are in no way essential to the validity of the instrument as an holographic will, and we are not to presume that the decedent made them a part of the instrument he executed without some evidence appearing upon the face of the instrument itself manifesting such an intention. The mere presence of printed matter upon stationery used by a person for the purpose of writing his holographic will which forms no part of the written instrument, and to which no reference directly or indirectly is made in the written instrument, will not destroy the effect of such instrument as an holographic will."

We are not unmindful of the Estate of Bower, 11 Cal.2d 180, 78 P.2d 1012, 1013. There it will be recalled the deceased used a printed form of a will, filling in, as here indicated by italics, certain blank spaces. The paper read:

"Last Will and Testament

"In the Name of God, Amen, I, *R. J. Bower of Bakersfield,* State of *California* of the age of *61* years, and being of sound and disposing mind and memory and not acting under duress, menace, fraud, or undue influence of any person whatever, do make, publish, and declare this my last will and testament in the manner following, that is to say:

"First: *I give and bequeath all my Property of Every Kind and Description Whatsoever whether real or personal to Anna K. deBillier*

"Secondly: *R. J. Bower*

"Mach fourth

"Nineteen hundred thirty two."

The court held that it appeared upon the face of the instrument that the deceased intended to incorporate the printed portions into his will, and as illustrative of that intention pointed to the figures "61" in the handwriting of the deceased which was entirely meaningless unless read in connection with the printed words "of the age of *61* years". The court there correctly held that it appeared on the face of the purported will that certain printed matter was intended by the testator as a part of his will, and therefore the document was invalid as a holographic will.

[4] But we do not believe in the instant case that the figures "*19*" standing alone

and neither expressly nor impliedly nor by reference referred to in the will can be construed as a part thereof.

The fact that the date was placed near the printed words or figures might by a forced construction be held to be some indication of an intent to adopt such printed matter, but courts should presume that the intention of the testator was that of a reasonable and prudent man under the circumstances, and should not adopt a strained construction to defeat what there is every reason to believe was the desire of the testator. In re Soher, 78 Cal. 477, 21 P. 8.

[5] Substantial compliance with the statute, and not absolute precision, is all that is required, and it must be kept in mind that section 53 of the Probate Code was enacted after the concurring opinion of Mr. Justice Myers criticising the rule as expressed in Estate of Francis, supra.

The language of the present section seems particularly applicable to the situation before us: "* * * No * * * date * * * printed * * * upon the document, which is not incorporated in the provisions which are in the handwriting of the decedent, shall be considered as any part of the will." There is nothing to indicate in any particular that in the instant case the printed figures "19" were "incorporated in" or "an essential part of the document", or "that he thereby intended to make said printed words a part of said instrument".

In an effort to make effective the intent of the testator the courts have gone so far as to reject immaterial matter even if made a part of the will, saying: "The presence of the words 'Last Will an (*sic*) Testament of Joseph M. Whitney' at the top of the sheet as above described is immaterial even if such words be deemed an essential portion of the will, which they are not." In re Whitney's Estate, 103 Cal.App. 577, 284 P. 1067, 1070. It is there held that the mere placing of the date immediately after or upon the exact line with printed words in the instrument is not in itself sufficient to show that the testator thereby intended to make such printed words a part of the instrument. The court could not assume, it held, that the decedent made such printed words a part of the instrument he executed without some evidence upon the face of the document manifesting such an intention, and mere juxtaposition is not enough to indicate such intention.

It would therefore appear that the order of the trial court denying probate of the instrument before us in the absence of any showing that the testator did intend to make the printed figures a part of his will, was a too literal construction of section 53 of the Probate Code. The order denying the admission of the document to probate is therefore reversed. It is so ordered.

I concur: THOMPSON, J.

I dissent: G. L. JONES, Justice pro tem.

CULLINAN v. GREY et al.*

Civ. 6389.

District Court of Appeal, Third District California.

Nov. 25, 1940.

Hearing Granted Jan. 23, 1941.

1. Municipal corporations 🔑519(6)

Where special assessment bonds were issued under Street Improvement Act, which, as amended, expressly provides that the lien of such bonds shall continue until discharged of record and shall have priority over all special assessment liens thereafter created against the same property, such bonds took priority over bonds subsequently issued for street improvements upon liens created after such amended statutory provision became effective. St.1903, p. 376, as amended; St. 1911, p. 730, as amended; St.1927, p. 1406, § 23; St.1911, p. 1196, § 6.

2. Municipal corporations 🔑519(1, 6)

A "street assessment lien" is a "contract," and the provisions of the statute under which the assessment was made are necessary parts of such contract and govern the rights and priorities of lienholders thereunder.

See Words and Phrases, Permanent Edition, for all other definitions of "Street Assessment Lien" and "Contract".

3. Municipal corporations 🔑519(6)

Liens created by statute to secure street improvements are "special liens" and where statute under which such liens were created expressly provided that such liens should be a first lien on the property, such liens took priority over special liens on the same property subsequently created for a similar purpose. St.1911, p. 760, § 66; St.1921, p. 292, § 23; St.1927, p. 1406, § 23; Civ.Code, § 2873.

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* Subsequent opinion 115 P.2d 460.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Liens".

4. Municipal corporations ⚿519(6)

The rule which recognizes the validity of tax liens in inverse order with respect to the time when such liens were created, in the absence of statutes to the contrary, is founded on the theory that liens for general assessments of taxes are superior to special levies for particular purposes because of the paramount necessity of levying taxes to maintain the government, or that liens for street improvements which enhance the value of the property should have preference over previous liens which do not benefit the property.

5. Municipal corporations ⚿519(6)

The rule of enforcing tax liens in inverse order with respect to the time when such liens were created had no application to determine priority as between special assessment liens against the same property, which liens were created at different times but all for purposes of street improvements, particularly where statute by which such liens were created expressly provided that those first created in point of time should take priority over subsequently created special liens. St.1903, p. 376, as amended; St. 1911, p. 730, as amended.

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Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by D. Cullinan against John Robert Grey and others and the City of Glendale to foreclose liens of certain bonds for street improvements. Gertrude Ham filed a cross-complaint asking similar relief as to bonds held by her. From a judgment foreclosing such liens of both complainant and cross-complainant and holding that the lien of bonds held by the City of Glendale was subject thereto, the City of Glendale appeals.

Affirmed.

Aubrey N. Irwin, A. L. Lawson, and Ray T. Hall, of Glendale, for appellant.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Robert J. Stahl, Deputy City Atty., both of Los Angeles, amici curiæ for appellant.

John F. Bender and Robert E. Rosskopf, both of Los Angeles, for respondent.

William Mackenzie Brown and Roscoe R. Hess, both of Los Angeles, amici curiæ for respondent.

Mr. Justice THOMPSON, delivered the opinion of the court.

The defendant, City of Glendale, has appealed from a judgment foreclosing liens, represented by bonds, for street improvements, owned by the plaintiff, D. Cullinan, and by the cross-complainant, Gertrude Ham, to secure payment for work performed on San Fernando road in Los Angeles county under the Street Improvement Act of 1911. Stats. of 1911, p. 730; 2 Deering's Gen.Laws of 1937, p. 3674, Act 8199. It was held that bonds subsequently issued and held by the City of Glendale, to secure levies of assessments against the same land for the same purpose, but issued under the Street Opening Act of 1903, Stats. of 1903, p. 376, 2 Deering's Gen.Laws of 1937, p. 3650, Act 8198, are subject to the said liens held by the plaintiff and Gertrude Ham.

It is claimed by the appellant that its bonds which were subsequently issued under the Street Opening Act of 1903 are nevertheless entitled to priority over the bonds previously issued and held by the plaintiff and Gertrude Ham.

The cause was presented on a written statement of facts, which, upon every material issue, supports the allegations of the complaint of the plaintiff and the cross-complaint of Gertrude Ham.

The stipulation of facts shows that the plaintiff is the owner of three street improvement bonds of the series numbered 124, issued by the City of Glendale, September 25, 1926, under the Street Improvement Act of 1911, to secure liens against lots Nos. 19 and 31, tract 4646, and lot No. 13 of tract 4280 of Los Angeles county, for the improvement of San Fernando road, portions of which bonds remain unpaid; that said bonds were issued pursuant to assessments regularly and lawfully made for street work, and that they were first created as valid liens against said lots; that the cross-complainant, Gertrude Ham, is the owner of one bond of series No. 194, issued March 20, 1928, by said City of Glendale under the same Street Improvement Act of 1911, to secure a lien against lot No. 19, tract 4646 of Los Angeles county, for street work on San Fernando road, created by the levy of assessment therefor, and which was recorded as a first lien on said lot 19, subject only to the said liens held by the plaintiff; that the defendant, City of Glendale, is the owner of three street improvement bonds, Nos. 10, 11 and 23 of series 239, issued October 24, 1929, incident to levies of assessments for work on the San Fernando road, under the Street Opening Act of 1903, which liens were registered subsequently to the bonds secured by liens held by both the plaintiff and Gertrude Ham.

Based on the written stipulation of facts, judgment was rendered against the City of Glendale, determining that its bonds, which were issued incident to valid assessments for street improvements, created liens subject to those which were previously created on the same property in favor of the plaintiff and the cross-complainant, Gertrude Ham. From that judgment this appeal was perfected.

The sole question to be determined is whether the statutes created liens for street improvements on the same property, which should be given force and effect in the reverse order in which they were originally created. In other words, should the liens of the appellant, which were created last, take precedence over those of the plaintiff and the cross-complainant, which were previously created?

The appellant's lien was created September 21, 1929, by a levy of assessment for street improvements under the Street Opening Act of 1903. Its bonds, which are secured by that levy, were issued under the Improvement Bond Act of 1911. (Stats. 1911, p. 1192.) Section 6 of the Bond Act, upon which the appellant relies in support of its contention that its bonds are entitled to priority over those of the plaintiff and Gertrude Ham, reads as follows: "Improvement bonds issued hereunder shall by their issuance be conclusive evidence of the regularity and validity of all proceedings thereto. The amount due upon any such bond shall be a lien upon the lot described in such bond superior to all other liens, charges, and encumbrances except the liens of prior assessments and of municipal, state and county taxes."

The plaintiff's bonds were issued September 25, 1926. The cross-complainant's bonds were issued March 20, 1928. The bonds of both the plaintiff and the cross-complainant were issued prior to those belonging to the appellant. In 1927, the Street Improvement Act of 1911, which was in effect when the appellant's liens in question were created, was amended. This amendment occurred before the appellant's lien was created. Section 23 of the Act of 1911, as amended in 1927, Stats. 1927, p. 1406, provides in part: "Said warrant, diagram and assessment, shall be recorded in the office of said superintendent of streets. When so recorded the several amounts assessed shall be a lien upon the lands, lots, or portion of lots assessed, respectively, and such lien shall so continue until it be discharged of record. Such lien shall be subordinate to all special assessment liens previously imposed upon the same property, but it shall have priority over all special assessment liens which may thereafter be created against the said property."

[1] The preceding language of the amendment of 1927 gives all liens for street improvements priority over liens which are thereafter created. Since the lien for which appellant's bonds were issued was created after that amendment went into effect, and the plaintiff's bonds were given to secure liens created before that time, it necessarily follows that the plaintiff's bonds have priority over the appellant's bonds. Thompson v. Clark, 6 Cal.2d 285, 298, 57 P.2d 490.

[2] It has been frequently held that a street assessment is a contract, and that the provisions of a statute then in force are necessary parts of that contract. Chapman v. Jocelyn, 182 Cal. 294, 187 P. 962; Welsh v. Cross, 146 Cal. 621, 81 P. 229, 106 Am.St.Rep. 63, 2 Ann.Cas. 796.

The Street Opening Act, under which the appellant's liens were created, contains no language which may be construed as granting priority over previous unsatisfied liens under the circumstances of this case. Section 20 of that act merely provides that after the assessment has been approved by the city council the superintendent of streets shall record the assessment and diagram in his office, from which date of recording "each of such assessments shall be a lien upon the property against which it is made". Nor does the act of 1911, under which the appellant's bonds were issued, contain language which may be construed to grant its bonds priority over previous liens. In fact, section 6 of that act specifically excepts "the liens of prior assessments". The plaintiff's and cross-complainant's liens were certainly based on prior assessments against the same land for the same purpose of street improvements.

[3] Section 66 of the Street Improvement Act of 1911, under which the respondent's liens attached, and incident to which his bonds were issued, provides that when bonds are so issued "said assessment shall be a first lien upon the property affected thereby until the bond issued for the payment thereof, and the accrued interest thereon, shall be fully paid." That language of the statute clearly created a "first lien" upon the land, to secure payment of the assessment "until the bond * * * shall be fully paid". Liens are either general or special in character. Sec. 2873, Civ.Code; 16 Cal.Jur. 298, sec. 5. All liens which are involved in this action are special in nature since they were created by statute to secure particular street improvements. It is apparent the legislature used the words "first lien" to indicate that it should be prior to all liens subsequently created "until the bonds shall be fully paid". To hold that a subsequent lien would supersede one specifically declared to be a "first lien" until the obligation was fully paid would nullify the meaning of the language employed. When a person agrees to furnish a first mortgage lien to secure a debt, unquestionably he guarantees that the lien shall be prior to all others. Appeal of Green, 97 Pa. 342, 347.

In 1921, section 23 of the Act of 1911 was amended (Stats.1921, p. 292) to provide that the assessments so imposed should become liens "subordinate to all special assessment liens previously imposed upon the same property, but it shall have priority over all special assessment liens which may thereafter be created against the said property". In 1927, section 23 was again amended, Stats.1927, p. 1406, to eliminate the two-year limitation of the lien. It provided that "such lien shall so continue until it be discharged of record. Such lien shall be subordinate to all special assessment liens previously imposed upon the same property, but it shall have priority over all special assessment liens which may thereafter be created against the said property." Section 66 of the Improvement Act of 1911, with respect to the creation of a lien to secure the payment of bonds which are issued incident to the levy of street assessments, has never been amended. It remains exactly as it was in 1911 when it provided that "said assessment shall be a first lien * * * until the bond issue * * * shall be fully paid". The 1927 amendment of section 23 of the act was in force when the appellant's lien was created in 1929, and we assume it would be bound by the law as it then existed. In any event, the provisions of section 66 of the Act of 1911 has been in force during the entire time involved in this case. That section created a first lien in favor of the respondent's bonds, until they are fully paid. Certainly, under such circumstances, it may not be said the appellant is entitled to a lien prior to those which were previously created in favor of the respondent. The language of the statute precludes that contention.

In support of its assertion that the rule of the validity of liens to secure special street assessments should be enforced in inverse order with respect to the time when they are created, numerous cases are cited by the appellant, among which are Woodill & Hulse Elec. Co. v. Young, 180 Cal. 667, 182 P. 422, 5 A.L.R. 1296; Balaam v. Pac. State Savings & Loan Co., 219 Cal. 612, 28 P.2d 1053, and Neary v. Peterson, 1 Cal.2d 703, 37 P.2d 62. We are of the opinion that rule is not applicable to the facts of this case because the reasons for invoking it are not present, and it is contrary to the language of the statute with respect to such liens. The amendment in 1927 of section 23 of the Street Improvement Act of 1911, and the provisions of section 66 of that act with respect to bonds leaves no room for the application of the inverse order rule.

[4, 5] The doctrine which recognizes the validity of tax liens in inverse order with respect to the time when they are created, in the absence of statutes to the contrary, is founded on the theory that liens for general assessments of taxes are superior to special levies for particular purposes because of the paramount necessity of levying taxes to maintain the government, or that liens for street improvements which enhance the value of the property should have preference over previous liens which do not benefit the property. We assume that when the reasons for that rule are absent the rule should not apply, and that the doctrine of inverse order of liens would not then be en-

forced. In the present case the question of priority of liens for general taxes to maintain the government is not involved. All of the liens which are involved in this suit were created to secure obligations to pay for street improvements on the same property. Nor does the application of the rule of priority apply because of the enhancement of the value of the property improved. That reason applies with equal force to each of the liens in the present case, for each of them was created to secure special assessments for street improvements. We may not assume that the last assessment would enhance the value of the property more than any of the prior assessments which were made for the same purpose. We are of the opinion the rule of enforcing liens in inverse order with respect to the time when they are created has no application to the circumstances of this case.

The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

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41 Cal.App.2d 647

HYMAN v. MARKET ST. RY. CO. et al.

Civ. 11174.

District Court of Appeal, First District, Division 1, California.

Nov. 23, 1940.

Rehearing Denied Dec. 23, 1940.

Hearing Denied Jan. 20, 1941.

1. Carriers 🔑318(1)

In action by passenger for injuries sustained in street car collision, evidence established that passenger was on car and was injured in collision, notwithstanding conductor's testimony that he observed no one fall, received no complaint, and did not observe any one injured, or testimony of another passenger that she neither saw nor heard any one complain of injury.

2. Damages 🔑216(9)

In action by married woman for injuries, instruction that plaintiff could not recover medical, hospital or drug bills incurred by her, but that husband alone could recover therefor was erroneous. Code Civ. Proc. § 370

3. Appeal and error 🔑1066
Trial 🔑252(8)

In action by passenger for injuries sustained in street car collision, where there was no evidence that collision was result of an unavoidable accident, giving instruction that verdict should be for defendants if jury believed collision resulted from unavoidable accident was prejudicial error.

4. Carriers 🔑321(21)

In action by passenger for injuries sustained in street car collision, where no issue of contributory negligence was presented, a "res ipsa loquitur" instruction was improperly refused, notwithstanding that alleged injury arose as result of collision between two vehicles, one of which was not under control of defendant operating vehicle on which passenger was riding.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

Appeal from Superior Court, San Francisco; James G. Conlan, Judge.

Action by Ella Hyman against the Market Street Railway Company and another for injuries sustained in a street car collision. Judgment for defendants, and plaintiff appeals.

Reversed.

Hearing denied; CURTIS and EDMONDS, JJ., dissenting.

Philander B. Beadle, of San Francisco, for appellant.

William M. Abbott, Cyril Appel, and Ivores R. Dains, all of San Francisco, for respondent Market St. Ry. Co.

John J. O'Toole, City Atty., and Henry Heidelberg, Deputy City Atty., both of San Francisco, for respondent City and County of San Francisco.

PETERS, Presiding Justice.

Plaintiff brought this action for injuries alleged to have been received in a collision between a street car owned and operated by the defendant Market Street Railway Company, on which she was riding as a passenger, and a Municipal Railway street car owned and operated by the defendant City and County of San Francisco. From a judgment in favor of the two defendants, entered upon a jury verdict, plaintiff prosecutes this appeal.

The collision occurred at the intersection of Market, McAllister and Jones streets in San Francisco at about 7 o'clock p. m. on the evening of September 11, 1937. The Market Street Railway car on which plaintiff was riding as a passenger was proceeding into Market street eastbound, and the municipal car was proceeding out Market, westbound. The motorman of each car testified that his car was at a complete stop when the other car ran into it. Passengers on each car corroborated the story of the motorman of their car. There was nothing to obstruct the view. Neither car was seriously damaged. The front window of the Municipal car was broken, the front step damaged, and the car dented. The Market Street Railway car had its front fender damaged.

Plaintiff testified that she was sitting in the rear section of the Market Street Railway car; that as a result of the impact she was thrown from her seat onto the floor and sustained shock and bruises from which she had not fully recovered at the time of the trial in January, 1939. She was taken to the Emergency Hospital by ambulance, and then to her home. She testified that after the collision she observed she was bleeding, and called for a doctor; that thereafter she does not remember anything until she reached the Emergency Hospital.

The evidence of permanent injury was sharply conflicting. Plaintiff's doctor testified that she had suffered a fractured vertebra, shock, contusions and bruises that had kept the plaintiff in bed for many months, and finally required hospitalization. Many doctors called by the defendants testified that all plaintiff's complaints as to permanent injury were due to arthritis and obesity.

[1] Respondents, in support of the judgment, contend that, upon the record, the jury could have concluded that plaintiff was not injured on the street car. The conductor of the Market Street Railway car testified that, in his position on the rear of the car, he was looking forward, but observed no one fall to the floor, nor was any complaint made to him, nor did he observe anyone injured. Mrs. Banks, a passenger on the car, testified that she was sitting in the front section; that several minutes after the collision she walked to the rear of the car; that she neither saw nor heard anyone making any complaint of injury, on or off the car. Respondents contend that under the rule that a fact may be established by negative testimony, the above-summarized testimony sustains the implied finding of the jury that the appellant was not injured in the collision. This contention is unsound. It is not disputed that there was a collision between the two cars at the time appellant claims to have been injured. The records of the Emergency Hospital show that appellant was brought to the hospital in an ambulance from Jones and Market streets; that the accident in which the appellant was injured was stated in the records to have arisen out of collision of street cars; that she was brought to the hospital at 7:10 p. m. and released at 7:30 p. m.; that the diagnosis was a contusion of the right arm and nose. Furthermore, a policeman testified that shortly after the accident the motorman of the Market Street Railway Company car had told him a woman was injured on that car. Defendant Market Street Railway Company admitted that plaintiff was a passenger. Under these circumstances the record is capable of but one interpretation—that appellant was on the car, and was injured in the collision. The extent of such injury is another matter.

Obviously, the motorman of at least one of the two street cars was negligent. There was no evidence that the collision occurred as the result of unavoidable accident. Both cars obviously were not at a standstill when the accident occurred. One, or both, of the motormen was not watching ahead.

[2] Appellant's main attack on the judgment is based on the ground that many of the instructions were prejudicially erroneous. With this contention we agree. It should also be mentioned that an examination of the instructions shows a large number of clerical errors that could not but have confused, if they did not, in fact, mislead the jury.

The trial court instructed the jury that plaintiff could not recover medical, hospital or drug bills incurred by her as a result of the accident, for the reason that the evidence shows that plaintiff is married and under the law the husband alone can recover such items. All evidence as to such damage was stricken from the record. This was clearly error. This case was tried before the decision of this court in Purcell v. Goldberg, 34 Cal.App.2d 344, 93 P.2d 578. In that case it was held that a married woman living with her husband may recover such special damage in an action prosecuted by her alone. That case interpreted section 370 of the Code of Civil Procedure to permit a married woman to recover consequential, as well as direct, damages.

[3] The trial court instructed the jury that the verdict should be for defendants if the jury believed the collision resulted from unavoidable accident. There was no direct or indirect evidence that the collision was the result of an unavoidable accident. The instruction, under the facts, was clearly misleading to the jury, and the giving of it was error prejudicial to appellant. Scandalis v. Jenny, 132 Cal.App. 307, 22 P.2d 545.

Appellant also complains of the refusal of the trial court to give what was, in effect, a res ipsa loquitur instruction submitted by her. This instruction applied only to the respondent Market Street Railway Company. It has been held that this doctrine is applicable to a passenger injured on a street car or railroad. Osgood v. Los Angeles, etc., Co., 137 Cal. 280, 70 P. 169, 92 Am.St.Rep. 171; Boone v. Oakland Transit Co., 139 Cal. 490, 73 P. 243; Kline v. Santa Barbara, etc., Ry. Co., 150 Cal. 741, 90 P. 125; Mudrick v. Market Street Ry. Co., 11 Cal.2d 724, 81 P.2d 950, 118 A.L.R. 533. In the first of the above-cited cases plaintiff was injured, as in the instant case, in a collision between cars of two companies. The court upheld the propriety of an instruction which was in effect a res ipsa loquitur instruction as against the defendant on whose car plaintiff was riding as passenger.

[4] The instruction refused in the present case is the same instruction upheld in the Kline and Boone cases, supra. It is true that there are several cases in which this instruction has been criticized. Steele v. Pacific Electric Ry. Co., 168 Cal. 375, 143 P. 718; Wyatt v. Pacific Elec. Ry. Co., 156 Cal. 170, 103 P. 892; Gray v. Los Angeles Ry. Corp., 69 Cal.App. 123, 230 P. 970. In the Steele and Gray cases judgments for the plaintiffs were reversed for error in giving the instruction, and in the Wyatt case judgment for defendant was affirmed over the objection that the instruction should have been given. But these three cases all involved situations where the passenger was injured in alighting from a street car, and the question of fact presented was whether the passenger was guilty of contributory negligence in getting off a moving car, or was injured as a result of the improper operation of the street car. All that these three cases held was that, where such an issue of fact is presented, it is improper to give the instruction. We have been referred to no case holding that where, as in the instant case, no issue of contributory negligence is presented, the instruction should not be given. The cases first cited definitely establish that such instruction, where no issue of contributory negligence is presented, should be given. The mere fact that the alleged injury arose as a result of a collision between two vehicles, one of which was not under the control of the defendant operating the vehicle on which the plaintiff was riding as a passenger, in no way changes the rule that the instruction should be given. Housel v. Pacific Electric Ry. Co., 167 Cal. 245, 139 P. 73, 51 L.R.A.,N.S., 1105, Ann.Cas.1915C, 665; Formosa v. Yellow Cab Co., 31 Cal.App.2d 77, 87 P.2d 716; Plumb v. Richmond Light & R. Co., 233 N.Y. 285, 135 N.E. 504, 25 A.L.R. 685, 690; Yellow Cab Co. v. Hodgson, 91 Colo. 365, 14 P.2d 1081, 83 A.L.R. 1156, 1163.

Appellant also objects to several other instructions, mainly upon the ground that they are misleading, confusing and unintelligible. While it is true that the form of these challenged instructions cannot be approved, it also appears that most of the objections are based upon certain typographical errors which doubtless will be corrected before the instructions are given on the retrial. Discussion of these instructions in this opinion, therefore, is unnecessary.

As already indicated, the evidence as to the seriousness of the injuries received by appellant is sharply conflicting. The evidence produced by respondents supports the implied finding that the injuries were superficial, and that no permanent injury resulted. But that appellant was injured in the collision and suffered some damage as a result thereof cannot be successfully disputed.

The judgment appealed from is reversed.

We concur: KNIGHT, J.; GOODELL, J., pro tem.

41 Cal.App.2d 733

HEALY v. MARKET ST. RY. CO. et al.

Civ. 11358, 11409.

District Court of Appeal, First District, Division 2, California.

Nov. 28, 1940.

Hearing Denied Jan. 27, 1941.

1. Street railroads 🔑114(8)

In action for death of child resulting when struck by street car where negligence was pleaded in general terms and passengers testified that they saw child on curb apparently waiting for street car to stop and motorman testified that he did not see child until he was directly in front of car and street was free of traffic and view was unobstructed and after car struck child motorman attempted to reverse heavy car up steep grade with child lying directly under wheel as result of which car lurched forward and struck child again, evidence warranted inference of negligence authorizing verdict for plaintiff.

2. Appeal and error 🔑930(1)

In action for death of child resulting when struck by street car where evidence justified an inference of negligence on part of the motorman, reviewing court in support of judgment would assume that jury drew such inference in finding for the plaintiff.

3. Street railroads 🔑111(2)

In action for death of child resulting when struck by street car where plaintiff pleaded negligence in general terms, plaintiff was permitted to prove any and all negligent acts of street railroad in relation to operation of street car.

4. Street railroads 🔑111(2), 112(2)

In action for death of child resulting when struck by street car where defendants' negligence was pleaded in general terms, evidence that after street car struck child and while child was lying in front of wheel motorman attempted to back car up steep grade so that child could be released and car lurched down grade presumably running over child a second time was admissible and sufficient under the "res ipsa loquitur" doctrine to raise an inference of negligence since plaintiff was entitled to inference arising out of the doctrine without specially pleading issue.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

5. Death 🔑24, 103(3)

In action for death of child resulting when struck by street car, whether parents were negligent in permitting child 4 years and 8 months of age to play in the open unattended was question of fact dependent on circumstances relating to physical and mental condition of child and physical condition of particular neighborhood as to traffic and similar dangers and the special training which had been given to child in relation to avoiding danger.

6. Death 🔑58(1)
Street railroads 🔑112(3)

In action for death of child resulting when struck by street car, it was presumed that child's parents and child exercised ordinary care in absence of proof which would compel conclusion that parents were contributorily negligent in permitting child to play in the open unattended.

7. Appeal and error 🔑972

Whether alleged misconduct of counsel is prejudicial is primarily for the trial court which has the opportunity to see the purpose of the conduct complained of and its effect upon the jury.

8. Appeal and error 🔑1031(5)

Reviewing court would assume that alleged misconduct of counsel was not prejudicial where complaining party merely cited instances and labeled them as misconduct without showing in what manner such conduct was prejudicial.

9. Trial 🔑296(4)

In action for death of child resulting when struck by street car where court charged that if parents or either of them was guilty of any act of negligence which was the sole proximate cause of any injury sustained by the child, then defendants were not liable, portion of an instruction which purportedly eliminated from consideration defense that child's parents may have been negligent in permitting him to play in the open unattended was not error when considered in light of instruction given.

10. Trial 🔑260(8)

In action for death of boy resulting when struck by street car while attempting to cross street where all material portions of supposed instruction relating to the provisions of city ordinance regulating the conduct of pedestrian in crossing a roadway were given, refusal to give a portion of an instruction referring to unlawful use of any roadway by pedestrian was not error.

11. Death ⚷99(3)

$5,000 for death of child 4 years and 8 months of age was not excessive.

12. Death ⚷77, 99(3)

Proof of exact pecuniary loss to a parent for the death of a minor child is unnecessary, and it is only when the amount awarded appears to be the result of passion or prejudice on part of the jury or is grossly out of proportion that the court may hold the damages awarded excessive.

13. Trial ⚷260(1)

Where criticized portions of instruction relating to measure of damages were fully covered by other instructions given, giving of criticized portion of instructions was not prejudicial error.

14. Appeal and error ⚷805

Where appeal was taken from an order denying a motion for judgment notwithstanding the verdict and the appellant did not prosecute the appeal, appeal was deemed abandoned.

◆

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Action by Joseph G. Healy against the Market Street Railway Company and others for death of plaintiff's minor son. From a judgment of the Superior Court for the plaintiff and from an order denying a motion for judgment notwithstanding the verdict, the defendants appeal.

Appeal from order denying motion dismissed and judgment affirmed.

Hearing denied; EDMONDS, J., dissenting.

Wm. M. Abbott, Cyril Appel, and Ivores R. Dains, all of San Francisco, for appellants.

Walter McGovern and Frank Ilgenfritz, both of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for damages arising out of the death of his minor son. The cause was tried with a jury, and plaintiff had a verdict for five thousand dollars. The defendants have appealed from the judgment and from the order denying their motion for judgment notwithstanding the verdict.

The deceased child was a boy of four years and eight months. He had been taken by his mother to play with a neighbor boy who lived a block away and across two intervening streets from his home. The defendant corporation operated a street railway system on Twentieth avenue in San Francisco. About 4 o'clock p. m. of a clear day in June the defendant Allen, as motorman, so operated a street car on that line that it came to a full stop at the intersection of Twentieth avenue and Rivera street for the discharge of passengers. As the car stood at that point the boy was seen to leave the opposite curb and endeavor to cross Twentieth avenue at a point about forty feet south of the intersection. The street car was started at about the same time, and the boy, approaching from the driver's left, was struck by the right portion of the fender and carried about fifty feet before the car came to a stop. The motorman alighted and found that the boy had fallen from the fender and was lying immediately in front of the right front wheel. The motorman on his own initiative returned to his car and attempted to reverse it. There was a deep slope in the grade of the street at that point so that when the motorman released the brakes, the car lurched forward. After the boy had been removed from the track it was found that his thigh was practically severed, and he died a few hours later.

[1-3] Appellants' first point is that there was no evidence of negligence on their part. What we have said in the statement of facts is sufficient answer. Passengers on the street car testified that they saw the boy on the curb apparently waiting for the car to come to a stop. The defendant Allen testified that he did not see the boy until he was directly in front of the car. The street was free of all other vehicle traffic, and no parked vehicles obstructed the clear view of the street. The jury was justified in drawing the inference that the motorman was not looking, and in support of the judgment we must assume that it drew that inference. The same may be said as to the act of the motorman in attempting to reverse the heavy car up grade with the boy lying directly under the wheel. If the jury inferred that the defendant was negligent in this respect the verdict has additional evidentiary support. Counsel for both parties have devoted a large part of their briefs to arguments on what they call the "first negligent act" and the "second negligent act", meaning the alleged negligent operation of the car in the

first instance and the later attempt of the motorman to reverse the car up the grade to release the boy. The arguments are interesting but no more. The respondent pleaded negligence in general terms and under the settled rules was thus permitted to prove any and all negligent acts of the appellants in relation to the operation of the street car.

The charging part of the complaint reads in part: "said defendant Edward Allen, who was then and there the agent, servant and employee of said corporation defendant, and who was then and there acting within the scope of his said employment, drove, operated and propelled a street car of said corporation defendant in a southerly direction in said Twentieth avenue in a careless, negligent and unskillful manner so as to cause said street car, then and there, to come into violent contact and collision with the person of said minor child whereby said minor was violently thrown and carried underneath said street car, thereby and then and there and as the proximate result of said negligence of defendants causing said minor to suffer and sustain certain physical injuries."

In support of these allegations respondent produced evidence relating to the operation of the car in general, as we have heretofore detailed, and particularly that after the boy had been struck by the car and was lying directly in front of the right front wheel, the motorman went forward and tried to pull the boy clear from the track. He then returned to the car, released the brakes and the air intending to back the car up the grade. The car lurched forward downgrade and then was reversed, presumably running over the boy a second time. There was no evidence as to which one of these acts caused the fatal injury—when the boy was first struck as the car came down the street, when the wheel passed over his thigh as the car lurched forward after the brakes were released, or when the car was then reversed up the grade. However, they were all so closely related to the operation of the street car as to come within the general charge that it was operated in a "careless, negligent and unskilful manner".

[4] But if there be any doubt as to the admissibility of the evidence of the so-called "second negligent act" under this theory that all of these separate acts were so closely related in the operation of the car at the time of the injury, and if there be any doubt as to the sufficiency of this evidence to prove appellants' negligence under the general charge of careless operation, the evidence was both admissible and sufficient under the res ipsa loquitur doctrine. The respondent having pleaded appellants' negligence in general terms was entitled to the inference arising out of this doctrine without specially pleading the issue. This question is discussed fully in Porter v. Rasmussen, 127 Cal.App. 405, 15 P.2d 888, where numerous cases are cited. This renders all the cases cited by appellants inapplicable here. One of them McKeon v. Lissner, 193 Cal. 297, 223 P. 965, is typical. The ruling there rested solely on the ground that the special act of negligence upon which the plaintiff therein relied was specially pleaded and that the complaint contained no charges of negligence in general terms.

[5, 6] Appellants contend that the plaintiff and his wife were guilty of contributory negligence in permitting the child to play in the open unattended. It would serve no purpose to write any more material on this subject. The boy was four years and eight months of age. There is no statute or ordinance which declares that as a matter of law he was too young to play upon the sidewalks of the city. The question whether his parents were negligent in permitting him to do so was purely a question of fact depending on all the facts and circumstances relating to the physical and mental condition of the boy, the physical conditions of the particular neighborhood as to traffic and similar dangers, and the special training which had been given to the boy in relation to avoiding danger. Invoking the presumption that both the parents and the boy exercised ordinary care the respondent may rest that issue since there is no proof to the contrary which would compel a different conclusion from that which the jury made.

[7, 8] Appellants complain of the unprofessional conduct of respondent's counsel during the course of the trial. Numerous instances are cited showing a persistent effort on the part of respondent's counsel to impress upon the jury that its adversary represented a corporation which was possessed of all evil, and that its counsel was guilty of unfair tactics in his attempt to defend such corporation. When a question of this nature is raised on the cold record, it is impossible for the appellate court to say whether the assigned misconduct is

prejudicial; that is a matter primarily committed to the trial court which has every opportunity to see the purpose of the conduct complained of and its effect upon the jury. When the trial court passes it we will assume that it was not prejudicial unless the appellant does more than has been done here in merely citing the instances and labeling them as misconduct.

[9] Criticism is made of instructions given upon request of respondent relating to the defense of contributory negligence on the part of the boy's parents. Criticism is directed to that part of the instruction reading: "without any contributory negligence on the part of the plaintiff", and it is argued that this eliminates from consideration the defense that the boy's mother might have been negligent in permitting him to play in the open unattended. The difficulty with the argument is that it picks out a single sentence from some twenty-three separate instructions given on the subject of contributory negligence. The jury was fully cautioned not to select a single instruction or portion of instruction but to consider them as a whole. The defect found by appellants in the portion of the instruction cited was fully covered by the definite admonition reading: "If you find from the evidence that at the time and place in question Mr. or Mrs. Healy, the father and mother of the decedent Joseph G. Healy, Jr. were, or either of them was, guilty of any act of negligence which was the sole proximate cause of any injuries sustained by said Joseph G. Healy, Jr. at such time and place, then and under those circumstances, if you so find, your verdict must be for the defendants."

[10] Further complaint is made of the refusal to give a portion of an instruction proposed by appellants with reference to the unlawful use of any roadway by a pedestrian. All the material portions of the proposed instruction relating to the provisions of the city ordinance regulating the conduct of a pedestrian in crossing a roadway were given. This was all that was material to the issue involved as the boy was attempting to cross the street at the time of the injury.

[11, 12] Finally it is argued that the verdict of five thousand dollars is excessive. No reason is given except that the respondent failed to prove loss to that amount. Proof of the exact pecuniary loss to a parent for the death of his minor child is of course impossible, and hence unnecessary. It is only when the amount of the verdict appears to be the result of passion or prejudice on the part of the jury, or that it is grossly out of proportion, that this court may hold that it is excessive. 8 Cal.Jur. p. 834. The sum of five thousand dollars would appear to be reasonable within the contemplation of the Supreme Court as indicated in O'Meara v. Haiden, 204 Cal. 354, 268 P. 334, 60 A.L.R. 1381.

[13] Appellants criticize portions of the instructions relating to the measure of damages but these instructions were all fully covered by other instructions. We find no prejudicial error in the record.

[14] Appellants have taken two appeals, one from the judgment and one from the order denying their motion for judgment notwithstanding the verdict. Counsel have stipulated that both be consolidated for hearing, but appellant has not prosecuted the latter appeal, and it will be deemed abandoned.

The appeal from the order denying their motion for judgment notwithstanding the verdict is dismissed. The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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41 Cal.App.2d 610

WEHEN v. LUNDGAARD.

Civ. 12103.

District Court of Appeal, Second District, Division 1, California.

Nov. 22, 1940.

Hearing Denied Jan. 20, 1941.

1. Courts ⚷120

The jurisdiction of the superior court is limited to amounts in excess of $2,000 in actions at law, but if action is one for equitable relief superior court has jurisdiction notwithstanding a lesser amount is involved.

2. Specific performance ⚷5

"Specific performance" will be decreed only when no other adequate relief is available to plaintiff, and where legal remedy of compensatory damages for breach of contract is sufficient to do complete justice between parties equity will not assume jurisdiction.

See Words and Phrases, Permanent Edition, for all other definitions of "Specific Performance".

3. Specific performance ⚿1

Whether equity will compel "specific performance" of a contract does not depend upon whether the property involved is realty or personalty.

4. Specific performance ⚿5

Equity will compel "specific performance" of contract only where a judgment for damages would fall short of redress which plaintiff's situation demands, such as where by nonperformance of contract plaintiff will be greatly embarrassed and impeded in his business plans or in a loss of profits which a jury cannot estimate with any degree of certainty.

5. Specific performance ⚿68

Equity will not compel "specific performance" of contracts relating to personalty where there is no specific quality in the individual articles which gives them a special value to the contracting party and where recovery of damages will enable him to purchase others in the market of like kind and quality.

6. Specific performance ⚿119

In determining whether equity will compel specific performance of contract for the transfer of personalty, a presumption prevails, under statute, that money damages will provide adequate compensation for a breach of the contract. Civ.Code, § 3387.

7. Specific performance ⚿69

Where articles contracted for are of such a rare or sentimental value that they cannot be duplicated, "specific performance" of a contract may be granted.

8. Specific performance ⚿68

Where purchaser of ice machine under conditional sales contract providing for 20 monthly installments did not pay any installments so that seller could have sued for total purchase price upon first or any default and damages, consisting of the purchase price, could have been determined with absolute certainty, seller would not be granted "specific performance" notwithstanding limitations had run against some of delinquent installments because of seller's "laches" in delaying more than five years after first default before seeking specific performance. Civ.Code, §§ 3387, 3527.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

9. Action ⚿63

The law helps the vigilant before those who sleep on their rights. Civ.Code, § 3527.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Stanley Wehen, trustee, against Martin Lundgaard for specific performance of conditional sales contract. From judgment for plaintiff, defendant appeals.

Reversed.

Buel R. Wood, of Los Angeles, for appellant.

H. Sidney Laughlin, of Los Angeles, for respondent.

WHITE, Justice.

During the year 1932 appellant owned and operated a dairy farm situate in Los Angeles County. On or about September 1 of that year respondent's assignor sold to appellant a Parker ice machine for the sum of $300. The transaction was evidenced by a written agreement under the terms of which appellant as buyer agreed to pay the purchase price in twenty monthly installments of $15 each, with interest at eight per cent per annum. No payments whatever were made pursuant to the contract, and accordingly on May 20, 1934, the entire amount and particularly the last payment under the contract, became due. On October 15, 1937, this action was commenced to enforce specific performance of the contract, resulting in judgment for plaintiff, and from which judgment this appeal was taken, coming to us upon the judgment-roll alone.

Appellant urges that the superior court is without jurisdiction to specifically enforce a conditional sales agreement involving $300 principal, where the seller allowed more than five years to elapse from the date of the first default in payment of an installment and when upon such date the seller was empowered under the terms of the contract to repossess the property or declare the entire amount of the contract due and sue therefor.

[1, 2] It is true, as contended by appellant, that in actions at law the jurisdiction

of the superior court is limited to amounts in excess of $2,000, but it is equally true that if the action is one for equitable relief, then the superior court is clothed with jurisdiction. Fair View Farms, etc., Co. v. Superior Court, 123 Cal.App. 9, 10 P.2d 1011; Tullis v. Title Guarantee & Trust Co., 11 Cal.App.2d 391, 54 P.2d 65. But this is not a case in which equity will intervene. There is no dissent in the authorities from the proposition that equity will only enforce agreements, for the breach of which damages may be recovered, when an action for damages would be an inadequate remedy. In other words, specific performance will be decreed only when no other adequate relief is available to the plaintiff. Where the legal remedy of compensatory damages is sufficient to do complete justice between the parties, equity will not assume jurisdiction. Morrison v. Land, 169 Cal. 580, 147 P. 259; Owens v. McNally, 113 Cal. 444, 453, 45 P. 710, 33 L.R.A. 369.

[3-7] While it is true, as set forth in Tahoe Pines Co. v. Newman, 59 Cal.App. 186, 189, 190, 210 P. 445, cited by respondent, that whether equity will enforce the specific performance of a contract is not dependent upon the character of the property involved, that is, whether it be real or personal, nevertheless, whether the property be real or personal it must first appear that no adequate relief other than an appeal to equity is available to the plaintiff before he can go into such a court. It is only where there are present circumstances in view of which a judgment for damages would fall short of the redress which the plaintiff's situation demands, as for instance, where by nonperformance of the contract the latter will be greatly embarrassed and impeded in his business plans or in a loss of profits which a jury cannot estimate with any degree of certainty, that equity will decree specific performance. Duff v. Fisher, 15 Cal. 375, 381. Furthermore, the general rule is that equity will not decree the specific performance of contracts relating to personal property where there is no specific quality in the individual articles which gives them a special value to the contracting party and where the recovery of damages will enable him to purchase others in the market of like kind and quality, such as could be done with reference to the property in the instant case. Moreover, by reason of the provisions of section 3387 of the Civil Code, it would appear that a presumption prevails in the case of contracts for the transfer of personalty that money damages will provide adequate compensation for a breach. As pointed out in 23 Cal.Jur., p. 477, "* * * where the breach complained of cannot be adequately compensated by damages,—as where the articles contracted for are of such a rare or sentimental value that they cannot be duplicated—specific performance may be granted. Thus equity will grant relief in the case of heirlooms, family jewels and the like, where there is a peculiar value attached to the article on account of its individual or associated qualities."

[8, 9] In the case at bar, under the terms of the contract, when the first and subsequent defaults occurred the seller was clothed with the power to declare all remaining instalments of the purchase price plus accrued interest thereon immediately due and payable and to enforce payment of the entire sum by suit therefor. It is manifest that had plaintiff resorted to his legal remedy no difficulty whatever would have been encountered in determining with absolute certainty the amount of his damages, which, according to the terms of the contract, would be the amount promised to be paid by the purchaser for the Parker ice machine which he purchased under the conditional sales contract, and which article of merchandise does not come within the classifications or exceptions adverted to in the foregoing quotation from California Jurisprudence. Under these circumstances, the case is not one within the well-settled principles relative to the proper exercise of equitable jurisdiction. The fact that plaintiff was guilty of laches and permitted the statute of limitations to run against some of the delinquent payments, does not entitle him to the intervention of equity, for as declared in section 3527 of the Civil Code, the law helps the vigilant, before those who sleep on their rights.

For the foregoing reasons, the judgment is reversed.

We concur: YORK, P. J.; DORAN, J.

41 Cal.App.2d 725

HIBERNIA SAVINGS & LOAN SOC. v. LAUFFER et al.

Civ. 11138.

District Court of Appeal, First District,
Division 2, California.

Nov. 28, 1940.

Rehearing Denied Dec. 28, 1940.

Hearing Denied Jan. 27, 1941.

1. Mortgages 🔑411

A mortgage foreclosure action cannot be prosecuted after sale of mortgaged property under power of sale in mortgage.

2. Dismissal and nonsuit 🔑60(1)

The trial court has inherent power, existing without aid of statutory authority, to dismiss action for plaintiff's failure to prosecute it diligently, and statutory provisions concerning dismissal of action for want of prosecution must be read in light of such inherent power's existence. Code Civ.Proc. § 583 et seq.

3. Dismissal and nonsuit 🔑60(2)

The purpose of statute providing for dismissal of action for want of prosecution is to fix minimum period of two years, within which mere delay in bringing action to trial is not deemed sufficient cause for dismissal, immediately ensuing interval of three years, during which court, in its discretion, may adjudge such delay sufficient, and maximum period of five years, on expiration of which such delay is sufficient as matter of law and dismissal is mandatory. Code Civ.Proc. § 583.

4. Appeal and error 🔑973

The trial court's order, dismissing action for want of diligent prosecution over two years and less than five years after filing of action, should not be disturbed by appellate court, except on showing of clear abuse of discretion, whether trial court acted under its inherent power or under power conferred by statute. Code Civ.Proc. § 583.

5. Dismissal and nonsuit 🔑60(2)

In action for deficiency judgment after sale of mortgaged property under power in mortgage, where plaintiff did not deny allegations of defendants' affidavits in conflict with plaintiff's affidavits opposing motion to dismiss action for want of diligent prosecution, plaintiff's affidavits showed that negotiations alleged therein with holder of subordinate judgment lien against property were discontinued over two years before service of summons, and no attempt was made to serve summons until nearly three years after filing of complaint, trial court did not abuse his discretion in dismissing action. Code Civ.Proc. § 583.

6. Dismissal and nonsuit 🔑71

In mortgage foreclosure action, it was unnecessary for defendants to allege in affidavits supporting their motion to dismiss action for want of diligent prosecution facts showing that they had meritorious defense to action or were injured by delay in prosecuting it. Code Civ.Proc. § 583.

7. Dismissal and nonsuit 🔑73

On defendants' motion to dismiss action for want of diligent prosecution, plaintiff should not ordinarily be required to present his case on merits. Code Civ.Proc. § 583.

8. Dismissal and nonsuit 🔑60(1)

The law will presume injury to defendant from unreasonable delay in prosecuting action.

9. Dismissal and nonsuit 🔑68

Defendants' five months' delay in presenting motion to dismiss action for want of diligent prosecution did not sustain plaintiff's claim of "laches," rendering dismissal of action on such ground abuse of trial court's discretion, in absence of showing that such delay was unreasonable. Code Civ. Proc. § 583.

> See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

10. Mortgages 🔑97

If there is any uncertainty as to meaning of mortgage drawn by mortgagee, it must be construed most strongly against mortgagee. Civ.Code, § 1654.

11. Dismissal and nonsuit 🔑50

The word "foreclose" in mortgage transactions has technical meaning, relating solely to method of terminating mortgagor's right of redemption, so that provision in mortgage that mortgagor waived all defenses, existing by virtue of homestead statute, statute of limitations, or otherwise, to any action to foreclose mortgage or to exercise of power of sale therein, applied only to foreclosure by action or sale under such power, not to action for deficiency judgment after foreclosure sale, and mortgagor did not thereby waive right to move for dismissal of such action on ground of failure to prosecute it with reasonable diligence. Code Civ.Proc. §§ 580a, 583; Civ.Code, § 2931.

See Words and Phrases, Permanent Edition, for all other definitions of "Foreclose".

12. Dismissal and nonsuit ⚷50

In mortgage foreclosure action, defendants did not waive right to move for dismissal on ground of failure to prosecute action with reasonable diligence by filing demurrer to, and motion to set aside, trial court's order permitting plaintiff to file amended and supplemental complaint seeking deficiency judgment after sale of mortgaged property under power in mortgage. Code Civ.Proc. § 583.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by the Hibernia Savings & Loan Society against John Lauffer and another to foreclose a mortgage and recover a deficiency judgment after sale of mortgaged property under a power of sale in the mortgage. From an order dismissing the action, plaintiff appeals.

Affirmed.

Tobin & Tobin and Raymond J. Arata, all of San Francisco, for appellant.

Woolsey & Huovinen and B. H. Dean, Jr., all of Oakland, for respondents.

SPENCE, Justice.

This is an appeal from an order dismissing the above-entitled action for failure on the part of plaintiff to prosecute said action with reasonable diligence.

[1] On August 1, 1928, defendants John Lauffer and Margaret Lauffer executed a note and mortgage in favor of plaintiff, which mortgage contained a power of sale. The note became due and payable on August 1, 1929. On July 27, 1933, plaintiff filed its complaint in the present action seeking the foreclosure of said mortgage and, on the same day, plaintiff recorded a notice of breach and election to sell under the power of sale contained in said mortgage. On April 24, 1934, plaintiff exercised said power of sale and sold the property covered by said mortgage. Said defendants knew nothing of the pendency of the foreclosure action until July 24, 1936, when copies of the complaint and summons were served upon them. At that time, almost three years had elapsed since the filing of the complaint and more than two years had elapsed since the property had been sold under the power of sale. Said action could not have been prosecuted as a foreclosure action after the sale had been made under the power of sale (Commercial Centre Realty Co. v. Superior Court, 7 Cal.2d 121, 129, 59 P.2d 978, 107 A.L.R. 714; Mayhall v. Eppinger, 137 Cal. 5, 7, 69 P. 489), but it was not until March 3, 1937, that plaintiff filed its amended and supplemental complaint seeking a deficiency judgment. At that time, almost three years had elapsed since the sale had been made and almost four years had elapsed since the original complaint had been filed. On March 15, 1937, said defendants filed a demurrer to the amended and supplemental complaint and thereafter on April 16, 1937, said defendants made a motion to set aside the order by which plaintiff had been granted leave to file the amended and supplemental complaint. The motion and demurrer were thereafter argued and submitted and were still under submission when defendants, on August 26, 1937, gave notice of motion to dismiss the action for lack of prosecution. Said motion was granted by the court on December 31, 1937, and this appeal followed.

[2] In arguing the question of whether the trial court erred in dismissing said action, the parties have discussed the nature of the power of the trial court with respect to such dismissals and the effect of the provisions of the statutes relating to such dismissals. It seems well settled that the power of a trial court to dismiss an action for failure on the part of plaintiff to prosecute it with diligence is an inherent power which exists without the aid of statutory authority and that the provisions of section 583 of the Code of Civil Procedure and of other related sections must be read in the light of the existence of such inherent power. Romero v. Snyder, 167 Cal. 216, 138 P. 1002; Johnston v. Baker, 167 Cal. 260, 139 P. 86.

[3, 4] Since 1933, said section 583 of the Code of Civil Procedure has provided that "The court may in its discretion dismiss any action for want of prosecution on motion of the defendant and after due notice to the plaintiff, whenever plaintiff has failed for two years after action is filed to bring such action to trial. Any action heretofore or hereafter commenced shall be dismissed * * * unless such action is

brought to trial within five years after the plaintiff has filed his action, except where the parties have stipulated in writing that the time may be extended. * * *" It is thus apparent that said section purports to permit a dismissal in the discretion of the court at any time after two years and purports to require a dismissal at any time after five years except where the parties have stipulated for an extension. Said periods of two and five years now run from the time of the commencement of the action rather than from the time of the filing of the answer as previously provided.

The history of section 583 and the related sections is discussed at some length in Romero v. Snyder, supra, and Johnston v. Baker, supra, and need not be repeated here. The purpose of said section 583, as indicated in Romero v. Snyder, supra, at page 219 of 167 Cal., at page 1003 of 138 P. was "to fix: (1) A minimum period within which mere delay is not deemed to be sufficient cause; (2) an immediately ensuing interval of three years, during which the court, in its discretion, may adjudge it sufficient; and (3) a maximum period of five years, upon the expiration of which, the delay is declared to be sufficient as a matter of law and the dismissal is made mandatory." The dismissal was entered here after two years had elapsed and before five years had elapsed from the time of the filing of the action and therefore within the period in which the court admittedly had the power to dismiss the action in the exercise of its discretion. It would therefore appear immaterial whether the trial court was acting under its inherent power or under the power which said section purports to confer upon it for, in either case, it is settled that the order of the trial court dismissing said action should not be disturbed except upon a showing of a clear abuse of discretion. Inderbitzen v. Lane Hospital, 17 Cal.App.2d 103, 61 P.2d 514; Steinbauer v. Bondesen, 125 Cal. App. 419, 14 P.2d 106; Vogel v. Marsh, 122 Cal.App. 748, 10 P.2d 791; Barry v. Learner, 113 Cal.App. 651, 299 P. 82.

[5-9] Plaintiff has endeavored to make a showing of an abuse of discretion on the part of the trial court but, in our opinion, the showing made is insufficient for that purpose. Plaintiff first calls attention to its affidavits in opposition to the motion in which it was alleged that certain negotiations were pending at one time. But defendants presented affidavits in conflict with those presented by plaintiff and alleged therein that defendants notified plaintiff in the early part of 1933 of their inability to make the payments required by the note and mortgage and further alleged that defendants then offered to convey the property to plaintiff and were then assured by plaintiff that it would not seek a deficiency judgment. These allegations were not denied by plaintiff. Plaintiff alleged that it did have certain negotiations with the holder of a subordinate judgment lien against the property but it affirmatively appears from plaintiff's affidavits that any such negotiations were discontinued at some time prior to March 30, 1934, which was more than two years prior to the service of summons on defendants. It is undisputed that the place of residence and the place of business of defendants were in the county where the action was pending and were known at all times to plaintiff but no attempt to serve summons upon defendants was made until July 24, 1936. The trial court no doubt concluded that the pendency of any alleged negotiations prior to March 30, 1934, did not excuse the subsequent lack of diligence in the prosecution of the action and the trial court was entirely justified in so concluding. Plaintiff further calls attention to the fact that defendants failed to allege facts in their affidavits showing that they had a meritorious defense to the action or that they had been injured by the delay. It was unnecessary, however, to allege such facts. Thompson v. Lester, 20 Cal.App.2d 745, 67 P.2d 1093; Lieb v. Lager, 9 Cal.App.2d 324, 49 P.2d 886; Gray v. Times-Mirror Co., 11 Cal. App. 155, 104 P. 481. Plaintiff cites and relies upon Herman v. Pacific Jute Mfg. Co., 131 Cal. 210, 63 P. 344, but that case is not controlling. The answer had been filed in that case and the court points out that defendant admittedly had no defense and had filed a sham answer merely for the purpose of delay. Such was not the case here. Ordinarily a defendant should not be required to present his case on the merits upon a motion for a dismissal (Thompson v. Lester, supra) and "The law will presume injury from unreasonable delay." Gray v. Times-Mirror Co., supra, 11 Cal.App. at page 164, 104 P. at page 484. Plaintiff further claims that defendants were guilty of laches in presenting their motion. Plaintiff states that defendants delayed the making of their motion for five months and took up the court's time with the presentation of a demurrer and the

making of another motion. The alleged five months' delay does not appear to have been an unreasonable delay and the fact that there was such alleged delay does not sustain plaintiff's claim that there was an abuse of discretion on the part of the trial court.

[10, 11] Plaintiff further contends that defendants waived their right to move for a dismissal by the express terms of the mortgage and also by the filing of a demurrer and motion to set aside the trial court's order permitting the filing of the amended and supplemental complaint. We find no merit in this contention. We will assume, solely for the purpose of this discussion and without deciding the question, that a defendant may waive the right to move for a dismissal and thereby deprive the court of any power to dismiss an action for failure to prosecute it with reasonable diligence. We are nevertheless of the opinion that there was no such waiver in the present case.

The mortgage contained the following provision: "In consideration of the granting of said loan to the Mortgagor by the Mortgagee, the Mortgagor hereby waives any and all defenses which may now or hereafter exist by virtue of any homestead statute, statute of limitation, or otherwise, to any action brought to foreclose said note or mortgage, or to the exercise of the power of sale herein contained, except the sole defense of payment."

The quoted provision of the mortgage provides in effect for a forfeiture of certain rights of the mortgagor. The mortgage was drawn by the plaintiff and if it may be said that there is any uncertainty as to its meaning, it must be construed most strongly against the plaintiff. Civ. Code, sec. 1654; 6 Cal.Jur. 309, sec. 185. We will pass the question of whether the right to move for a dismissal of an action constitutes a "defense" as the above-quoted provision relates only to the waiver of defenses "to any action brought to foreclose said note or mortgage, or to the exercise of the power of sale therein contained". So far as actions are concerned, said provision relates only to an action to "foreclose". The word "foreclose" is a technical word and it has a technical meaning in mortgage transactions, Civ.Code, sec. 2931, which meaning relates solely to the method employed in terminating the right of redemption of the mortgagor. This technical meaning is the same as the commonly understood meaning of the word when applied to such transactions. We therefore believe that a fair construction of said provision of the mortgage is that it was intended to apply only to foreclosure by action or by sale under the power of sale and that it was not intended to apply to an action prosecuted solely for the purpose of obtaining a deficiency judgment after a sale upon foreclosure. Plaintiff stresses the fact that the word "or" was used between the words "note" and "mortgage" but the entire phrase refers to an action "to foreclose said note or mortgage". We have never heard of the use of the word "foreclose" with respect to an action prosecuted solely for the purpose of obtaining a deficiency judgment on a note after a sale upon foreclosure and we do not believe it was intended to be so used here. Such an action is something different from a foreclosure action as is evidenced by the fact that during the pendency of these proceedings, a different statute of limitations was made applicable to such actions limiting the time to three months after the sale. Code Civ.Proc. sec. 580a. The most that can be said is that uncertainty exists as to whether said provision of the mortgage was intended to apply to an action prosecuted solely for the purpose of obtaining a deficiency judgment after the exercise of the power of sale contained in the mortgage and, under the rules of construction above set forth, we are impelled to hold that it was not so intended. There was therefore no express waiver by defendant of the right to move for a dismissal in the present case.

[12] In support of the contention that defendants waived their right to move for a dismissal by filing a demurrer and a motion to set aside the trial court's order permitting the filing of an amended and supplemental complaint, plaintiff cites and relies upon certain language found in Johnston v. Baker, 167 Cal. 260 at page 265, 139 P. 86. We believe, however, that the decision in Romero v. Snyder, 167 Cal. 216, 138 P. 1002, is a complete answer to said contention. The language in Johnston v. Baker, supra, to which reference has been made by plaintiff was not necessary to the decision but, in any event, it related to the effect of the filing of an answer rather than the filing of a demurrer and that case was decided when the times specified in said section 583 dated from the time of the filing of the answer rather than from the time of the filing of the action.

In view of our conclusions that defendants had not waived their right to move for a dismissal of the action and that the trial court did not abuse its discretion in granting said motion, it follows that the order of dismissal should not be disturbed.

The order dismissing the action is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

41 Cal.App.2d 701

MANN v. CHASE et al.

Civ. 11183.

District Court of Appeal, First District, Division 1, California.

Nov. 27, 1940.

Hearing Denied Jan. 23, 1941.

1. Automobiles 🔑245(87)

In action for death of guest resulting when automobile in which he was riding struck an embankment, whether guest, who had been drinking with the automobile driver, knew, when he entered automobile, of driver's intoxicated condition, or thereafter discovered it and had a chance to leave the automobile at a safe place so as to be free from contributory negligence, was for the trier of facts.

2. Automobiles 🔑245(87)

In action for death of guest resulting when automobile in which he was riding struck an embankment, whether guest, in accepting ride with automobile driver with whom guest had been drinking, was contributorily negligent could be determined as a matter of law only if the court was impelled to say that from the facts reasonable men could draw but one inference pointing unerringly to the negligence of the guest contributing to the injury.

3. Negligence 🔑56(2), 82

Where the basis of recovery or denial thereof in a negligence action is predicated upon a violation of the law, such violation must be a proximate cause of accident, otherwise the violation is immaterial.

4. Automobiles 🔑226(2)

Where adult automobile guest bought beer which minor automobile driver participated in drinking in addition to liquor from another source while at a swimming pool, and driver became intoxicated and lost control of automobile as result of which guest was killed, and furnishing of beer was only remotely connected with cause of accident, which was intoxication resulting from consumption of liquor and driving automobile while intoxicated, recovery for guest's death was not precluded on ground that he was contributorily negligent in that he furnished beer to minor in violation of statute, since, if statute was violated, violation did not directly contribute to accident. St.1937, p. 2175, § 61; Vehicle Code, § 403, St.1935, p. 154.

5. Negligence 🔑56(2), 62(1)

In a negligence action it is essential to establish a causal connection between a wrongful act and the resulting injury, and the unlawful act with no independent intervening agency must be the efficient cause of the injury.

◆

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Crystal Mann against John F. Chase and others for the death of Robert Mann resulting when an automobile in which he was riding as a guest overturned. From a judgment for the plaintiff, defendants appeal.

Affirmed.

Booth B. Goodman, of Oakland, for appellants.

Philip M. Carey, of Oakland, for respondent.

Hearing denied; CURTIS and EDMONDS, JJ., dissenting.

WARD, Justice.

Plaintiff, as the only heir of Earl Robert Mann, who died of injuries received when an automobile in which he was riding as a guest struck an embankment and overturned, sued John F. Chase, a minor, driver of the car, Franklin D. Chase, its owner and the brother of John, and Mary C. Chase, their mother, who had signed John's application for a driver's license. The court found that the accident was the proximate result of the wilful misconduct of John Chase who was driving in an intoxicated condition, and judgment was rendered as follows: "From Defendant John F. Chase the sum of $10,500.00; from the defendant Franklin D. Chase, as provided in section 402 of the Vehicle Code of the State of California, St.1937, p. 2353, the sum of $5,000.00, jointly and severally with said defendant John F. Chase; and from the defendant Mary C. Chase, as provided in section 352 of said Vehicle Code, the sum of $5,000.00, jointly and severally with said defendant John F. Chase; * * *." Mrs. Chase and her son Franklin appeal.

It will not be necessary herein to discuss the finding of wilful misconduct other than as it refers to the intoxication of John F. Chase, as the finding in that regard is sufficient to sustain the judgment.

On the night of the accident, respondent's son, a young man twenty-two years of age, in company with John F. Chase and Robert Leslie Rodriguiz, both minors, left Berkeley in Alameda county to go to a swimming pool at Orinda, in the adjoining county of Contra Costa. On the way they stopped at a liquor store where, with money contributed by the three, Mann purchased two half-gallon jugs of beer, which he placed in the car, being driven by John Chase, in which the three were riding. At the swimming pool, part of the beer was removed from the car and consumed, Chase drinking some of it. There is evidence that with friends or acquaintances in another party, he also drank whiskey. Mann remained in the pool for the greater part of the time, but on several occasions, he, too, drank of the beer. The three left the pool shortly after midnight and started their return trip to Berkeley, part of which took them over a road having many turns and a decided down grade. On one of these curves, John Chase, swerving to avoid an on-coming car, to which his attention had been called by Rodriguiz, drove into an embankment and the car overturned.

Appellants urge that respondent's son was guilty of contributory negligence which as a matter of law proximately contributed to the accident. The question involved may be stated as follows: If an adult guest in an automobile operated by a minor, purchases intoxicating liquor, in the consumption of which and of further liquor from another source, the minor participates, and by reason of the ensuing intoxicated condition of the minor he loses control of and overturns the machine, causing the death of the adult guest, is such guest guilty of contributory negligence barring recovery by his heirs?

[1, 2] The problem of whether, when the driver of a vehicle and a guest have been drinking, it may be found from the evidence that the driver was intoxicated, but that the guest, if it is not shown that he knew of the driver's intoxicated condition when he entered the car, or thereafter discovered it and had a chance to leave the car at a safe place, was free from contributory negligence, is one to be decided by the trier of the facts. If intoxication ensues, it is not the intoxication per se, but the knowledge of the guest that such intoxication exists, that brings the guest into the category of a possible contributor to the negligence of the driver. This is a question of fact and not one of law. Lindemann v. San Joaquin Cotton Oil Co., 5 Cal.2d 480, 55 P.2d 870. In McMahon v. Schindler, 38 Cal.App.2d 642, 646, 102 P.2d 378, 380, the court said: "* * * that it becomes a question of law only when the court is impelled to say that from the facts reasonable men can draw but one inference pointing unerringly to the negligence of the plaintiff contributing to the injury." The antecedent behavior of the decedent is immaterial except as a circumstance to be considered in determining the requisite care he should have used if he knew that John Chase was intoxicated. The furnishing of the liquor may be a signal of danger, but the actual intoxication is generally the proximate cause of the accident. While a reasonable inference may be drawn that Mann knew the beer was to be consumed at the swimming pool, our attention has not been called to any evidence showing that he knew Chase had partaken of whisky, and there is no evidence that he knew Chase was in an intoxicated condition.

Contributory negligence in this case can only be predicated upon the fact, if such were found to exist, that the purchasing of the beer by the decedent for Chase and his guests was in fact the giving or furnishing of liquor to a "person under the age of twenty-one years" and that such furnishing was the proximate cause of the accident. Sec. 61, Alcoholic Beverage Control Act, Stats.1935, p. 1123, as amended Stats.1937, p. 2175.

[3, 4] The giving of liquor to a minor is unlawful but not necessarily the proximate cause of an accident which may follow. If appellants' position should be sustained, it would result in holding that the giving of liquor to a minor creates a con-

clusive presumption against the donor that the minor will become intoxicated. Where the basis of recovery or denial in a negligence action is predicated upon a violation of the law, such violation must be a proximate cause of the accident, otherwise the violation is immaterial. It cannot be reasonably contended that the mere furnishing of the liquor, independent of its subsequent use and effect, contributed directly to the accident. Its mere consumption without resulting intoxication, would not bring the case within the purview of Vehicle Code, section 403, St.1935, p. 154.

[5] In a negligence case it is essential to establish a causal connection between a wrongful act and the resulting injury; and the unlawful act, with no independent intervening agency, must be the efficient cause. In this case the proximate cause was the intoxication resulting from the consumption of liquor, and the driving of the car by Chase while so intoxicated. The furnishing of the liquor was only remotely connected with the cause of the accident and contributed, if at all, only indirectly to the injury.

The contributory negligence of the deceased is the only subject contained in appellants' "statement of question involved".

The judgment is affirmed.

We concur: PETERS, P. J.; KNIGHT, J.

41 Cal.App.2d 669

PEOPLE v. FRANKLIN.

Cr. 2159.

District Court of Appeal, First District, Division 2, California.

Nov. 26, 1940.

Hearing Denied Dec. 23, 1940.

1. Criminal law 🔑608

Where no affidavit was filed in support of defendant's application for continuance on ground of witness' absence, and defendant failed to give such witness' name after being placed on witness stand at his request for purpose of making statement in support of application, it was properly denied. Pen.Code, § 1050.

2. Criminal law 🔑594(1), 1151

A request by defendant for continuance because of witness' absence, without filing supporting affidavit or naming such witness when placed on witness stand to make statement supporting application, is addressed to trial court's discretion, and appellate court will assume that such discretion was properly exercised, in absence of contrary showing. Pen.Code, § 1050.

3. Criminal law 🔑1037(1)

In trial for robbery in store, where store employee testified that defendant "had his hand like this (indicating) and said 'Let me have it,'" error, if any, in permitting district attorney's reference in argument to such employee's fear that defendant had a gun in his pocket cannot be held prejudicial to defendant by appellate court, in absence of objection thereto at time.

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Milo Nelson Franklin was convicted of robbery in the second degree, and he appeals.

Affirmed.

Milo Nelson Franklin, in pro. per.

Earl Warren, Atty. Gen., and Dennis Hession, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

The defendant was tried before a jury and found guilty of robbery in the second degree.

There is no conflict in the evidence offered by the state in support of the charge laid in the information. The defendant did not take the stand to deny any of the charges made by the state, and did not offer any evidence in support of his defense. The prosecuting witness testified that she was an employee on duty in a candy store and that about 10:30 a. m. on April 7, 1940, the defendant entered the store, went to the cash register and ordered her to "Let me have it." This witness gathered all the small change from the cash register, put it in a brown paper bag and handed it to defendant, who then left, warning her to allow him fifteen minutes to escape or "I am going to come back and let you have it." At about 12:10 p. m. of the same day the defendant came to the entrance of the same store at a time when this witness was talking with an inspector of the police department. When she saw the defendant she cried out to the inspector, "There he is now." The defendant endeavored to escape, but was apprehended, and when taken to the station was found to have in his possession approximately twelve dollars in small change which was identified as approximately the amount taken in the robbery. Defendant's only explanation of his conduct at the time of his arrest and on subsequent conversations with the authorities was that he had been drinking, and so far as the holdup was concerned his mind was a blank.

[1, 2] He prosecutes this appeal in propria persona, and this accounts for many statements in his briefs which appear to have been prepared without close examination of the transcribed record. His criticisms of the conduct of the public defender are all of this type and do not merit consideration. His statement that he was not permitted to take the witness stand in his own defense is only partly true. He did not ask and was not denied the opportunity to take the witness stand as a witness in his own defense. Before the state had put in its proof he asked to be placed on the witness stand for the purpose of making a statement in support of an application for a continuance of the trial. No affidavit was filed in support of the motion, and, when defendant failed even to give the name of the absent witness, his application was properly denied under the terms of section 1050 of the Penal Code, which outlines the procedure necessary to be taken in support of such an application. People v. Schenk, 19 Cal.App.2d 503, 65 P.2d 895. A request for a continuance of the time of trial under such circumstances, as well as a request for a change of counsel, is a matter which is strictly within the discretion of the trial court, and we will assume that that discretion was properly exercised where as here no showing is made to the contrary.

[3] Some criticism is made of the argument of the district attorney which is in such general terms that it is difficult to label it a charge of misconduct. Something is said about his reference to the fear of the employee of the store that the appellant had a gun in his pocket. Her evidence was that when the appellant approached her he "had his hand like this (indicating) and said, 'Let me have it.'" We, of course, can not tell from the printed record what the witness indicated as to the position of appellant's hand at that time. It may be that her testimony was such as would have enabled a jury to have inferred that the appellant made the motions of drawing or presenting a gun or that his action was such that it would at least have caused the witness to believe that such was his intention. If this were not the fact we can not assume that the trial judge would not have cautioned the jury if a proper objection had been made at the time, but since no such objection was made, it is not an error which can now be said to have been prejudicial.

The record discloses that appellant was given a fair trial and a full opportunity to have presented a defense, if any he had, and that none of the objections now raised are tenable.

The judgment and the order denying a new trial are affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

41 Cal.App.2d 741

REINHARD v. LAWRENCE WAREHOUSE CO. et al.

Civ. 11372.

District Court of Appeal, First District, Division 2, California.

Nov. 28, 1940.

Hearing Denied Jan. 27, 1941.

1. Appeal and error 🔑893(1), 989

On appeal from judgment directing verdict for defendant, the only question is whether trial court erred, and appellate court cannot try the case or the issue de novo.

2. Appeal and error 🔑172(2)

Where glazing contractor's employee suing landlord and tenant for injuries sustained by falling from skylight in complaint pleaded a cause of action for negligence in maintenance of skylight, and did not plead a nuisance, and if any of evidence tended to prove a nuisance, he did not rely upon it as such, and did not so inform the trial court, employee could not on appeal from judgment directing verdict for landlord and tenant claim error for the first time with regard to issue of nuisance.

3. Nuisance 🔑1, 59

A "nuisance" is "common" or "public" where it affects the rights enjoyed by citizens as part of the public, and a "private nuisance" is one that affects a single individual or a determinate number of persons in the enjoyment of some private right not common to the public.

See Words and Phrases, Permanent Edition, for all other definitions of "Common Nuisance", "Private Nuisance", and "Public Nuisance".

4. Landlord and tenant 🔑170(1)

An employee of glazing contractor employed by lessee to repair skylight could not recover from lessor for injuries sustained by falling from skylight on theory that lessor maintained a "public nuisance" where skylight was over a portion of business office, and there was no evidence that anyone worked under it, that any of public entered such office, or that any one other than employees and invitees were at any time in proximity to the skylight.

5. Landlord and tenant 🔑170(4)

An employee of glazing contractor employed by lessee to repair skylight could not recover from lessor for injuries sustained by falling from skylight on theory that lessor maintained a "private nuisance" and hence was liable even though free from negligence, where employee pleaded that he was an invitee of lessor and lessee but proved that he was invitee of lessee only, and hence as to lessor employee was a "trespasser".

See Words and Phrases, Permanent Edition, for all other definitions of "Trespasser".

6. Negligence 🔑32(1)

The owner or occupant of premises only owes due or ordinary care to an invitee and is not an insurer.

7. Negligence 🔑32(1)

Knowledge of defect is the basis upon which liability of owner to an invitee rests.

8. Nuisance 🔑10

A person who was not the creator of a nuisance must have notice or knowledge of it before he can be liable for resulting injury. Civ.Code, § 3483.

9. Landlord and tenant 🔑170(1)

A corporation as grantee of building from heirs of decedent who constructed the building could not be deemed the "creator" of alleged nuisance in maintaining a defective skylight so as to render corporation liable to employee of glazing contractor employed by lessee, for injuries sustained by falling from skylight, where heirs succeeded to the building immediately upon decedent's demise and there was no privity between corporation and decedent, and decree of distribution made after conveyance merely confirmed the title in corporation. Probate Code, § 300; Civ.Code, § 3483.

10. Nuisance 🔑10

The word "neglect" within statute providing that every successive owner of property who neglects to abate a continuing nuisance created by a former owner is liable therefor in same manner as one who first created, it is not synonymous with "omit", since "neglect" imparts "intent" which presupposes knowledge, and creator of a nuisance is presumed to have knowledge of his own acts, but there is no presumption that successor to title to realty has knowledge of acts of his predecessor in interest. Civ. Code, § 3483.

See Words and Phrases, Permanent Edition, for all other definitions of "Intent", "Neglect" and "Omit".

11. Landlord and tenant 🔑164(6)

A landlord cannot be held for negligence because of a hidden defect in premises of which he had no knowledge, for same reason that landlord cannot be held in damages for nuisance of which he had no knowledge.

12. Landlord and tenant 🔑167(2)

A landlord was not liable for injuries sustained by employee of glazing contractor employed by tenant to repair skylight when employee fell from skylight where evidence was undisputed that defective condition could not have been discovered by reasonable care or inspection.

13. Landlord and tenant 🔑167(2)

A tenant which employed glazing contractor to repair skylight was not liable for injuries to contractor's employee who fell from skylight, where evidence disclosed that no reasonable or ordinary inspection would have enabled tenant to discover defective condition.

◆

Appeal from Superior Court of City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Fred A. Reinhard against the Lawrence Warehouse Company and another to recover for injuries sustained by plaintiff while working on a skylight. From a judgment for defendants, plaintiff appeals.

Affirmed.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

Thomas C. Ryan and George Olshausen, both of San Francisco, for appellant.

Hadsell, Sweet, Ingalls & Lamb, of San Francisco, for respondent John A. Lennon Estate Co.

Myrick & Deering and Scott, James Walter Scott, and J. LeRoy Wehr, all of San Francisco, for respondent Lawrence Warehouse Co.

NOURSE, Presiding Justice.

In 1912 one John A. Lennon contracted for the construction of a four-story building at 37 Drumm street in San Francisco. The building was erected by a contractor under the supervision of an architect. In 1923 Lennon leased the entire building to the Lawrence Warehouse Company for a term of twenty years. In 1924 Lennon died leaving as his only heirs ten children to whom this property descended. In 1926 one of these children conveyed his interest to the others, and, in 1927, the remaining children conveyed the Drumm street property to the Estate Company, respondent herein. Thereupon the estate was closed, and a decree of final distribution to the company was entered in conformity with the conveyances from the heirs.

On December 20, 1938, the lessee engaged a glazing contractor to make some repairs to a skylight which was maintained in the rear of the building over a private office. Plaintiff, an employee of this contractor, while working on the skylight, fell and was injured. He sued the owner and the lessee for damages caused by their alleged negligence in the maintenance of the skylight. The charging part of his complaint reads: "That on the 20th day of December, 1938, plaintiff was an invitee of the defendants in said building and was engaged in repairing a certain glass skylight maintained by said defendants on said premises; that the defendants carelessly and negligently maintained said skylight in a dangerous and defective condition in this: that the cross bars of said skylight were not anchored or did not extend into the walls of said building; that said cross bars were not reinforced by rivets in order to prevent the galvanized metal surrounding said bars from buckling; that the defendants failed to have the hip joints of said skylight placed close together in order to render sufficient support to said skylight; that after said skylight was built the defendants carelessly and negligently installed a sprinkling and ventilating system in said building and used said skylight for support of both said sprinkling system and said ventilating system, thus adding greatly to the strain of said skylight; that for many years the iron ribs into which the glass in said skylight was fitted, were rusted and rotten; that as a result of all of said conditions said skylight became so weakened that it was unable to support the weight of plaintiff while working on said skylight and said skylight gave way and fell in and precipitated plaintiff a distance of approximately twenty (20) feet to the floor below."

At the close of plaintiff's case tending to show that the skylight had been constructed defectively and had since decayed, the trial court granted the motions of both defendants for a directed verdict. On his appeal from the judgment plaintiff seeks to hold the owner on the ground that the faulty construction of the roof was a nuisance; and seeks to hold the lessee on the further ground that it was negligent in failing to observe the dangerous condition of the roof. Before discussing these questions it should be stated that the plaintiff as a witness in his own behalf testified that he had had many years experience as a glazier, had worked on numerous skylights, was familiar with the various types of construction, had worked on a few of the type used in the Drumm street building, and that it was impossible to tell whether the beams of this skylight were safely imbedded in the brick without tearing the brick out, or the metal off. In this respect the witness's statement was confirmed by his experts, and no conflicting testimony was given. The trial court was thus confronted with the undisputed evidence that plaintiff's injuries resulted from a condition of the building which was unknown to both landlord and tenant, and could not have been discovered through ordinary or usual inspection or care.

[1, 2] The directed verdict in favor of the landlord is sound for many reasons, but we will mention but a few. In his complaint the plaintiff clearly and simply pleaded a cause of action for negligence in the maintenance of the skylight. He did not plead a nuisance, public or private. If any of his evidence tended to prove a nuisance he did not rely upon it as such and did not so inform the trial court. The motion for a directed verdict was made upon the case then before the trial court, based upon the plead-

ings and the proof. It is not a question of variance. It is a simple question whether the evidence proves the case which plaintiff tendered to the trial court. On this appeal the only question is whether the trial court erred. We cannot try the case or the issue de novo. Since the plaintiff did not tender the issue to the trial court which he now argues for the first time on appeal, there was no error in that court in reference to that issue which can be reviewed here.

[3, 4] Aside from the question of pleading, the evidence failed to prove a nuisance, either public or private. It is said in 46 C.J. p. 646: "A nuisance is common or public where it affects the rights enjoyed by citizens as part of the public, that is, the rights to which every citizen is entitled. A private nuisance is one that affects a single individual or a determinate number of persons in the enjoyment of some private right not common to the public." Appellant proved that the skylight was over a portion of the business office of the warehouse company. There was no evidence that any one worked under it, or that any of the public entered these offices. There was no evidence that any customers entered the office, or that any one other than the employees and invitees of the firm were at anytime in proximity to the skylight. There was no evidence that these offices were at anytime open to the public. Hence, none of the elements necessary to establish a public nuisance are present.

[5, 6] But the appellant argues that the skylight might have been a private nuisance and that the owner should be held though free from negligence. The argument is not sound. Appellant pleaded that he was an invitee of the defendants for the purpose of repairing the skylight. He proved that he was the invitee of the lessee only. As to the owner he was as a trespasser. The rule is settled in this state that the owner or occupant of premises only owes due or ordinary care to an invitee, and is not an insurer. Mautino v. Sutter Hosp. Ass'n, 211 Cal. 556, 560, 296 P. 76.

[7, 8] This doctrine is a simple corollary of the well accepted rule that knowledge is the basis upon which the liability to an invitee rests. In 20 Ruling Case Law, p. 57, it is said: "The true ground of liability is the proprietor's superior knowledge of the perilous instrumentality and the danger therefrom to persons going upon the property. It is when the perilous instrumentality is known to the owner or occupant and not known to the person injured that a recovery is permitted. * * * And, hence, there is no liability for injuries from dangers that are obvious, or as well known to the person injured as to the owner or occupant." And there is no dispute in the authorities that one who was not the creator of a nuisance must have notice or knowledge of it before he can be held. Grigsby v. Clear Lake Water Works Co., 40 Cal. 396, 407; Edwards v. Atchison, T. & S. F. R. Co., 9 Cir., 15 F.2d 37, 38. The same principle is clearly stated in 46 C.J. p. 742 as follows: "It is a prerequisite to impose liability against a person who merely passively continues a nuisance created by another that he should have notice of the fact that he is maintaining a nuisance and be requested to remove or abate it, or at least that he should have knowledge of the existence of the nuisance."

[9] To escape this rule appellant argues that the respondent Lennon Estate Company having taken direct from the deceased must be deemed the "creator" of the alleged nuisance. The argument is faulty because based upon a wholly false premise. The heirs of Lennon succeeded to the property immediately upon his demise. Sec. 300, Prob.Code; Johns v. Scobie, 12 Cal.2d 618, 623, 86 P.2d 820. While the title rested in them they conveyed to the corporation. There was no privity between the corporation and the deceased; no organization calling for the application of the "alter ego" doctrine. The decree of distribution, made after the conveyance, merely confirmed the title in the corporation. This was not a transfer of title from the deceased to the corporation, that title was transferred from the deceased to the heirs by operation of law. Schade v. Stewart, 205 Cal. 658, 660, 272 P. 567.

[10] The sound principle that one who has not created a nuisance must be shown to have knowledge of its existence before he can be held finds expression in section 3483 of the Civil Code which reads: "Every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of, such property, created by the former owner, is liable therefor in the same manner as the one who first created it." The words "neglect" and "omit" are not synonymous. The former imparts intent and intent presupposes knowledge. The creator of a nuisance is presumed to

have knowledge of his own acts. But there is no presumption that the successor to the title to realty has knowledge of the acts of his predecessor in interest. The only conclusion possible under the authorities is that the Lennon heirs, having succeeded to the title by operation of law, transferred to the corporation without knowledge of the alleged nuisance, and the corporation took without notice, or, to be more precise, the appellant made no effort to prove knowledge in any of these parties and rests his case on the argument that such proof was not necessary, though the undisputed evidence is that the existence of the alleged nuisance was not discovered until some twenty-six years after the building was constructed.

[11, 12] For the same reason that a landlord cannot be held in damages for a nuisance of which he had no knowledge, he cannot be held for negligence because of a hidden defect in the premises, of which he had no knowledge. Ayres v. Wright, 103 Cal.App. 610, 618, 619, 284 P. 1077; Ellis v. McNeese, 109 Cal.App. 667, 670, 293 P. 854, 855. And it is stated plainly in the latter case that, "It is not sufficient to show that by the exercise of reasonable care the landlord could have discovered the defective condition, but in order to hold him liable it must appear that he knew of such defect." Here the undisputed evidence is that the defective condition of the premises could not have been discovered either by reasonable care or by reasonable inspection. Appellant made this proof in detail to show that the defect was not obvious and that he was free from negligence in not discovering it before the fall. Therein he sought to eliminate the three elements which would have relieved the defendants from legal liability—"actual notice of the danger by the invitee, obvious danger which should have been seen, and danger which might have been seen by reasonable diligence and care". Kessler v. Cudahy Packing Co., 38 Cal.App.2d 607, 610, 102 P.2d 362, 363; 20 R.C.L. p. 57. But, in proving the absence of all these elements as to an expert workman actually on the premises, he at the same time proved the nonliability of the defendants—that the defect was hidden, not discoverable by reasonable care or reasonable inspection, and that it was presumably unknown to the defendants.

[13] Little further need be said in reference to the appeal from the judgment in favor of the warehouse company. Appellant here rests his argument on a charge of negligence in failing to maintain the roof in a safe condition. He proved no lack of reasonable care on the part of the tenant. The appellant's argument that the defective condition might have been discovered through a reasonable inspection is based wholly upon an incorrect statement of the evidence. On this issue he called four witnesses. It was his theory that the skylight collapsed because the beams, or hip rafters, were not properly imbedded in the brick of the walls and that the hips, or ribs, had rusted and decayed. In his own behalf he testified that for twenty-two years he had been working for the same contractor in the construction and repair of skylights, had worked on some having the same type of construction, and had worked on this particular one several times before the accident. In answer to the question "Was it possible without tearing the thing down—by that I mean pulling the beams out, pulling the sheet metal off and taking it to pieces—to see whether or not those beams were embedded in the brick in any way?" he said, "It would be impossible to tell unless you tore the brick out." Appellant's co-worker was called as a witness, and we find these questions and answers given:

"Q. There was nothing to indicate to you as you looked and examined that skylight that there was anything wrong with it that would cause it to let down? A. I didn't see anything.

"Q. The only way you could see it would be to tear it apart to find out how it was made, isn't that right? A. I would say so, yes."

An expert engineer was called by appellant and testified as follows: "Q. What would have been necessary to do, what would it have been necessary to do in order to see whether or not that core bar was embedded in the wall of the building? A. It would have been necessary to lift up some flashing that is embedded in the brick work, take out two lights of glass, and split the sheet metal sash bar open so you could see the core bar."

Another expert, a structural engineer engaged in his profession in San Francisco since 1910, testified that the design of this particular skylight was a usual and customary type. In response to the question, "And looking at such a skylight, without tearing it apart to see how the lateral support was or to see the size of those hip rafters, or digging it out to see how far the end was embedded in the wall, without doing that you could not in any way tell that that skylight was unsafe, could you?" he answered, "No, I don't think you could."

Upon this state of the record counsel for appellant states the question involved as to the tenant's liability should be limited by the consideration "that witnesses testified they did not 'think' its condition could be ascertained without digging out the roof". A more careful examination of the undisputed evidence would have relieved all parties from a useless discussion of a question which is not an issue here since that evidence discloses that no reasonable or ordinary inspection would have enabled the tenant to discover the defective condition. Upon his own evidence the appellant has shown that the tenant exercised all the ordinary and reasonable care required of any reasonable person under the same circumstances, and failed to make any proof of facts from which the jury could have inferred negligence.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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41 Cal.App.2d Supp. 962

PEOPLE v. SELBARES.

C. A. 1741.

Appellate Department, Superior Court, Los Angeles County, California.

Nov. 23, 1940.

1. Statutes 🔑231

The section of Vehicle Code relating to traffic signals and duties of drivers, and section providing that a motorist shall obey instructions of any official traffic signal unless otherwise directed by police or traffic officer are expressions of the same legislative purpose and must be construed together and, so far as reasonably possible, in harmony with each other. Vehicle Code, §§ 475, 476(c) (1), (f), St.1939, p. 1607.

2. Automobiles 🔑329

Under Vehicle Code, the "instructions" of traffic signals are not "applicable" to a traveler, and traffic is not "controlled" by signals when back of the instructions of those signals there stands no legitimizing command of the local authority by which they were erected. Vehicle Code, §§ 475, 476 (c) (1), (f), St.1939, p. 1607.

See Words and Phrases, Permanent Edition, for all other definitions of "Applicable", "Controlled" and "Instructions".

3. Automobiles 🔑329

Where city officials in control of mechanically operated traffic control signal operated by city in public street determined that it should be operated for only a part of each day, a motorist who drove past signal at a time when officials determined that it should not be in operation could not be convicted for failure to stop, notwithstanding semaphore arm of signal directed him to "Stop," it appearing that signal was controlled by an electric clock and deviations from established schedule could be attributed only to some mechanical defect or irregularity in control mechanism. Vehicle Code, §§ 459(d), 465, St.1935, pp. 164, 165; §§ 475, 476(c) (1), (f), St.1939, p. 1607.

◆

Appeal from Municipal Court of Los Angeles; Charles P. Johnson, Judge.

William B. Selbares was convicted of driving past a mechanically operated traffic control signal in the city of Los Angeles, and he appeals.

Reversed and remanded for new trial.

Horowitz & McCloskey, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., W. Jos. McFarland, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for respondent.

SHAW, Presiding Judge.

Defendant drove past a mechanically operated traffic control signal erected and operated by the City of Los Angeles in a public street of the city, at a time when the semaphore arm thereof purporting to control his motion directed him to "Stop". This is made a misdemeanor by the Vehicle Code, unless the facts relied on by defendant relieve him from the charge. These facts are: that the Los Angeles city officials in charge and control of this signal had determined that it should be operated for only a part of each day, and should not be in operation at the time when defendant drove past it; that the operation of the signal was controlled by an electric clock and deviations from its established schedule "can be attributed only to some mechanical defect or irregularity in the control mechanism"; and that it was in fact in operation when defendant drove past it, although it had been inspected and found in good order about two weeks before. Upon these facts the judgment of conviction must be reversed.

Section 476 of the Vehicle Code, as added by St. 1939, p. 1607, contains these provisions pertinent to the present case: "Whenever traffic is controlled by official traffic control signals exhibiting the words 'Go,' 'Caution,' or 'Stop,' or exhibiting different colored lights successively, the following colors only shall be used, and said terms and lights shall indicate as follows: * * * (c) Red alone or 'Stop.' 1. Vehicular traffic facing the signal shall stop before entering the nearest crosswalk at an intersection or at such other point as may be indicated by a clearly visible line, and shall remain standing until green or 'Go' is shown alone, except as provided in the next succeeding paragraph. * * * (f) No person shall disobey the directions of this section except when it is necessary for the purpose of avoiding a collision or in case of other emergency or when otherwise directed by a police or traffic officer, or as permitted under section 454." Section 475 of the Vehicle Code provides: "The driver of any vehicle, the person in charge of any animal, any pedestrian, and the motorman of any street car shall obey the instructions of any official traffic signal applicable to him and placed as provided by law, unless otherwise directed by a police or traffic officer, subject to the exemptions granted by section 454."

[1] Undoubtedly, these two sections, which were both added to the Code in 1939, by the same amendment, are expressions of the same legislative purpose, and. must be construed together and, so far as reasonably possible, in harmony with each other.

[2, 3] No complaint is made and no specification of insufficiency of the evidence is directed to the proposition that this signal was not an "official traffic control signal," placed and maintained by local authorities under section 465, Vehicle Code, St.1935, p. 165, which authorizes such signals to be so placed and maintained, and we therefore proceed on the assumption that it was. No emergency appears, nor any other circumstance which, under the terms of subdivision (f) of section 476, would excuse defendant's failure to stop. Notwithstanding that fact, however, we think the defendant committed no offense when he passed the signal. Section 459 of the Vehicle Code provides that "The provisions of this division [which includes sections 475 and 476] shall not prevent local authorities within the reasonable exercise of the police power from adopting rules and regulations by ordinance or resolution on the following matters: * * * (d) Regulating traffic by means of semaphores or other traffic control signaling devices." Here the local authorities have done just what is thus permitted, and the effect of their regulations is that at the time defendant drove past this signal it should not be operating or regulating traffic. When the Legislature left this power to the local authorities, it cannot reasonably have meant in the same breath to say that the movements of such signals should control traffic at a time when the authorities installing them direct otherwise. Such provision would in effect be a delegation directly to the mechanical device of the power to regulate traffic. While the delegation of fact finding or even discretionary power to officials is often upheld on the ground that they may be expected to apply intelligence to the exercise of such power, we know of no reason for holding that a like delegation to a mere machine would be valid. Better is it, since all laws must have a reasonable interpretation, so to construe the legislation in question as not to impute to it the delegative intent last mentioned, and this construction we adopt, holding that, in the words of section 475, Vehicle Code, the "instructions" of signals are not "applicable to" a traveler, and that, in the words of section 476, Vehicle Code, traffic is not "controlled by" signals, when back of the instructions of those signals there stands no legitimizing command of the local authority by which they were erected.

The judgment is reversed and the cause is remanded to the Municipal Court for a new trial.

BISHOP and SCHAUER, JJ., concur.

16 Cal.2d 655

PEOPLE v. AGNEW.

Cr. 4309.

Supreme Court of California.

Nov. 29, 1940.

1. False imprisonment 🔑44

Evidence sustained conviction of "false imprisonment" arising out of defendant's making a citizen's arrest of person under Penal Code, charging such person with perjury. Pen.Code, §§ 236, 837.

See Words and Phrases, Permanent Edition, for all other definitions of "False Imprisonment".

2. False imprisonment 🔑43

That accused did not lay hands on person arrested under citizen's arrest under Penal Code or that accused did not expressly direct action of officers in detaining such person and causing him to be booked at police station did not preclude prosecution for "false imprisonment", since such detention was the natural consequence of accused's announced arrest of such person and was clearly at accused's implied request and direction. Pen.Code, §§ 236, 837.

3. Criminal law 🔑1037(1)

If there was justification for a claim of misconduct on part of district attorney, it was incumbent upon defendant to make an assignment of misconduct upon the trial and, in absence of such assignment, it is ordinarily too late to raise the point for the first time on appeal.

4. Criminal law 🔑1086(14)

A defendant could not claim prejudicial misconduct on part of district attorney on ground that at one time during trial district attorney had a police photograph of defendant in his hand and held it in a position where jurors might see it, where there was nothing in record of trial to show that such incident occurred, or that any assignment of misconduct was made with respect thereto.

5. Criminal law 🔑1088(5)

Where, several days after defendant's motion for new trial had been denied and judgment of conviction had been entered, defendant filed affidavit in trial court purporting to show for the first time that an alleged prejudicial incident had occurred, such affidavit formed no part of record on appeal and could not be considered.

6. False imprisonment 🔑44

The common-law presumption of unlawfulness in unlawful imprisonment cases still exists in California regardless of fact that such presumption is not specifically enumerated among those found in statute defining disputable presumptions. Pen.Code, §§ 236, 837; Code Civ.Proc. § 1963.

7. Criminal law 🔑330

Where subject matter of negative averment in indictment, or a fact relied upon by defendant as a justification or excuse, relates to him personally or otherwise lies peculiarly within his knowledge, generally, burden of proof as to such averment or fact is on him. Pol.Code, § 4468; Code Civ.Proc. §§ 1962, 1963.

8. False imprisonment 🔑44

The general rule that where subject matter of a negative averment in indictment, or a fact relied upon by defendant as justification or excuse, relates to him personally or otherwise lies peculiarly within his knowledge, defendant has burden of proof as to such averment or fact, applies to cases of false imprisonment even in absence of an express statutory provision to that effect. Pen. Code, §§ 236, 837; Code Civ.Proc. §§ 1962, 1963.

9. False imprisonment 🔑43

The offense of "false imprisonment" consists of two elements, the violation of another's personal liberty, and the unlawfulness of such violation. Pen.Code, §§ 236, 837.

10. False imprisonment 🔑44

In prosecution for false imprisonment arising out of defendant's making a citizen's arrest of person charging such person with perjury, instruction that unless jury found that person had actually committed perjury the arrest was not lawful was erroneous as placing an undue burden upon defendant and depriving him of benefit of reasonable doubt as to lawfulness of the arrest, since instruction was required to be treated as though it expressly declared that burden was upon defendant to prove lawfulness of arrest by preponderance of the evidence. Pen. Code, §§ 236, 837.

11. Criminal law 🔑778(5)

In prosecution for false imprisonment arising out of defendant's making a citizen's arrest of person charging such person with perjury, an instruction that, if person committed perjury, defendant had right to arrest him, but, if person did not commit such perjury, arrest was unlawful and burden was on defendant to prove that person committed the perjury, while substantially correct as far as it went, should not have been given without a qualifying instruction that burden thus placed upon defendant could be met by evidence which produced in jurors' minds a reasonable doubt as to whether person had in fact committed perjury. Pen. Code, §§ 236, 837.

12. False Imprisonment ⚿44

As regards instructions which should be given in prosecution for false imprisonment, no presumption of unlawfulness should arise and no burden should be cast upon a defendant if evidence introduced by prosecution tends to show that arrest caused by defendant was lawful. Pen.Code, §§ 236, 837.

13. Criminal law ⚿1172(2)

In prosecution for false imprisonment arising out of defendant's making a citizen's arrest of person charging such person with perjury in civil action between defendant and such person, error in instructions on subjects of burden of proof and of reasonable doubt was "prejudicial", where there was sharp conflict in evidence and question whether person had committed perjury was one that jury might have decided either way and it was probable that trial might have resulted in acquittal if proper instructions had been given. Pen.Code, §§ 236, 837.

See Words and Phrases, Permanent Edition, for all other definitions of "Prejudicial".

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

R. W. Agnew was convicted of causing the false imprisonment of another, and he appeals from the judgment of conviction and from the order denying a new trial.

Reversed and remanded for new trial.

For prior opinion, see 101 P.2d 775.

R. W. Agnew, in pro. per. and Cantillon & Glover and Thomas B. Sawyer, all of Los Angeles, for appellant.

Earl Warren, Atty. Gen., R. S. McLaughlin, Deputy Atty. Gen., and William La Plante, Deputy Dist. Atty., of Los Angeles, for respondent.

SPENCE, Justice pro tem.

Defendant was charged in three counts, the third count charging false imprisonment by violence, menace, fraud and deceit, a violation of sections 236 and 237 of the Penal Code. He was acquitted on the first two counts but was found guilty on the third count of false imprisonment, a misdemeanor, being a lesser offense included in the charge contained in said third count. He was sentenced to six months imprisonment in the county jail and he appeals from the judgment of conviction and the order denying his motion for a new trial.

This prosecution was the aftermath of certain business dealings and litigation between defendant and Willis O. Prouty, the prosecuting witness. Mr. Prouty was the president of a manufacturing concern at Manhattan Beach. Defendant arranged with Mr. Prouty to purchase some second hand transformers and signs which were located in the yard of the manufacturing concern. Defendant made numerous trips to the yard for the purpose of loading and transporting the purchased articles but was finally refused further admission to the yard by Mr. Prouty because Mr. Prouty had received information to the effect that defendant had taken from the yard numerous articles which were not included in the purchase. Thereafter defendant brought a civil action claiming that certain of the purchased articles had been detained by Mr. Prouty. A cross-complaint was filed alleging conversion by defendant herein of articles not included in the purchase. Said action resulted in a judgment against defendant herein on the cross-complaint in the sum of $566. Several days after the trial of said action, defendant purported to make a so-called citizen's arrest of Mr. Prouty under section 837 of the Penal Code, claiming that Mr. Prouty had committed perjury in the civil action. Mr. Prouty was detained for a time but was subsequently released. This prosecution for false imprisonment followed.

Upon this appeal, defendant contends (1) that the evidence was insufficient to sustain his conviction; (2) that the trial court committed prejudicial error in giving and refusing to give various instructions; and (3) that the district attorney was guilty of prejudicial misconduct. Our review of the record convinces us that error in the instructions requires a reversal of the judgment but before proceeding to that phase of the case, we will deal briefly with the other contentions of defendant.

[1, 2] We find no merit in the contention that the evidence was insufficient to sus-

tain the conviction. This contention appears to be based in part upon the claim that the testimony of Mr. Prouty concerning the circumstances surrounding the original business transaction was inherently improbable and in part upon the claim that there was no evidence showing an "imprisonment" of Mr. Prouty by the defendant. While the testimony of Mr. Prouty on the one hand and of defendant on the other, both in the civil action and in this action, was highly conflicting in so far as it related to the circumstances surrounding the original business transaction, we find nothing in the record which would justify this court in branding the testimony of Mr. Prouty as inherently improbable and therefore insufficient to sustain the conviction in this action. As to the "imprisonment" of Mr. Prouty, there is no material conflict in the evidence. Defendant concedes that he intended to make a citizen's arrest of Mr. Prouty upon a charge of perjury and that he had previously advised the police of such intention. He further concedes that he did announce, in the presence of Mr. Prouty and of the police officers, that he was making a citizen's arrest of Mr. Prouty. We deem it immaterial that defendant did not lay hands on Mr. Prouty or that he did not expressly direct the action of the officers in detaining Mr. Prouty and causing him to be booked at the police station. Such detention was the natural consequence of defendant's announced arrest of Mr. Prouty and was clearly at his implied request and direction.

"False imprisonment is the unlawful violation of the personal liberty of another." Pen.Code, sec. 236. If such imprisonment is effected by "violence, menace, fraud, or deceit", it is punishable by imprisonment in the state prison, but if effected otherwise, it is punishable by fine or imprisonment in the county jail or both. Pen.Code, sec. 237. In defining false imprisonment, it is said in 22 Amer.Juris. at page 359, "In order to constitute a case of false imprisonment, it is essential that there be some restraint of the person; but it is not necessary that there be confinement in a jail or prison. Any exercise of force, or express or implied threat of force, by which in fact the other person is deprived of his liberty or is compelled to remain where he does not wish to remain, or to go where he does not wish to go, is an imprisonment. The wrong may be committed by acts or by words, or both, and by merely operating upon the will of the individual or by personal violence, or both. * * * If an act is done with the intention of causing the confinement of the person actually confined or of another and such act is a substantial factor in bringing about a confinement, it is immaterial whether the act directly or indirectly causes the confinement." See, also, State v. District Court, 70 Mont. 378, 225 P. 1000; Martin v. Houck, 141 N.C. 317, 54 S.E. 291, 7 L.R.A., N.S., 576; 5 Corp.Jur. 386; 6 C.J.S., Arrest, § 1; 25 Corp.Jur. 454. We conclude that said authorities sustain the view that there was ample evidence on an "imprisonment" of Mr. Prouty by defendant within the meaning of said section 236 relating to false imprisonment.

[3-5] As to the claim of prejudicial misconduct on the part of the district attorney, we are of the opinion that there is no merit therein. The asking of certain questions on the trial is now assigned as misconduct but no such assignment was made during the trial. Assuming without deciding that there was justification for a claim of misconduct, it was incumbent upon the defendant to make an assignment of misconduct upon the trial and, in the absence of such assignment, it is ordinarily too late to raise the point for the first time on appeal. People v. King, 13 Cal.2d 521, 90 P.2d 291; People v. Mundt, 31 Cal.App.2d 685, 88 P.2d 767; People v. Payton, 36 Cal.App.2d 41, 96 P.2d 991. The same may be said of defendant's claim that at one time during the trial, the district attorney had a police photograph of defendant in his hand and held it in a position where the jurors might see it. There is nothing in the record of the trial to show that this incident occurred or that any assignment of misconduct was made with respect thereto. Several days after defendant's motion for a new trial had been denied and the judgment of conviction had been entered, defendant filed an affidavit in the trial court purporting to show for the first time that such an incident had occurred. This affidavit forms no proper part of the record on this appeal and may not be considered.

We now turn to defendant's charge of prejudicial error on the part of the trial court in giving and refusing to give various instructions. Except as hereinafter noted, we are satisfied from a reading of the record that there was no prejudicial error in the action of the trial court. The serious question presented is that of the propriety of the trial court's action in dealing with the instructions on the general subject of the burden of proof and the presumption of innocence.

The trial court gave the following instruction on its own motion: "It is admitted by the defendant that he arrested Willis O. Prouty on the charge that he Prouty had committed perjury, both in his affidavit which was part of the cross-complaint in the civil suit of Agnew v. Prouty and in the testimony which he, Prouty, gave at the trial of that action. If Prouty did commit such perjury, the defendant had a right to arrest him, but if Prouty did not commit such perjury, the arrest of Prouty by the defendant was unlawful. The burden is on the defendant to prove that Prouty committed perjury."

The following instruction was given by the trial court as a modification of an instruction requested by the district attorney: "You are instructed that, unless you find from the evidence that Willis O. Prouty had actually committed perjury, a felony, or that a felony had been committed by someone and the defendant had reasonable cause to believe that Willis O. Prouty had committed it, the arrest of Willis O. Prouty, if any was made by the defendant, was not lawful."

The giving of these two instructions and the refusal to give an instruction requested by defendant are assigned as prejudicial error. The refused instruction was to the effect that the defendant was entitled to the presumption of innocence and that it was the duty of the jury to give him the benefit of this presumption and to acquit him unless, after hearing all the evidence, the jury was convinced beyond a reasonable doubt of his guilt.

The trial court no doubt felt that the given instructions were proper under the decision in People v. McGrew, 77 Cal. 570, 20 P. 92. In that case the following instruction was given: "While it is true that the prosecution must prove the imprisonment, it is also true that, the imprisonment being proven, the law presumes it unlawful until the contrary is shown. It is for the defendant to justify it by proving that it was lawful." The court there held that said instruction had been properly given. Defendant contends that the McGrew case should be overruled and that in any event the giving of the above mentioned instructions and the refusal to give his requested instruction on the presumption of innocence, is amplification of the stock instruction based on section 1096 of the Penal Code, should be held to be prejudicial error under the circumstances. We shall therefore consider first the attack upon the soundness of the holding in the McGrew case approving said instruction.

People v. McGrew, supra, was decided in 1888 and has been cited with apparent approval since that time in two civil cases. Monk v. Ehret, 192 Cal. 186, 189, 219 P. 452; Peters v. Bigelow, 137 Cal.App. 135, 137, 30 P.2d 450. It followed the rule laid down in certain criminal cases and set forth in certain texts cited therein. Our review of the authorities leads us to the conclusion that the instruction therein approved was substantially correct as far as it went but that, for the reasons hereinafter stated, said instruction should no longer be given in a criminal case without proper qualification.

We cannot agree with defendant that the instruction given in the McGrew case was wholly unsound. Defendant's argument that there cannot be two conflicting presumptions in a criminal case and that the presumption of innocence outweighs all other presumptions finds some support in the language of certain decisions such as People v. Strassman, 112 Cal. 683, 45 P. 3, but the effect of such language is clearly nullified by the decision in People v. Le Doux, 155 Cal. 535, at page 553, 102 P. 517, at page 524, the court saying. "The instructions declare that the presumption of innocence is the only presumption allowable in a criminal case, that it is not overcome by any other presumption, but does overcome all other presumptions of whatsoever kind or nature. Such, however, is not the law. All presumptions are evidence. Conclusive presumptions (Code Civ.Proc. §§ 1961, 1962) are not overcome by the presumption of innocence, nor are many disputable presumptions so overcome." It thus appears that some disputable presumptions are allowable in criminal cases and the question arises as to whether a presumption of unlawfulness is allowable in a criminal prosecution upon a charge of unlawful imprisonment.

[6] Defendant concedes that there was such a presumption of unlawfulness at common law but calls attention to the fact that there is no statutory presumption on the subject in this state. We deem the last mentioned fact to be immaterial. There were many presumptions known to the common law. As was said in an early

case in this jurisdiction "One of the favorite and much indulged doctrines of the common law, is the doctrine of presumption." Conger v. Weaver, 6 Cal. 548, 556, 65 Am.Dec. 528. At an early date, this state adopted the common law as "the rule of decision in all the courts of this state" in so far as it was not repugnant to the federal constitution or the constitution or laws of this state. Stat. 1850, p. 219; see, also, Pol.Code, sec. 4468; 5 Cal.Juris. 255. When this state adopted the code, it was declared in section 1962 of the Code of Civil Procedure that certain presumptions "and no others" are deemed conclusive but no similar provision was embodied in section 1963 of the Code of Civil Procedure defining disputable presumptions. The last mentioned section merely lists numerous presumptions which are "of that kind". We find nothing in the codes which purports to abolish those disputable presumptions known to the common law which are not repugnant to the presumptions which are found in our statutes. We are therefore of the opinion that the common law presumption of unlawfulness in unlawful imprisonment cases still exists in this state regardless of the fact that such presumption is not specifically enumerated among those found in said section 1963.

[7] This conclusion is in line with the general rule that "Where the subject matter of a negative averment in the indictment, or a fact relied upon by defendant as a justification or excuse, relates to him personally or otherwise lies peculiarly within his knowledge, the general rule is that the burden of proof as to such averment or fact is on him." 16 Corp.Juris. 530, 22 C.J.S., Criminal Law, § 571. The foregoing statement of the rule was quoted with approval in People v. Osaki, 209 Cal. 169, at page 191, 286 P. 1025. While that case is not directly in point, the general rule sanctioning the placing of the burden of proof upon the defendant in certain criminal cases, by statute or otherwise, is discussed at length. The rule is therein referred to as "the rule of convenience or necessity" (209 Cal. at page 185, 286 P. at page 1031), and it is said that "The common-law rule, which has come to be known as the 'rule of convenience,' has been recognized and applied by our federal and state courts in large numbers, in the absence of a statute to that effect." 209 Cal. at page 184, 286 P. at page 1030.

[8, 9] We believe that cases of false imprisonment are of the type in which such general rule should be applied even in the absence of an express statutory provision to that effect. Considerations of convenience and necessity would seem to compel this conclusion. "The offense of false imprisonment consists of two elements, the violation of another's personal liberty, and the unlawfulness of such violation." 12 Cal.Juris. 445. Any allegations in the information charging falsity, unlawfulness or lack of warrant or authority are in the nature of negative allegations as they are the equivalent of an allegation that the imprisonment was not lawful. The difficulty and practical impossibility of proving such negative allegations is apparent from a reading of the code sections relating to arrests, and more particularly from a reading of section 837 of the Penal Code. That section providing that "A private person may arrest another: 1. For a public offense committed or attempted in his presence. 2. When the person arrested has committed a felony, although not in his presence. 3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it." Any attempt to negative the situations covered by the first two subdivisions might well be met with the objection that the questions would call for the legal conclusion of the prosecuting witness and any attempt to negative the situation covered by the third subdivision would be futile. On the other hand, it should be a simple matter for the one assuming to make a citizen's arrest without process to show justification for such arrest if any such justification exists. The facts constituting such claimed justification would ordinarily lie peculiarly within his knowledge. It therefore seems clear that the McGrew case should not be overruled as the instruction therein approved appears substantially correct as far as it went and is sustained by reason and authority.

This conclusion, however, does not fully dispose of defendant's contentions with respect to said instructions nor does it mean that we are of the view that the instruction given in the McGrew case should be given without proper qualification. The instruction given in the McGrew case implied that the burden was upon the defendant to prove the lawfulness of the imprisonment *by a preponderance of the evidence.* The least that may be said is that said instruction, standing alone, would necessarily tend to confuse the jury with respect to the degree or quantum of proof required of the defendant to meet the presumption of the unlawfulness of the imprisonment. In the present case, the trial court went further than did that court in the McGrew case and instructed the jury that "unless you find from the evidence that Willis O. Prouty had actually committed perjury" the arrest was not lawful. This instruction gave additional support to the implication found in other challenged instructions that it was incumbent upon the defendant to prove *by a preponderance of the evidence* that Prouty had committed perjury.

If the instructions had expressly stated that the burden was upon the defendant to prove *by a preponderance of the evidence* that Prouty had committed perjury, such instructions would have been clearly erroneous. This view finds support in the authorities dealing with the burden of proof in homicide cases. Section 1105 of the Penal Code provides, "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." In the early cases it was held that said section required that the defendant show justification *by a preponderance of the evidence* (People v. Hong Ah Duck, 61 Cal. 387; People v. Raten, 63 Cal. 421), but said cases were overruled in People v. Bushton, 80 Cal. 160, 22 P. 127, 549. The last mentioned case has been consistently followed. See People v. Post, 208 Cal. 433, 281 P. 618; People v. Roe, 189 Cal. 548, 209 P. 560; People v. Morris, 3 Cal.App. 1, 84 P. 463; People v. Lanagan, 81 Cal. 142, 22 P. 482; People v. Elliott, 80 Cal. 296, 22 P. 207. In People v. Bushton, supra, the court said at page 164 of 80 Cal., at page 129 of 22 P.: "He is only bound, under this rule, to produce such evidence as will create in the minds of the jury a reasonable doubt of his guilt of the offense charged. * * * The well-settled rule that a defendant shall not be convicted unless the evidence proves his guilt beyond a reasonable doubt applies to the whole and every material part of the case, no matter whether it is as to the act of killing, or the reason for or manner of its commission. * * * The jury should have been instructed that the burden of proving circumstances of mitigation, or that justified or excused the killing, devolved upon the defendant; but that if, upon the whole case, they entertained a reasonable doubt from the evidence, as to his guilt, he should be acquitted. Any other rule as to the weight of the evidence makes one measure applicable to one part of the case; and a different one to another part, and leads to confusion." And as was said in People v. Roe, supra, at page 565 of 189 Cal., at page 567 of 209 P.: "While the court gave the usual instructions as to the presumption of innocence and the fact that defendant's guilt must be established beyond a reasonable doubt, such instructions cannot be said to render the erroneous instruction referred to harmless."

[10-12] Our consideration of the instructions in the present case leads us to the conclusion that said instructions must be treated in the same manner as though they had expressly declared that the burden was upon the defendant to prove the lawfulness of the arrest of Mr. Prouty *by a preponderance of the evidence.* They required that defendant prove that Mr. Prouty "had actually committed perjury". Such instructions placed an undue burden upon the defendant and deprived him of the benefit of a reasonable doubt as to lawfulness of said arrest. We are therefore of the opinion that the second given instruction above quoted was erroneous and should not have been given. We are further of the opinion that while the first given instruction above quoted was substantially correct as far as it went, it should not have been given without a qualifying instruction informing the injury that the burden thus placed upon the defendant could be met by evidence which produced in their minds a reasonable doubt as to whether Mr. Prouty had in fact committed perjury. In passing we may further add that it would appear desirable that any instructions on this subject should embrace a further qualification such as that found in section 1105 of the Penal Code. No presumption of unlawfulness should arise and no burden should be cast upon a defendant if the evidence introduced by the prosecution tends to show that the arrest was lawful.

The question of the necessity for some qualification of the instruction given in People v. McGrew, supra, defining the degree or quantum of proof required of the defendant to meet the burden placed upon him, was not raised in that case. It is significant to note in this connection that People v. McGrew, supra, was decided in the year preceding the decision in People v. Bushton, supra, and prior to the time that the earlier decisions in People v. Hong Ah Duck, supra, and People v. Raten, supra, had been overruled. Under the rule of last mentioned cases, a defendant was required to meet the burden by proving justification by a preponderance of the evidence. It appears probable that counsel in the McGrew case were familiar with said decisions and therefore urged only the point concerning the propriety of raising the presumption of unlawfulness and the propriety of placing the burden of proof upon the defendant in an unlawful imprisonment case.

[13] Having concluded that the giving of the challenged instructions was error, there remains the question of whether such error was prejudicial to the defendant. A review of the record shows that there was a sharp conflict in the evidence. Mr. Prouty's version of the original transaction and defendant's version thereof were diametrically opposed. The question of whether Mr. Prouty had committed perjury in the civil action was therefore one which the jury in this action might have decided either way. Defendant's claim that Mr. Prouty had committed perjury and that the arrest was therefore lawful was his main, if not his sole defense. Under these circumstances, it became highly important to the defendant that proper instructions on the subjects of burden of proof and of reasonable doubt should have been given. But the instructions given on the subject of the burden of proof were erroneous and it is altogether probable that the trial might have resulted in an acquittal if proper instructions had been given. The error in giving said instructions must therefore be held to have been prejudicial. We have not discussed error in the refusal to give defendant's requested instruction above mentioned as we believe that the judgment must be reversed because of the error in the instructions given. It is apparent however that the refusal to give defendant's requested instruction on reasonable doubt strengthens the view that the giving of the erroneous instructions was prejudicial to the defendant under the circumstances here presented.

The judgment and order denying the motion for a new trial are reversed and the cause is remanded for a new trial.

We concur: GIBSON, C. J.; CARTER, J.; EDMONDS, J.; TRAYNOR, J.; HOUSER, J.; SHENK, J.

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16 Cal.2d 683

In re NORTHCUTT'S ESTATE.

SMITH v. DEWAR.

L. A. 17113.

Supreme Court of California.

Dec. 3, 1940.

As Modified on Denial of Rehearing
Dec. 30, 1940.

1. Wills 🔑440

The intention of testatrix was to be gleaned from language in will.

2. Wills 🔑450

The words of a will should receive an interpretation which will give to every expression some effect, rather than one which will render any expression inoperative.

3. Wills 🔑456

Where a will has been drawn by a testator who is not familiar with the technical meaning of terms, a nontechnical meaning may be given them, but where the will was prepared by an attorney, it may be assumed that the legal terms therein were used in their technical sense.

4. Wills 🔑470

The words of a will are not to be construed by any one section or paragraph, but all parts of the will are to be construed together and in relation to each other so as to form, if possible, a consistent whole.

5. Wills 🔑448

Where it is not made certain by the terms of a will that intestacy was intended, an interpretation which will avoid intestacy will be adopted.

6. Wills 🔑565(1)

"Personal property" within testamentary direction that executor sell all personal property of testatrix and divide it in equal shares between two designated beneficiaries included bank deposit of testatrix, particularly where a contrary construction would lead to intestacy as to the bank deposit. Civ. Code, §§ 14, 2221.

See Words and Phrases, Permanent Edition, for all other definitions of "Personal Property".

7. Appeal and error ⚷1008(3)

Where the construction given to an instrument by trial court is reasonable and appears to be consistent with intent of party making it, appellate court will not substitute another interpretation, though it may seem equally tenable with that accorded by the trial court.

◆

Appeal from Superior Court, Los Angeles County; Clemmence Brown, Judge.

Proceeding in the matter of the estate of Carrie L. Northcutt, deceased, between Forest G. Smith, as executor of the last will and testament of Carrie L. Northcutt, deceased, and as trustee of the testamentary trust created under the last will and testament of Carrie L. Northcutt, deceased, and Robbie Nelson Dewar. From an order of distribution, the executor and trustee appeals.

Affirmed.

Prior opinion, 103 P.2d 201.

Helen King, of Los Angeles, for appellant.

Hansen & Sweeney and E. D. Yeomans, all of Los Angeles, for respondent.

PER CURIAM.

The executor and testamentary trustee named in the will of Carrie L. Northcutt, deceased, has instituted this appeal from an order of partial distribution by which the sum of $750 was directed to be paid out of the estate to the respondent, Robbie Nelson Dewar, who was designated as one of the legatees in the said will.

At the time of her death on February 14, 1938, the testatrix possessed two parcels of real property of the estimated total value of $40,000, cash on deposit in a bank in the amount of $7,250.75, and certain other property which consisted of household furniture and personal effects of the value of approximately $200. She was survived by her sister, Mrs. Byrd Lowell Boyd, the latter's son, Earl Lowell Standish, and Robbie Nelson Dewar, who was also a nephew of the testatrix. By the terms of the said will, Forest G. Smith, who as attorney for the testatrix had prepared the document, was appointed the executor thereof.

In the fourth paragraph of the will of the testatrix the following provision was set forth: "I hereby direct that my Executor shall sell all my personal property, and shall divide the same in equal shares between Mrs. Byrd Lowell Boyd and Robbie Nelson Dewar. If, however, any of the portion of the same is needed to pay debts or cost of administration, same to be first deducted."

The fifth paragraph of the will provided as follows: "I give, devise and bequeath the residue of my estate, real and personal, wherever situated and however held, hereinafter termed the 'Trust Estate' to Forest G. Smith, as Trustee in Trust as follows: * * *" Thereafter, and in the same paragraph,—which contained the provisions by which the trust was created,—it was specified that during the term of the trust the entire net income from one of the two parcels of real property hereinbefore mentioned should be paid to Mrs. Byrd Lowell Boyd, sister of the testatrix, and that the net income from the other parcel of real property should be paid to the nephew, Robbie Nelson Dewar. By the provisions of the trust, the trustee was given full power to pay out of the principal and gross income of the trust estate all expenses and liabilities of every kind which might be incurred in the administration and protection of the trust. In the said fifth paragraph of the will it was further provided that the term of the trust should be twenty years, at the expiration of which time each of the two parcels of real property was to become the sole and separate property, respectively, of each of the two named beneficiaries. It appears, therefore, that the sister and the nephew of the testatrix, who are the legatees named in paragraph four, were designated as the only beneficiaries in the fifth paragraph of the will, which related wholly to the "Trust Estate". By the terms of a separate paragraph of the will it was specifically declared that the testatrix "purposely, intentionally and with full knowledge" omitted the making of any provision for her other nephew, Earl Lowell Standish.

The principal question that is presented by the appeal is with respect to the construction which should be placed on the language used in the fourth and fifth paragraphs of the will. In that regard the probate court ruled that the "personal property" mentioned in the fourth paragraph was intended to include the sum of money which at the time of her death was credited to the account of the testatrix in the bank; and on the basis of that construction the court directed that distribution of the sum of money heretofore mentioned be made to the legatee, Robbie Nelson Dewar.

It will be noted that the pertinent portion of the provisions of paragraph four of the will provided as follows: "* * * my executor shall sell all my *personal property,* and shall divide the same in equal shares between Mrs. Byrd Lowell Boyd and Robbie Nelson Dewar". The construction which the probate court placed on the ambiguous language thus quoted was that by the use of the term "personal property" the testatrix intended to have included within that designation the sum of money which was on deposit to her credit in the bank; that such sum was to be added to the money which might be obtained from a sale of that part of the personal property which could be sold, and that the total amount of those two items—less any portion thereof which might be needed to pay debts and costs of administration—should be divided equally between the two named legatees.

As opposed to that conclusion, although appellant concedes that it is generally recognized that the term "personal property" is deemed to include all property—other than real property—which may be the subject of ownership, nevertheless it is contended that when the words "personal property" are used in a testamentary document the meaning which ordinarily might be attached to those particular words may be restricted or controlled by other general words with which they may be associated. And in that regard appellant directs attention to the fact that in said fourth paragraph of the will the testatrix provided that all her personal property should be *sold.* Appellant contends that, since it is obvious that the sum of money on deposit in the bank could not be made the subject of sale, the testatrix apparently had not intended to include that fund as a part of the "personal property" referred to in the said fourth paragraph; that by the further direction in said paragraph that the executor "shall divide the same", the testatrix meant that the *proceeds* from the intended sale of that part of her personal property which was salable should be divided; and that the balance of her personal property—which was the sum of money on deposit to her credit in the bank—was not intended to be disposed of by the provisions of the fourth paragraph, but was intended to pass to the trustee by virtue of the residuary language in the fifth paragraph, wherein it was provided that: "I give, devise and bequeath the residue of my estate, real and personal, wherever situated and however held, hereinafter termed the 'Trust Estate' to Forest G. Smith, as Trustee in Trust as follows: * * *."

In that regard, it is contended by appellent that, by the use of the last quoted language in the fifth paragraph of the will, the testatrix intended to bequeath to him, as trustee, "for the purposes of the trust", all her personal property except the furniture and personal effects. In answer to that contention, respondent suggests that the use of the term "personal property" in the residuary clause was merely a compliance with the form in which a residuary provision is usually set forth in a will—for the purpose of preventing the possible lapse of a gift for which a testator may have made specific provision elsewhere in the will. In connection therewith, respondent asserts that notwithstanding the residuary language which was employed in the fifth paragraph of the will, the remaining provisions set forth therein disclose the fact that it was not the intention of the testatrix that the money on deposit to her credit in the bank should pass into and become a part of the trust. Futhermore, respondent directs attention to the following facts which are made apparent from a reading of the entire context of the said fifth paragraph: that no express provision was made therein for the disposition to any beneficiary of either the income from or the principal of the fund on deposit in the bank; that the existence of such a fund was not even mentioned therein; and that the only property which the testatrix disposed of, or even attempted to dispose of, by the provisions of the trust—as fully set forth in the fifth paragraph of the will—was the real property therein described, and the income therefrom. In that connection, respondent cites the provisions of section 2221, Civil Code, together with the cases entitled In re Estate of Ralston, 1 Cal.2d 724, 726, 37 P.2d 76, 96 A.L.R. 953, and Wittfield v. Forster, 124 Cal. 418, 57 P. 219, as authority for the rule that it is essential to the creation of a voluntary trust that the language by which the trust is sought to be created not only indicate a definite intention to create a trust, but that it also express with certainty the subject, purpose and beneficiary of the trust.

[1-4] However, returning to a more specific consideration of the language which appears in the fourth paragraph of the will,—from which the intention of the testatrix is to be gleaned (In re Estate of Robinson, 159 Cal. 608, 115 P. 49; In re Estate of Bourn, 25 Cal.App.2d 590, 78 P. 2d 193; In re Estate of Combs, 136 Cal. App. 286, 28 P.2d 711),—and in the light of the rule that the words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any expression inoperative (In re Estate of Tompkins, 132 Cal. 173, 64 P. 268; In re Estate of Deffebach, 14 Cal.App.2d 268, 57 P.2d 1340), among other things, it may be noted that in referring to the disposition of her personal property the testatrix used the word "all". By the particular language there employed the testatrix directed the executor to sell *"all"* her "personal property" and "divide *the same*" equally between the two named legatees. It therefore becomes obvious that if appellant's proposed construction of the provisions of the said fourth paragraph of the will were to be adopted, a small portion only of "all" of the personal property of the testatrix would pass to the designated legatees. Moreover, with respect to the signification which may be attached to certain technical words and phrases, by the specific provisions of section 14, Civil Code, the words "personal property" are to be interpreted as including "money". And although it is true that when used in a will technical words are not always to be construed in a technical sense, and that a nontechnical meaning may be given to such words where it appears that the will has been drawn solely by the testator who was not familiar with the technical meaning of the terms (Estate of Gracey, 200 Cal. 482, 253 P. 921; Estate of Olsen, 9 Cal.App.2d 374, 379, 50 P.2d 70), yet in the present case, as hereinbefore has been stated, the will was not prepared by the testatrix herself but was drafted by her attorney. Accordingly, it may be assumed that the legal terms embodied in the will were used in their technical sense. In that regard, in Estate of Bourn, 25 Cal.App.2d 590, 595, 78 P.2d 193, 196, it was said that: "As declared by said section 106 [Probate Code], 'technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention, or unless it satisfactorily appears that the will was drawn solely by the testator, and that he was unacquainted with such technical sense'; and it is held generally that where the will is drawn by a lawyer whose experience and competence [are] beyond question, the presumption that legal terms embodied in the will are used in their legal sense is all but conclusive. See Hay v. Dole, 119 Me. 421, 111 A. 713; In re Leonard's [Will], 143 Misc. 172, 256 N.Y.S. 355, citing numerous authorities." See, also, Estate of Hollingsworth, 37 Cal.App. 2d 432, 99 P.2d 599; 26 Cal.Jur., p. 895. Furthermore, one of the governing rules with respect to the construction of a will is that the words are not to be construed by any one section or paragraph but that the instrument must be read as a whole (Estate of Vizelich, 129 Cal.App. 347, 18 P.2d 773; Estate of Somerville, 12 Cal. App.2d 430, 55 P.2d 597), and that all parts of a will are to be construed together and in relation to each other so as to form, if possible, a consistent whole. Estate of Mayne, 28 Cal.App.2d 340, 82 P.2d 504.

[5] In the light of the foregoing rules, it becomes apparent that if the terms of the will of the testatrix were to be so construed that the money on deposit in the bank was intended to pass to the trustee and become a part of the trust estate, the ultimate result would be that Mrs. Northcutt died intestate as to that particular property, since no beneficiary was expressly named in the trust provisions of the will with respect to the fund in the bank. And, in the event of the application of that construction, the sum which was on deposit in the bank would not be distributed until after the termination of the trust,—at which time one of the heirs at law, who had been specifically disinherited by the testatrix in her will, would thereupon be entitled to a proportionate share of that fund. With respect to such a situation, many decisions of this state provide authority for the rule that where by the terms of a will it is not made clear nor certain that intestacy—whether partial or

total—was intended, an interpretation which will avoid intestacy will be adopted. In re Estate of Deffebach, 14 Cal.App.2d 268, 57 P.2d 1340; In re Estate of Mallon, 34 Cal.App.2d 147, 93 P.2d 245; In re Estate of Wallace, 11 Cal.2d 338, 79 P.2d 1094; In re Estate of Beldon, 11 Cal.2d 108, 77 P.2d 1052. Also, it has been judicially declared that "The very fact of making a will raises a presumption that the testatrix intended to dispose of all of her property". 26 Cal.Jur. p. 899; see, also: Estate of Beldon, 11 Cal.2d 108, 77 P.2d 1052; Estate of Olsen, 9 Cal.App.2d 374, 379, 50 P.2d 70, 72. And in the case last cited, the court reiterated the rule that "Whenever a disputed word or phrase may be reasonably given either of two meanings, that meaning should be given which will prevent intestacy. * * * In re Estate of Farelly, 214 Cal. 199, 206, 4 P.2d 948; In re Estate of Heberle, 153 Cal. 275, 95 P. 41; O'Connor v. Murphy, 147 Cal. 148, 81 P. 406." Constructions which lead either to total or partial intestacy are not favored. In re Estate of Gracey, 200 Cal. 482, 253 P. 921.

[6] On consideration of the will in its entirety, it would seem obvious that the testatrix did not intend that the fund on deposit in the bank should pass to the trust estate, which was created by the provisions of paragraph five. That conclusion is supported by the fact that with respect to the bank account the testatrix failed to appoint a beneficiary,—and by the further fact that none of the provisions of the trust contains any reference to such fund, or to a disposition either of the income from or the principal of any property except the two parcels of real property. And it appears equally clear that the testatrix desired that *all* her personal property, including the said money in the bank, should be distributed under the provisions of the fourth paragraph of the will.

[7] Furthermore, the construction placed by the probate court on the terms of the will is not unreasonable. And the rule is well settled that where the construction given to an instrument by a trial court is reasonable and appears to be consistent with the intent of the party making it, courts of appellate jurisdiction will not substitute another interpretation, even though it may seem equally tenable with that accorded by the trial court. In re Estate of Maloney, 27 Cal.App.2d 332, 334, 80 P.2d 998; In re Estate of Mallon, 34 Cal.App.2d 147, 93 P.2d 245; In re Estate of Boyd, 24 Cal.App.2d 287, 74 P.2d 1049; In re Estate of Wilson, Cal.App., 104 P.2d 716; In re Estate of Bourn, 25 Cal.App.2d 590, 78 P.2d 193.

It therefore follows that the order appealed from should be, and it hereby is, affirmed.

16 Cal.2d 691

WALSH et al. v. RAILROAD COMMISSION et al.

L. A. 17569.

Supreme Court of California.

Dec. 4, 1940.

1. Courts 🔑206(1), 207(3)

The Supreme Court has no original jurisdiction over applications for declaratory or injunctive relief, and the only relief in the nature of injunctive relief which may be granted is that which is granted as an incident to exercise of original jurisdiction in such proceedings as prohibition.

2. Prohibition 🔑22

A peremptory writ of prohibition may not issue with respect to any respondent who has not been given notice. Code Civ.Proc. §§ 1088, 1105.

3. Courts 🔑207(5)

City attorney's prosecution of alleged violators of Motor Carrier Transportation Agent Act was not exercise of "judicial function" so as to warrant issuance of prohibition against city attorney by Supreme Court exercising original jurisdiction. Code Civ. Proc. § 1102; St.1933, p. 1012, § 1 et seq., as amended by St.1935, p. 1833, and p. 1013, § 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Judicial Function".

4. Prohibition 🔑1

"Prohibition" may not issue except for purpose of arresting proceedings of those exercising judicial functions. Code Civ.Proc. § 1102.

See Words and Phrases, Permanent Edition, for all other definitions of "Prohibition".

5. Prohibition ⚷3(1)

In determining whether petitioners would be without a remedy unless prohibition issued to prevent enforcement of statute making it unlawful to engage in business of a motor carrier transportation agent without a license, constitutionality of the statute could be raised upon trial of charges against petitioners or upon habeas corpus. St.1933, p. 1012, § 1 et seq., as amended by St.1935, p. 1833, and p. 1013, § 3.

6. Prohibition ⚷3(1)

In determining whether petitioner for writ of prohibition to prevent enforcement of penal statute has other remedy, whether petitioner's acts constitute violation of the statute may be raised, and, ordinarily, can only be raised, upon trial of charges against petitioner.

7. Prohibition ⚷19

Where court determined that petitioners for writ of prohibition were not entitled to any relief, intervention by party which sought to oppose petitioners and to raise issues of fact was denied.

Original proceeding by E. A. Walsh and others against the Railroad Commission and others for a writ of prohibition and other relief to prevent enforcement of the Motor Carrier Transportation Agent Act, St. 1933, p. 1012, § 1 et seq., as amended by St. 1935, p. 1833, wherein Passenger Carriers, Incorporated, applied for leave to intervene.

Leave to intervene denied, demurrer to petition for writ of prohibition and other relief sustained, and petition denied.

Paul H. Bruns, of Los Angeles, for appellant.

W. J. McFarland, Asst. City Atty., and John L. Bland, Deputy City Atty., both of Los Angeles, for respondent Ray L. Chesebro.

SPENCE, Justice pro tem.

Petitioners filed herein a petition entitled "Petition for Writ of Prohibition and/or Writ of Injunction and for Temporary Restraining Order". The prayer of said petition asks "(1) For a declaration of their rights, duties and obligations with respect to the respondents herein in relation to the provisions of said Motor Carrier Transportation Agent Act and said Act; and (2) For a writ of prohibition to prohibit the respondents, excepting the Railroad Commission of the State of California, from enforcing or attempting to enforce the said Act, or any of its terms or provisions, against the petitioners; and/or (3) For a writ of injunction restraining and enjoining said respondents, excepting the Railroad Commission of the State of California, from enforcing or attempting to enforce the said Act, or any of its terms or provisions, against the petitioners; and (4) For a temporary restraining order, or an alternative writ of prohibition or injunction against the respondents, excepting the Railroad Commission of the State of California, from enforcing or attempting to enforce the said act, or any of its terms or provisions, against the petitioners. * * *"

On June 14, 1940, this court ordered that an alternative writ of prohibition issue returnable on September 24, 1940. Petitioners failed, however, to cause the issuance or service of any alternative writ and the only respondent who has appeared herein is "Ray L. Chesebro, City Attorney of the City of Los Angeles", who appeared as a named respondent and not on behalf of the respondent city of Los Angeles or any other respondent. There is nothing in the record to show that the remaining respondents, or any of them, have ever been served with or have ever had any notice of the hearing or any notice of the pendency of this proceeding.

On the return day, appearances were made only on behalf of the petitioners and on behalf of said respondent Ray L. Chesebro. Said respondent had filed a demurrer to the petition and said demurrer was argued and ordered submitted. There was also an application for leave to intervene made by Passenger Carriers, Incorporated. Said application was likewise submitted.

The petition herein is a lengthy one but, for the purpose of this discussion, the essential facts may be briefly stated. It is alleged therein that each petitioner has for some time been engaged in the business of conducting an "auto travel business" in the city of Los Angeles; that petitioners have been threatened with prosecution and certain petitioners have been arrested and are being prosecuted in the municipal court of the city of Los Angeles upon the charge of violating section 3 of chapter 390 of the Statutes of 1933, pp. 1012, 1013, as amended in 1935 (Stats.1935, chap. 665, p. 1833); that said statute is unconstitutional and that, in any event, the nature of each petitioner's acts in conducting an "auto travel business", as described in the petition, did not constitute a violation of the statute.

No copy of any complaint filed against any petitioner has been set forth but said section 3 of the statute, which petitioners allege they have been charged with violating, reads in part as follows: "it shall be unlawful for any person, firm or corporation to engage in the business, or act in the capacity, of a motor carrier transportation agent within the meaning of this act without first obtaining a license therefor."

The unusual procedural situation presented here leads us to the conclusion that regardless of the question of whether the act is constitutional or unconstitutional and regardless of the nature of petitioners' acts in conducting an "auto travel business", the demurrer to the present petition must be sustained and the petition must be denied.

[1] The first observation to be made is that the present petition must be treated solely as an application to this court for a writ of prohibition. This court has no jurisdiction over original applications for declaratory relief or for injunctive relief, and the only relief, in the nature of injunctive relief, which may be granted by this court is that relief which is granted as an incident to the exercise of its original jurisdiction in such proceedings as prohibition proceedings.

[2] The second observation to be made is that petitioners have failed to bring respondents, other than respondent Chesebro, before this court in any appropriate manner. A peremptory writ of prohibition may not issue with respect to any respondent without notice to said respondent (Code Civ.Proc., secs. 1088 and 1105; 21 Cal.Jur. 626, sec. 23), and as no notice has been given to and no appearance has been made by respondents except as above noted, no peremptory writ could issue herein with respect to respondents other than respondent Chesebro.

[3, 4] We now come to a consideration of the demurrer of respondent Chesebro to the petition on file herein. It is the contention of said respondent that said petition does not state facts sufficient to warrant the issuance of a writ of prohibition against said respondent. This contention must be sustained. It is alleged in the petition that said respondent is the city attorney of the city of Los Angeles and that he is threatening to prosecute petitioners and is prosecuting certain petitioners in the municipal court upon complaints charging violations of the above-mentioned act. In so doing, said respondent Chesebro is not exercising any judicial function and it is clear that the writ of prohibition may not issue except for the purpose of arresting the proceedings of those "exercising judicial functions". Code Civ.Proc. § 1102; 21 Cal.Jur. 591, § 7, and cases cited.

[5, 6] Petitioners take the position that they will be without a remedy unless relief is granted to them in this proceeding. With this, we cannot agree. The question of the constitutionality of the act may be raised upon the trial of any petitioner or said question may be raised more expeditiously upon a habeas corpus proceeding. The further question of whether the acts of any petitioner constitute a violation of the statute may be raised and ordinarily can only be raised upon the trial of such petitioner. Sullivan v. San Francisco Gas & Electric Co., 148 Cal. 368, 83 P. 156, 3 L.R.A.,N.S., 401, 17 Ann.Cas. 574; Los Angeles T. Ins. Co. v. Los Angeles, 52 Cal. App. 152, 198 P. 1001. We do not wish to be understood as holding that there are no remedies available to petitioners other than those above mentioned but we are merely indicating that petitioners are not without remedy. In fact, petitioners affirmatively allege that one of said petitioners has instituted a habeas corpus proceeding in the superior court and that other petitioners have instituted actions in the superior court and in the United States District Court. It seems clear, however, that this court cannot properly issue a peremptory writ of prohibition or other relief against any of the respondents in this proceeding for the reasons above set forth.

[7] The application for intervention herein is made on behalf of a corporation which opposes the application of petitioners and which seeks to raise certain issues of fact. In view of our conclusion that petitioners are not entitled to any relief in this proceeding against any of the respondents, it would serve no useful purpose to permit the requested intervention.

The application of Passenger Carriers, Incorporated, for leave to intervene is denied. The demurrer of respondent Ray L. Chesebro to the petition is sustained and the petition for a peremptory writ of prohibition and other relief is denied.

We concur: GIBSON, C. J.; SHENK, J.; TRAYNOR, J.; EDMONDS, J.; HOUSER, J.; CARTER, J.

16 Cal.2d 668

TAYLOR et ux. v. POLE et al.

L. A. 17283.

Supreme Court of California.

Dec. 2, 1940.

Rehearing Denied Dec. 30, 1940.

1. Damages 🔑32

Definite disturbances of the nervous system caused by mental shock, excitement and so on, are classed as "physical injuries" and are recognized elements of damage.

See Words and Phrases, Permanent Edition, for all other definitions of "Physical Injuries".

2. Damages 🔑96

The segregation of the items which combine to form the full measure of actual injury in a personal injury action is a matter for the exercise by the jury of its unbiased judgment, and in assessing the damages, it is accorded a wide latitude and an elastic discretion.

3. Damages 🔑96

In personal injury involving aggravation of pre-existing ailment, there is no scale by which damages are to be graduated with certainty, and they admit of no other test than the intelligence of a jury governed by a sense of justice.

4. Trial 🔑296(7)

In action for injuries sustained in an automobile accident, instruction that if because of plaintiff's pre-existing condition, there was a change in her subsequent to the accident, and such change was due to combination involving aggravation of her then condition plus exaggeration on her part of the aggravation, and if there was no testimony from which jury could determine how much was aggravation and how much was not, then plaintiffs had failed to establish by preponderance of evidence the amount of aggravation, improperly placed an unwarranted burden of proof on plaintiff and misled jury, and the defects were not cured by remainder of charge but were so prejudicial as to require new trial on issue of damages.

5. Appeal and error 🔑882(17)

Where jury found for plaintiff suing for injuries and damage to automobile but assessed his damages at "$No," notwithstanding undisputed item of property damage of $117.64, the jury's finding, being without support in the evidence, was erroneous in its entirety, and therefore action of court in ordering payment of $117.64 as a condition of denial of motion for new trial did not cure the error in the verdict.

◆

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by Austin H. Taylor and wife against Rupert Pole and another to recover for injuries to person and property. From judgment for less than the amount demanded, plaintiffs appeal.

Judgment reversed and cause remanded for new trial solely on issue of damages, with directions.

Prior opinion, 92 P.2d 483.

Richard Dunnigan, Burton B. Crane, and Bernard Brennan, all of Los Angeles, for appellants.

Nourse & Jones and Nourse, Betts & Jones, all of Los Angeles, for respondents.

PER CURIAM.

Plaintiffs, husband and wife, brought this action to recover for injuries to person and property sustained when the automobile in which they were riding was struck by a machine driven by Rupert Pole, a minor. The accident occurred on July 22, 1937. Plaintiffs' car was stopped in traffic on a steep grade, and was struck from the rear by the automobile driven by defendant Pole, traveling at a rate of from ten to twenty miles an hour. The trial took place in June, 1938. The jury found for the plaintiffs, assessing Mae M. Taylor's damages at $650 and "Austin H. Taylor's damages at $No." Plaintiffs' motion for a new trial was denied as to Mrs. Taylor, and conditionally "denied as to Austin H. Taylor in the event defendants pay into court $117.64 for the plaintiffs; otherwise granted as to him." The defendants paid the required sum into court.

Both plaintiffs appealed from the judgment. Mrs. Taylor contends that the award to her is so grossly inadequate as to compel the conclusion that the verdict was the result of passion and prejudice, and that the court erred in its instructions to the jury. She is a woman over fifty years of age, and the evidence discloses that she was severely injured in the accident.

According to her testimony, and that of witnesses on her behalf, she sustained bruises and contusions of the shoulder, arm and side, a laceration several inches in length on the left leg, and a bump on the forehead about the size of a hen's egg. The force of the collision caused her to lose consciousness for a short period, and she was taken to the receiving hospital for temporary treatment. A few hours later she was removed to her home, where she was confined to her bed for six weeks or more. She was attended regularly by her family physician and was examined by medical experts called in by him. Her prior history showed that between the ages of four years and twenty years she had frequently had hysterical seizures during which she sometimes frothed at the mouth, and on one occasion she fell and broke her arm. In 1911 or 1912 these spells disappeared and she enjoyed fairly good health, except that on one occasion, about two years before the accident, she was in a semi-conscious condition or coma for about five days. She had previously had an abdominal operation. She had also been troubled with nervous indigestion, and had been treated for gastric ulcers and other ailments. During the year following the accident and up to the time of trial of the cause she suffered from severe headaches and was in a highly nervous condition. Her eyes crossed spasmodically and could be brought to a focus only by voluntary action of the muscles. Her hearing was impaired, and her teeth injured. She suffered from numbness or anesthesia of her left side, including her arm and leg. The movement of her left arm was limited and painful, and her left foot dropped, causing her leg to drag when walking. Some of these injuries, particularly those to the leg and foot, were expected to be permanent.

Nine medical experts called by the plaintiffs, five medical experts called by the defendants, and several lay witnesses testified to the nature and severity of Mrs. Taylor's injuries, their probable permanence, and the extent, if any, to which her condition might be attributable to pre-existing disease, or aggravation thereof by the accident, rather than directly to injury. There was a question as to whether Mrs. Taylor had actually sustained a blow on the head, or brain injury. No record was made at the receiving hospital of a lump on her forehead. There was also a question as to whether the difficulty with eyes and teeth and certain other distressing conditions had existed prior to the accident. Was Mrs. Taylor malingering or exaggerating her disabilities? To what extent, if any, had the accident aggravated her physical troubles, nervousness, and tendency to have hysterical seizures?

On all of these issues, the testimony of the expert witnesses was conflicting. Notwithstanding this, however, their evidence as a whole showed without contradiction that Mrs. Taylor was badly hurt in the collision. The fact of the laceration of her leg was undisputed, and the condition resulting from it which caused her left foot to drop and her leg to drag was noted by all of the physicians who examined her subsequent to the accident. They differed only in their views as to the probable permanence of this disability. The medical experts for defendants expressed the opinion that the condition was due to severance of the peroneal nerve or muscle at the point of laceration, and that rejuvenation of the nerve seemed to be in progress. One of them stated that hysterical reaction as well as severance of the nerve was a factor to be considered as a cause of the complete foot drop. Another said that he had measured the left leg and found it to be an inch smaller than the right.

Two of these witnesses testified that the hysteria which Mrs. Taylor experienced at periods both prior to and after the accident, is a real functional disease, a characteristic symptom of which is organic numbness or loss of sensation. In this type of condition, one of them explained, any stress suffered by the patient is liable to cause a recurrence of hysterical seizures or an aggravation or exaggeration of incapacity during a period of litigation.

It thus appears that without considering plaintiffs' evidence as to the severity of

Mrs. Taylor's injuries and the extent of disability caused by the accident, the testimony of defendants' expert witnesses, standing alone, is sufficient to show that her leg was lacerated in the collision, with a resulting prolonged impairment of function which may or may not be permanent, and that the hysteria to which she was susceptible was aggravated to a degree, however slight. The amount of aggravation no physician would attempt to define with precision.

[1] Such a record might well justify the conclusion that the award made by the jury in the sum of $650 was inadequate as a matter of law, particularly in view of the fact that in this state definite disturbances of the nervous system caused by mental shock, excitement, and so on, are classed as physical injuries and are recognized elements of damage. Dryden v. Continental Baking Co., 11 Cal.2d 33, 39, 77 P.2d 833; Sloane v. Southern Cal. Ry. Co., 111 Cal. 668, 44 P. 320, 32 L.R.A. 193; 8 Cal.Jur. p. 772. The evidence shows that following the accident Mrs. Taylor incurred expenses of over $2,800 for medical and nursing care, and although some of these expenses were unquestionably incurred for the treatment of pre-existing disease, a portion of them no doubt constitute special damages suffered as a result of the accident.

It is, however, unnecessary to determine the issue of inadequacy of the verdict, for we deem that defendants' instruction No. 16-A, one of several questionable instructions given by the trial court, on the subject of damages, was so clearly prejudicial as to require a reversal of the judgment. It reads: "You are instructed that if you find that because of Mrs. Taylor's pre-existing conditions, whatever they may have been, there was a change in her subsequent to the accident, and further find that such change was due to a combination involving aggravation of her then condition plus exaggeration on her part of the aggravation, and if you find that there is no testimony from which you can determine how much is aggravation and how much is not, then the plaintiffs have failed to establish by a preponderance of the evidence the amount of aggravation, and in such event you can not arbitrarily fix the aggravation but will resolve the issue in favor of the defendant and against the plaintiffs because of plaintiffs' failure to establish by a preponderance of the evidence."

The paramount vice of this instruction is that it required the jury to undertake what no medical expert would even attempt, and what some tacitly admitted could not be done, that is, to sunder the "combination involving aggravation of her then condition plus exaggeration on her part of the aggravation", and to "determine how much is aggravation and how much is not", or "the amount of aggravation"; if they found no testimony from which this determination could be made, then, they were instructed, they must resolve the issue against the plaintiffs.

The instruction also ignored the fact that where there is an aggravation of the disease of hysteria induced by accident, an exaggeration of disability is itself a characteristic condition or symptoms of the disease. In such case a patient's exaggeration of incapacity may be classed in whole or in part as an aggravation of disease caused by the accident, or in whole or in part as due to deliberate malingering or fraudulent simulation of disability. The issue is one of fact.

[2, 3] Obviously there is no rule by which either expert or laymen may measure the precise degree, if any, to which a pre-existing pathological condition has been aggravated, or to which the patient has exaggerated the aggravation. The mental elements which must be taken into account with other elements in determining a just admeasurement of compensatory relief afford no definite or certain criterion by which the amount to be assigned to the one item or the other may be ascertained. Eldridge v. Clark & Henery Const. Co., 75 Cal.App. 516, 535, 243 P. 43. From the very necessities and uncertainties of the situation, the segregation of the items which combine to form the full measure of actual injury is a matter for the exercise by the jury of its unbiased judgment, and in assessing the damages it is accorded a "wide latitude" and an "elastic discretion". Knight v. Fitch, 22 Cal.App.2d 252, 254, 70 P.2d 976. As stated in Eldridge v. Clark & Henery Const. Co., supra, 75 Cal.App. at pages 536, 537, 243 P. at page 52: "* * * In cases of this class there is no scale by which the damages are to be graduated with certainty. They admit of no other test than the intelligence of a jury, governed by a sense of justice. * * *"

[4] In the instruction here under discussion the court not only placed an un-

warranted burden of proof on plaintiffs in requiring an exact measurement of indefinite elements of injury, but at the same time it misled the jury because of its failure to define properly the broad standard by which they might, in the exercise of their sound discretion and good sense, assess the amount of damages to be awarded. Lee v. Southern Pac. R. Co., 101 Cal. 118, 121, 35 P. 572; Knight v. Fitch, supra. These defects were not cured by the remainder of the charge, and unquestionably the error was so prejudicial as to entitle Mrs. Taylor to a retrial of the issue of damages.

The appeal of Mr. Taylor is also well taken. As heretofore stated, by the verdict the jury found for him, but assessed his damages at "$No." This was clearly erroneous, as witness the fact that the court conditioned its denial of motion for new trial upon payment into court by defendants for plaintiffs of the sum of $117.64, the amount expended by Mr. Taylor for repair of his automobile.

Mr. Taylor, who is a chiropractor, testified that in the accident his upper back was wrenched and the nerves of his left arm were strained. For a few days he was unable to use the arm, and he suffered pain for about two months. He received no medical attention, but rendered treatment to himself with the aid of his office help. At the time of trial he had made a complete recovery. This testimony was not contradicted, but neither was it corroborated. Mr. Taylor also testified to the amount of damage done to his car. This testimony was likewise uncontradicted, and it was corroborated by the introduction in evidence of the repair bill in sum of $117.64.

Defendants contend that it is obvious that the jury, in assessing Mr. Taylor's damages at "$No.", after finding in his favor, discredited his statement that he suffered personal injuries, and inadvertently overlooked the undisputed item of property damage. Hence, say defendants, the error in the verdict was completely cured by the trial court's action in ordering payment of $117.64, the exact amount of the property damage, as a condition of denial of motion for new trial.

[5] There is a conflict of authority as to the extent of the power of a trial court to assess damages or increase the amount of an inadequate award made by jury verdict, as a condition of denial of motion for new trial. See Adamson v. County of Los Angeles, 52 Cal.App. 125, 198 P. 52; County of Los Angeles v. Rindge Co., 53 Cal.App. 166, 200 P. 27; San Francisco v. Superior Court, 94 Cal.App. 318, 271 P. 121; Werner v. Bryden, 84 Cal.App. 472, 258 P. 138; and review of authorities therein; Secreto v. Carlander, 35 Cal. App.2d 361, 95 P.2d 476; 28 Cal.L.Rev. note p. 533 et seq.; 61 A.L.R., note, pp. 194 et seq.; Dimick v. Schiedt, 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603, 95 A.L.R. 1150; McCormick on Damages § 19, pp. 82-83; 44 Yale L. Jour. p. 318 et seq. The question need not be here determined because even the application of the broadest rule to which we have been cited would not sustain the trial court's action in the present cause. This is so because in ordering the increase to cover the item of property damage the court failed to take cognizance of the fact that Mr. Taylor also sought compensation for personal injuries.

Had only the issue of property damage been before the jury, the trial court might have been justified in concluding that the omission of that item from the verdict was pure inadvertence. On the other hand, had only the issue of damages for personal injuries been submitted, the conclusion might have been warranted that the jury's failure to award even nominal damages was the result of its failure to credit Mr. Taylor's uncorroborated statement that he was hurt. The fact is, however, that both elements were involved, and the trial court was not entitled to indulge in a dual speculation with respect to them. It could not infer that the failure to make an award for property damage was the result of oversight, and by the same token infer that the failure to make an award for personal injuries was the result of discrediting Mr. Taylor's testimony. No severance of issues was made upon the trial or on submission of the cause to the jury. In assessing Mr. Taylor's damages at naught, therefore, the jury made a finding with respect to both property damage and personal injuries. This finding, being without support in the evidence, was erroneous in its entirety. The trial court, in ruling on motion for new trial, could not split the issue of damages and presume that the jury's conclusion was partly right and partly wrong, and by ordering an increase to cover property damage, substitute its own finding for the verdict.

Although a reversal of the judgment both as to Mr. and Mrs. Taylor is required, the retrial may be limited to the issue of damages. No appeal from the judgment was taken by defendants. The implied finding of the jury that the accident was the result of the negligence of defendant Pole had overwhelming support in the evidence and is conclusive.

The judgment is reversed, and the cause is remanded for a new trial solely upon the issue of the amount of damages, and the trial court is directed, upon settlement of that issue, to enter judgment in favor of the plaintiffs for the amount so found.

16 Cal.2d 676

METROPOLITAN WATER DIST. OF SOUTHERN CALIFORNIA v. ADAMS et al.

L. A. 17512.

Supreme Court of California.

Dec. 2, 1940.

Rehearing Denied Dec. 30, 1940.

1. Eminent domain 🔑148

Statutes empowering court, in eminent domain action, after trial and judgment, or pending appeal from judgment, to authorize plaintiff to take possession and award defendant interest from date of order letting plaintiff into possession, were inapplicable to eminent domain action in which plaintiff took possession of land under order of court made before judgment. Code Civ.Proc. §§ 1249, 1254; Const. art. 1, § 14.

2. Eminent domain 🔑148

The taking possession of land in eminent domain action by plaintiff under court order does not vest landowner's right to payment for land so as to entitle owner to interest from date of taking possession to date of payment. Civ.Code, § 3302; Code Civ. Proc. § 1255a; Const. art. 1, § 14.

3. Eminent domain 🔑160

Under eminent domain provision of Constitution requiring immediate payment "as soon as the same can be ascertained according to law", the quoted phrase means after a jury has fixed the amount of compensation, or in case action is tried without jury, after the court has determined the amount. Const. art. 1, § 14.

See Words and Phrases, Permanent Edition, for all other definitions of "As Soon as the Same can be Ascertained According to Law".

4. Eminent domain 🔑198(1)

In eminent domain action, one of the possible issues is whether there is any public necessity to take owner's land, and, if such issue is decided against the condemner, the proceeding terminates and the owner is restored to possession of his land, if possession thereof has been previously taken by the condemner. Const. art. 1, § 14.

5. Eminent domain 🔑246(3)

The service and filing of written notice by plaintiff of abandonment of eminent domain action ipso facto terminates the action, except in those rare instances in which the condemner is estopped from availing itself of right of abandonment. Code Civ.Proc. § 1255a.

6. Eminent domain 🔑148

"Just compensation" for taking of private property for public use includes, not only the actual cash value or market value of property taken, but also the actual cash value of the use of such property from the date of the taking possession thereof up to the date of judgment if possession is taken by the condemner prior to judgment. Const. art. 1, § 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Just Compensation".

7. Eminent domain 🔑148

Under Constitution requiring "just compensation" for private property taken for public use, allowance of interest from date of condemner's taking possession of land to date of entry of judgment was proper method of fixing landowner's compensation for use of land prior to the judgment, notwithstanding value of land was fixed as of date of trial, and its then value was more than value at time condemner took possession of land. Code Civ.Proc. §§ 1249, 1254; Civ. Code, § 3302; Const. art. 1, § 14.

8. Eminent domain 🔑148

Under Constitution requiring "just compensation" for private property taken for public use, no specific command to include interest is necessary when interest or its equivalent is a part of such compensation. Const. art. 1, § 14.

EDMONDS, J., dissenting.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action in eminent domain by the Metropolitan Water District of Southern California against E. Bennett Adams and others. From those portions of the judgment which cover allowances for interest from the date of taking possession of lands to date of entry of judgment, plaintiff appeals.

Affirmed.

For prior opinion of District Court of Appeal, see 99 P.2d 675.

Rehearing denied; EDMONDS, J., dissenting.

James H. Howard, Arthur A. Weber, Charles C. Cooper, Jr., Donald M. Keith, Hill, Morgan & Bledsoe, and Vincent Morgan, all of Los Angeles, for appellant.

Miguel Estudillo and C. L. McFarland, both of Riverside, for respondents.

C. C. Carleton, Chief Counsel, Frank B. Durkee, C. R. Montgomery, and Robert E. Reed, Attys., Department of Public Works, all of Sacramento, amici curiae for respondents.

CURTIS, Justice.

This is an action in eminent domain for the purpose of condemning certain parcels of land for use as a part of what is known as the Cajalco reservoir in Riverside county. The action was brought on March 11, 1935. On August 21, 1935, an order was made pursuant to section 14 of article I of the Constitution of the state granting to the plaintiff the right of immediate possession and use of the land upon the deposit in court of certain sums of money as security. The action was partly tried in 1936 but the issue as to amounts of damage or the market value was tried before a jury in 1938. The verdict, findings and judgment all contained, in addition to the amounts found as the value of the respective parcels of land, further sums covering interest at seven per cent per annum with respect to each of these amounts from the date of the taking possession of the lands to the date of the entry of judgment. The plaintiff has appealed from those portions of the judgment which cover these allowances for interest and the legality of such interest allowances is the sole question presented in the appeal in this case.

Respondents first claim that the allowance of interest on the value of the respective parcels of land sought to be condemned may be recovered under the provisions of that part of section 1249 of the Code of Civil Procedure, which reads as follows: "If an order be made letting the plaintiff into possession, as provided in section 1254, the compensation and damages awarded shall draw lawful interest from the date of such order." That part of said section was adopted in 1872. Section 1254 of the Code of Civil Procedure referred to in section 1249 and in effect at the date of the enactment of section 1249 was declared unconstitutional by this court in the case of Vilhac v. Stockton & I. R. Co., 53 Cal. 208. It has been amended several times, the last amendment being enacted in 1903, which was in effect at the time this action was instituted. Section 1249 was re-enacted in 1911, with only a slight amendment, with the paragraph quoted above left unchanged. As so amended it also was in effect at the commencement of this action.

[1] These sections of the code have no application to the present controversy in which the plaintiff, in pursuance of section 14 of article I of the Constitution, took possession of the land sought to be condemned under order of the court made before judgment and only a few months after the commencement of the action. Section 1254 of the Code of Civil Procedure empowers the court only "after trial and judgment entered or pending an appeal from the judgment" to "authorize the plaintiff, if already in possession, to continue therein, and if not, then to take possession of and use the property during the pendency of and until the final conclusion of the litigation". Section 1249 of the Code of Civil Procedure awarding a defendant interest from the date of the order, only applies when the order letting a plaintiff in possession is made as provided in said section 1254, which order is made only after judgment. The order letting the plaintiff in possession in the present proceeding was made before judgment and pursuant to section 14 of article I of the Constitution.

[2] Respondents next take the position that by the taking possession of the land in a condemnation proceeding by a plaintiff under order of court, as provided for in section 14 of article I of the Constitution, the condemner's right to the property becomes vested, and concurrently the property owner's right to the payment to him of a sum of money for such taking becomes vested. In other words, that the act of taking possession irrevocably fixes the respective rights of the condemner and the landowner, and that after possession is thus

taken of the land, the condemner becomes the vested owner of the land and the landowner is entitled to immediate payment for the land, and under the provisions of section 3302 of the Civil Code, to interest on the delayed payment for the period of delay. This position cannot be sustained for a number of reasons.

[3-5] In the first place, there is no provision for absolute immediate payment, but only immediate payment "as soon as the same can be ascertained according to law", and that means after a jury has fixed the amount of compensation, or in case the action is tried without a jury, after the court has determined said amount. In the second place, the rights of the parties are not irrevocably fixed by the act of the plaintiff taking possession for the reason that one of the possible issues in every condemnation case is whether there is any public necessity to take the owner's land, and should this issue be decided against the plaintiff, the proceeding terminates and the owner is restored to the possession of his land, if possession thereof had been previously taken by the condemner. In the present proceeding the landowners denied the allegation that public necessity required the taking of their lands. Furthermore, the plaintiff may abandon the proceeding at any time before the expiration of thirty days after final judgment by serving upon defendant and filing in court written notice of such abandonment. Sec. 1255a, Code Civ.Proc. While the plaintiff by abandoning the proceeding subjects himself to the payment of certain costs and expenses incurred by the defendant, the service and filing of said notice ipso facto terminates the proceeding, except in those rare instances in which the condemner is estopped from availing itself of the right of abandonment.

However the conclusion reached upon the matters just discussed does not, in our opinion, dispose of the claim of the respondents that they are entitled to interest on the amounts of their several judgments from the date of the order permitting the appellant to take possession of said property to the date of said judgments. Section 14 of article I of the Constitution provides that "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner * * *."

[6, 7] There can be no question, we think, that just compensation for the taking of respondents' property includes not only the actual cash value, or market value of said property, but also the actual cash value of the use of said property from the date of the taking possession thereof up to the date of judgment, if possession is taken by the condemner prior to judgment. The damage for the taking of said property in the present case, in pursuance of section 1249 of the Code of Civil Procedure, was fixed as of the date of trial, at its then actual value. Had plaintiff not taken possession of said property prior to the trial of said action, respondents' damage would still have been fixed at the actual value of said property at the date of trial—the same as if no prior possession had been taken by appellant.

There should be some means or method of procedure, if we are to comply with the constitutional requirement that just compensation be paid to the owner for the taking of his property, whereby compensation for its use prior to the judgment is paid to him. It is suggested that compensation for the use of said property so taken is but an incident to the damage sustained by reason of the taking of the property, and that the jury might take such damage into consideration in fixing the compensation to which the landowner is entitled by reason of the taking of his property. As favoring such suggestion the language of said section 14 of article I of the Constitution is cited, where the court in fixing the amount of money to be paid into court upon the taking possession prior to judgment may direct the deposit of an amount "reasonably adequate to secure to the owner of the property * * * immediate payment of just compensation for such taking and any damage incident thereto. * * *." This language indicates that in addition to just compensation for the taking, the landowner may sustain damage incident thereto, and we are not prepared to hold that this incidental damage as such might not be taken into consideration by the jury in fixing the just compensation due the respondents.

No contention is made that any instruction in this case was given to the jury that they had such right. On the other hand, the jury was instructed that it could allow interest on the value as fixed by it of the respective pieces of property at the rate of seven per cent per annum from the date of the taking possession of said lands to the date of the entry of judgment. As we have seen, the jury acted upon this instruction, and in addition to the amounts found as to value, included interest on said amounts. Legal interest is frequently accepted as the basis for fixing the measure of damages. While it does not appear that this rule has ever been applied in this state in condemnation proceedings, there is no adverse ruling as far as we have been able to ascertain. In the United States courts in cases like the instant one interest has been frequently allowed in condemnation proceedings where possession is taken prior to judgment.

In the case of Danforth v. United States, 8 Cir., 102 F.2d 5, at page 10, a condemnation, we find the following discussion of the subject:

"The appellant contends that he is entitled to receive interest from the time of the taking. * * * The Government concedes this to be the rule. * * * The appellant is clearly entitled to interest as part of his damage. * * *

"It remains to determine the date of the taking. The evidence is undisputed that the set-back levee was started by the Government on October 21, 1929. * * * It follows that interest should have been allowed from October 21, 1929, to the date of judgment. * * *"

[8] In Seaboard Air Line R. Co. v. United States, 261 U.S. 299, at page 306, 43 S.Ct. 354, at page 356, 67 L.Ed. 664, the court held as follows:

"It is obvious that the owner's right to just compensation cannot be made to depend upon state statutory provisions. The Constitution safeguards the right and section 10 of the Lever Act directs payment. The rule above referred to, that in the absence of agreement to pay or statute allowing it the United States will not be held liable for interest on unpaid accounts and claims, does not apply here. The requirement that 'just compensation' shall be paid is comprehensive and includes all elements and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation. Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added. The legal rate of interest, as established by the South Carolina statute was applied in this case. This was a 'palpably fair and reasonable method of performing the indispensable condition to the exercise of the right of eminent domain, namely, of making "just compensation" for the land as it stands, at the time of the taking.' United States v. Sargent [8 Cir.], 162 F. 81, 84, * * *.

"The addition of interest allowed by the District Court is necessary in order that the owner shall not suffer loss and shall have 'just compensation' to which he is entitled."

A further statement on this same subject is found in the case of Jacobs v. United States, 290 U.S. 13, at pages 16 and 17, 54 S.Ct. 26, at page 28, 78 L.Ed. 142, 96 A.L.R. 1. The court held as follows: "The amount recoverable was just compensation, not inadequate compensation. The concept of just compensation is comprehensive, and includes all elements, 'and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation.' The owner is not limited to the value of the property at the time of the taking; 'he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking.' Interest at a proper rate 'is a good measure by which to ascertain the amount to be added.' * * *"

These authorities in our opinion announce a fair and just rule, which we think should be applied and followed by this court in its decision of the instant case. Appellant has not produced any persuasive authorities to the contrary. Neither has it advanced any good reason why the respondents are not entitled to interest for the time they were deprived of possession of their property prior to judgment. It does call our attention to evidence in the case to the effect that the value of the property sought to be condemned was fixed at the date of the trial of said action, and that its value was then 40 per cent more than at the commencement of the action. It follows, so the appellant states, that respondents, if allowed interest, will have received both the enhanced value of their property and interest on its value from the date possession was taken. So it would appear. But we can see no injustice in allowing interest under those conditions. Had appellant not taken possession prior to judgment, the respondents would have been entitled to the enhanced value of their property the same as if possession had been taken. The value of respondents' property at the date of trial, whether less or more, was the measure of respondents' damage for the taking of their property, but it did not cover respondents' damage for being deprived of the use of said property prior to judgment. In our view of the merits of this appeal, we are of the opinion that interest was properly allowed under the facts of this case.

The judgment is affirmed.

We concur: GIBSON, C. J.; SHENK, J.; CARTER, J.; SPENCE, Justice pro tem.

EDMONDS, Justice (dissenting).

For the reasons stated by the District Court of Appeal when this case was decided by that court, 99 P.2d 675, I believe that the respondents are not entitled to interest upon the value of their respective parcels of land and that those portions of the judgment appealed from should be reversed.

41 Cal.App.2d 808

LLOYD v. LOS ANGELES COUNTY et al.

Civ. 11544.

District Court of Appeal, First District, Division 2, California.

Dec. 5, 1940.

1. Judgment ⇨243

Where county auditor and county treasurer were not made parties defendant to an action against the county, no judgment could be rendered against such officers.

2. Judgment ⇨243

Where county auditor and county treasurer were not made parties to a judgment creditor's action against county to collect fund due plaintiff's judgment debtor by virtue of a judgment against the county, and in favor of the judgment debtor, a judgment which ordered payment of such fund by county auditor to county clerk to be by clerk paid to plaintiff was unauthorized because a judgment against county can only be paid by auditor and treasurer who were therefore "necessary parties" defendant to the action.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessary Parties".

3. Action ⇨6

The rule regarding necessary parties to an action is not relaxed in an action brought to obtain declaratory relief.

4. Quieting title ⇨34(5)

A complaint, which alleged that certain defendants had or claimed to have an interest in the fund sought to be recovered by the plaintiff against county which was alleged to be owing to plaintiff's judgment debtor, but that the nature, character, or extent of such interest was unknown to plaintiff, was insufficient to state a cause of action to quiet title to the fund in plaintiff.

5. Appeal and error ⇨843(2)

Where a judgment, which ordered county auditor to pay over certain fund due under a judgment against county to be applied in satisfaction of plaintiff's judgment, was reversed for nonjoinder of necessary parties, appellate court would not consider county's right to assert by counterclaim a right to the fund by virtue of unpaid taxes due, since any statement on such issue would be mere "obiter".

See Words and Phrases, Permanent Edition, for all other definitions of "Obiter".

Appeal from Superior Court, Los Angeles; Goodwin J. Knight, Judge.

Action by Gaylord F. Lloyd against the County of Los Angeles, Caddo Company, and others to collect from Los Angeles County funds due the Caddo Company by virtue of a judgment in favor of that company and against Los Angeles County in order that such funds should be applied in satisfaction of plaintiff's prior judgment against the Caddo Company and also to quiet title to such fund in the plaintiff. From a judgment for plaintiff, Los Angeles County appeals.

Reversed and remanded.

J. H. O'Connor, Co. Counsel, and A. Curtis Smith, Deputy Co. Counsel, both of Los Angeles, for appellant.

Don Marlin, Neil S. McCarthy, Earl L. Banta, and Howard P. Hall, all of Los Angeles, for respondents.

STURTEVANT, Justice.

The plaintiff commenced this action against a large number of defendants. Many of the defendants appeared and answered. No one was served as a fictitious defendant and as to those named as fictitious defendants the action was dismissed. The County of Los Angeles was the only defendant appearing at the trial.

The plaintiff's complaint was stated in three counts. In paragraph I of the first count the plaintiff alleged the corporate capacity of the County of Los Angeles. In paragraph II he alleged the capacity of several corporations. Then in paragraph III he alleged: "That said defendants, and each of them, have, or claim to have, an interest in the fund sought to be recovered herein by the plaintiff, but that the nature, character or extent of such interest is unknown to plaintiff." There are no other allegations in that purported count.

In the second count of his complaint the plaintiff alleged as follows:

"I. That heretofore on the 5th day of October, 1933 plaintiff recovered from the defendant, Caddo Company, a corporation, in the above entitled court a judgment in the sum of $15,000.00, with interest thereon at 7% per annum from October 5, 1933 until paid; that said judgment was entered on the 10th day of October, 1933 in Judgment Book 872 at page 202 of the records of the above entitled court. That no appeal was taken from said judgment and that the same is now a final judgment, and that the whole of said amount is due, owing and unpaid.

"II. That heretofore, towit, on the 9th day of February, 1934, the defendant, Caddo Company, a corporation, recovered a judgment in its favor in the sum of $5,368.33 from the County of Los Angeles, State of California; that the said sum is at this time in the hands of the Treasurer of the County of Los Angeles, State of California. That no appeal was taken from said judgment by the County of Los Angeles, State of California, and said judgment has now become a final judgment, and is entered in Book 879 page 77 of Judgments, Los Angeles County, State of California.

"III. That immediately after the 9th day of February, 1934, the date upon which said judgment was rendered in favor of the defendant, Caddo Company, a corporation, against the County of Los Angeles, State of California, plaintiff by virtue of his judgment heretofore recovered against the Caddo Company, a corporation, garnisheed the moneys, in the hands of the Treasurer of the County of Los Angeles, recovered by the said Caddo Company, a corporation, from the County of Los Angeles, State of California; and that a return upon said garnishment was made by the County of Los Angeles, State of California, to the Sheriff of the County of Los Angeles, State of California, which return showed that said money was being held by the County of Los Angeles, State of California; that after the garnishment levied by plaintiff herein, defendant, Hughes Industries Co., Ltd., a corporation, filed on the 19th day of February, 1934, with the County of Los Angeles a purported assignment, assigning to it by the defendant, Caddo Company, a corporation, any sum or sums which might be recovered by the Caddo Company, a corporation, in its suit against the County of Los Angeles, State of California.

"IV. That by reason of the said assignment filed by the Hughes Industries, Co., Ltd., a corporation, with the County of Los Angeles, the said County of Los Angeles has refused to pay the said sum to plaintiff; that plaintiff is informed and believes and basing this allegation upon that ground alleges that the Treasurer of the County of Los Angeles, State of California, and the County of Los Angeles, State of California makes no claim against and for said sum.

"V. Plaintiff further alleges that a controversy has arisen relating to the legal rights and duties of the respective parties to this action concerning the right to collect the money in the hands of the Treasurer of the County of Los Angeles, and that this action is brought for the purpose of ascertaining the rights of plaintiff, and further, to prevent the County of Los Angeles from paying to the defendants, or any of them, any portion of the moneys now in its hands as a result of the judgment heretofore recovered by the Caddo Company, a corporation, against the County of Los Angeles, State of California."

All allegations therein, except paragraph IV, were admitted by failure to deny. Paragraph IV was denied. At the end of his complaint he inserted a prayer that the trial court declare (1) that plaintiff was entitled to collect the judgment against the County of Los Angeles; (2) that the defendants be restrained from collecting it; (3) that Los Angeles be restrained from paying it until the final order of the court; (4) that plaintiff's title be quieted and that the proceeds be applied on the plaintiff's judgment against the Caddo Company.

In his third cause of action the plaintiff pleaded fraud. In its answer the defendant denied nearly every allegation contained in that count. It also pleaded counterclaims by which it sought to recover judgment against the Caddo Company for unpaid taxes for the fiscal years 1932 and 1933.

Prior to the trial the plaintiff and the County of Los Angeles entered into a stipulation of facts. That stipulation was approved by the other defendants. The action was heard on said stipulation and the judgment of the trial court was based solely thereon. In that stipulation it was agreed that paragraphs I, II and III of the second cause of action were true and that the allegations of the said counterclaims were true.

The trial court rendered a judgment establishing the plaintiff's title to the judgment for $5,368.33 and directed the auditor to pay said sum to the clerk and directed the latter to pay it to the plaintiff.

[1-3] The defendant makes the contention, among others, that the plaintiff has sued the wrong parties. We think he has. The clear purpose of the plaintiff's case was to establish his title to, and collect the proceeds of, the judgment theretofore rendered in the action entitled Caddo Company v. Los Angeles. That judgment could only be paid by the auditor drawing a warrant and said warrant being paid by the treasurer. But neither of those officers, nor the clerk of the court, was a party to this action. As no one of those persons was made a party no judgment could properly be rendered against any one of them. Woody v. Peairs, 35 Cal.App. 553, 559, 170 P. 660. True that was a proceeding in mandamus, but the rule regarding necessary parties is not relaxed in actions brought to obtain declaratory relief. Declaratory Judgments—Borchard, p. 104.

[4] As the first count purporting to plead a cause of action to quiet title was wholly insufficient, all that portion of the judgment purporting to establish the title of the plaintiff to the judgment of the Caddo Company v. Los Angeles County has no pleading to rest on and that portion is also invalid.

[5] The defendant complains because the trial court did not allow its counterclaims. We do not feel called upon at this time to pass on that complaint. As noted above the plaintiff's cause of action should be against the fiscal officers of the county and not against the defendant. Until proper parties are before the court it would be mere obiter to discuss the right to file counterclaims.

The judgment is reversed and the action is remanded to the trial court for further proceedings not inconsistent with what has been said above.

We concur: NOURSE, P. J.; SPENCE, J.

41 Cal.App.2d 813

FRANKENSTEIN v. HOUSE.

Civ. 12643.

District Court of Appeal, Second District, Division 2, California.

Dec. 5, 1940.

Hearing Denied Feb. 3, 1941.

1. Automobiles 🔑181(1, 2)

Where elderly woman accepted invitation to ride as guest of automobile owner, and entered automobile, but owner stopped automobile on a hillside and absented himself temporarily, and automobile rolled down hillside, causing woman to be thrown therefrom, the woman remained a "guest" at all times until she was thrown to the street, and could not recover for owner's simple negligence. Vehicle Code § 403, St.1935, p. 154.

See Words and Phrases, Permanent Edition, for all other definitions of "Guest".

2. Automobiles 🔑181(2)

The guest statute manifests intention that a person becomes a "guest" of the driver of an automobile when he has accepted a ride in a vehicle upon a highway without giving compensation therefor. Vehicle Code, § 403, St.1935, p. 154.

3. Automobiles 🔑181(1, 2)

As long as a person, without compensation to driver, has entered automobile upon driver's invitation and remains in the vehicle upon a highway, "during such ride" he is a "guest" and cannot recover damages for simple negligence of the host. Vehicle Code, § 403, St.1935, p. 154.

4. Pleading 🔑236(6)

Where complaint alleging injuries to guest as result of host's leaving automobile

on hillside unattended without setting brakes and gears so that automobile rolled down hillside and threw guest to street stated no cause of action because wilful misconduct of host was not shown, refusal to permit filing of amended complaint merely adding that host knew that guest was unfamiliar with operation of automobiles, and that automobile was left in dangerous position, was not an abuse of discretion. Vehicle Code, § 403, St.1935, p. 154.

Appeal from Superior Court, **Los Angeles** County; Ruben S. Schmidt, Judge.

Action by Reah Frankenstein against Henry G. House for injuries suffered in automobile accident. From a judgment sustaining a demurrer without leave to amend, plaintiff appeals.

Affirmed.

Hearing denied; CARTER, J., dissenting.

Victor Ford Collins and William Manns, both of Los Angeles, for appellant.

Parker & Stanbury, of Los Angeles, for respondent.

MOORE, Presiding Justice.

Plaintiff appeals from a judgment sustaining a demurrer to the first and second counts of her complaint without leave to amend. The third count was excepted from said ruling but it was subsequently dismissed on motion of plaintiff.

The charging part of the first count is contained in paragraphs 1 and 2, which are as follows:

"I. That on or about the 29th day of March, 1938, plaintiff was invited by defendant to go for a ride in his Buick automobile. That plaintiff is an elderly woman of the age of seventy years and is unfamiliar with the operation of automobiles. That at said time defendant drove said automobile, which plaintiff was an occupant thereof, to 814 Bonnie Beach Street, in the city of Los Angeles, County of Los Angeles, State of California, parked said automobile on a steep hill in front of said address and brought said automobile to a complete stop. That subsequently and after the aforementioned ride had ceased, defendant did negligently and carelessly leave said automobile unattended while plaintiff was an occupant in the rear seat thereof.

"II. That as a direct and proximate result of said carelessness and negligence of the defendant, as aforesaid, said automobile rolled down the hill on said Bonnie Beach Street, causing plaintiff to be violently thrown and hurled from said automobile to the street."

The charging part of the second count consists of paragraph II of the first count by adoption and paragraph II of the second count, which is as follows:

"II. That on or about the 29th day of March, 1938, plaintiff was an occupant of a Buick automobile owned by defendant. That plaintiff is an elderly woman of the age of seventy years and is unfamiliar with the operation of automobiles. That at said time, and while said car was parked on a steep hill on Bonnie Beach street, in the city of Los Angeles, county of Los Angeles, state of California, defendant did negligently and carelessly fail to set the brakes and gears on said automobile, and did carelessly and negligently leave the same unattended while plaintiff was an occupant in the rear seat thereof."

Section 403 of the Vehicle Code, St.1935, p. 154, in effect at the time plaintiff received her injuries as alleged in subsequent parts of her complaint, reads as follows: "No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of such vehicle or against any other person legally liable for the conduct of such driver on account of personal injury to or the death of such guest during such ride, unless the plaintiff in any such action establishes that such injury or death proximately resulted from the intoxication of wilful misconduct of said driver."

The only questions before this court are: (1) Did the court err in sustaining the demurrer without leave to amend, and (2) was it abuse of discretion to deny plaintiff the privilege of amending her complaint?

[1] From the allegations quoted, it is made clearly to appear that the plaintiff accepted defendant's invitation to ride as his guest and entered his car; that in the course of the ride defendant stopped his car on a hillside and absented himself; that plaintiff remained in the car and that during defendant's absence the car rolled down the hillside, causing plaintiff to be thrown therefrom. Having placed herself under his care for a ride in his vehicle, and having remained therein until she was thrown therefrom "on the highway", the relation

of host and guest continued at all times from her entry into the automobile until she was thrown to the street. A fair interpretation of the pleading impels the conclusion that defendant's absence from the car was temporary and a part of the course to be pursued on the "drive".

The nearest approach to the facts of this case that has been called to our attention is found in the cases of Nemoitin v. Berger, 111 Conn. 88, 149 A. 233, and Head v. Morton, 302 Mass. 273, 19 N.E. 2d 22, in which the supreme courts of Connecticut and Massachusetts emphasized that a person in the situation occupied by plaintiff herein at the time of her injuries is a guest. In the Nemoitin case, the defendant had invited plaintiff to ride home from the beach in defendant's car. He opened the rear door and while plaintiff was entering and taking his seat the defendant took his position at the steering wheel. Upon observing that the rear door was open, defendant carelessly reached back and slammed the door upon the fingers of plaintiff. Under the guest statute of Connecticut plaintiff was a guest and not entitled to recover damages in the absence of intentional or reckless disregard of his rights as such.

In the Head case, defendant called at a drugstore for plaintiff and another lady to convey them to plaintiff's home. Upon stopping at the sidewalk plaintiff assisted her companion to enter the car and then attempted to enter herself, when defendant suddenly started the car forward, which movement caused the rear door to knock the plaintiff down. The highest appellate court of Massachusetts held that plaintiff was a guest at the moment of the accident and was not entitled to recover and that the real test as to the rights of a person to recover under such circumstances was to determine whether a gratuitous ride of the plaintiff had begun at the time of the injury.

[2] In view of the language of section 403 of the Vehicle Code, it appears to have been the intention of the legislature that a person becomes a guest of the driver of an automobile when he has accepted a ride in a vehicle upon a highway without giving compensation therefor. Plaintiff herein did not become a pay passenger or a trespasser at any time after entering defendant's car. She remained therein at the time it was parked on Bonnie Beach street solely for the purpose of continuing her ride on defendant's return. She conferred no material favor and paid no price for the courtesy extended to her. She was his guest to the same extent as if defendant, in a moment of frenzy, had leaped from the car as it rolled down the precipitous street.

[3] The cases cited by plaintiff (Moreas v. Ferry, 135 Cal.App. 202, 26 P.2d 886; Prager v. Israel, Cal.Sup., 98 P.2d 729; Puckett v. Pailthorpe, 207 Iowa 613, 223 N.W. 254; Samuelson v. Sherrill, 225 Iowa 421, 280 N.W. 596; Hunter v. Baldwin, 268 Mich. 106, 255 N.W. 431; and Fone v. Elloian, 297 Mass. 139, 7 N.E.2d 737) are not in point. Each of these cases arose by reason of some negligence on the part of the defendant before the guest relation had commenced or after it had ceased, or where the vehicle was not "upon a highway" and "during such ride", or where the relationship had never been contemplated. As long as a person, without compensation to the driver, has entered a car upon the invitation of such driver and remains "in the vehicle upon a highway", "during such ride" (sec. 403) he is a guest and cannot recover damages for the simple negligence of the host. The demurrer to the complaint was correctly sustained.

[4] The court properly denied leave to file an amended complaint. No substantial changes in the pleading were proposed. After the word "defendant" in the last sentence of paragraph I of the first count, plaintiff proposed to insert the following as her amendment to the complaint, to-wit: "knowing that plaintiff was unfamiliar with the operation of automobiles, and knowing that said automobile was in a dangerous position on account of the steep hill on which said automobile was standing". She likewise proposed that the same words be inserted in paragraph II of her second count. The proposed language constituted no substantial amendment. Consequently there was no abuse of discretion by the trial judge.

The judgment is affirmed.

We concur: WOOD, J.; McCOMB, J.

41 Cal.App.2d 758

GILLETTE v. CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 11418.

District Court of Appeal, First District,

Division 2, California.

Nov. 29, 1940.

Rehearing Denied Dec. 28, 1940.

1. **Street railroads 🔑114(7), 118(16)**

In action by motorman of privately owned street car against city and county of San Francisco for injuries suffered when struck by passing municipal street car, evidence *held* to authorize instructions on unavoidable accident and verdict for city and county.

2. **Appeal and error 🔑207, 719(1)**
Trial 🔑133(6)

Remarks of counsel to jury were not ground for reversal where there was no assignment of error or objection as to some of such remarks and trial court granted the only request that jury be admonished as to any remark.

3. **Trial 🔑120(2)**

In action by employee of privately owned street railway against city and county for injuries suffered when struck by municipal street car, references by counsel for city and county to the privately owned street railway as if it were an interested party were objectionable, in view of statutes governing subrogation of employer to employee's right to damages. St.1937, pp. 273–275, §§ 3850–3862.

4. **Trial 🔑205**

In action by motorman of privately owned street car against city and county of San Francisco for injuries suffered when struck by passing municipal street car, where there was no direct evidence of what motorman saw, instruction that law presumes that motorman saw what, in exercise of ordinary care, he could have seen, was not erroneous.

5. **Street railroads 🔑112(2)**

In action by motorman of privately owned street car against city and county of San Francisco for injuries suffered when struck by passing municipal car, fact that plaintiff was struck did not raise presumption that defendant was negligent.

6. **Trial 🔑295(7)**

In action by motorman of privately owned street car against city and county of San Francisco for injuries suffered when struck by passing municipal street car, wherein motorman relied principally on doctrine of last clear chance, instructions on contributory negligence that directed verdict under specified conditions but ignored element of proximate cause were in conflict with instructions correctly stating last clear chance doctrine, and constituted prejudicial error though trial court instructed jury that all instructions were to be read together.

7. **Street railroads 🔑102(2)**

In action by motorman of privately owned street car against city and county of San Francisco for injuries suffered when struck by passing municipal street car, motorman's negligence did not constitute a defense if not a proximate cause of his injuries.

8. **Trial 🔑295(1)**

Where instructions are in direct conflict on a material factor, judgment must be reversed though trial court instructed jury that all instructions were to be read together.

9. **Negligence 🔑141(9)**

An instruction on last clear chance doctrine was not erroneous because containing provision that defendant had actual knowledge of plaintiff's perilous situation.

◆

Appeal from Superior Court, City and County of San Francisco; Alfred J. Fritz, Judge.

Action by James T. Gillette against the City and County of San Francisco and others, for injuries suffered when struck by street car. From a judgment on a verdict for defendants, plaintiff appeals.

Reversed.

Timothy Healy and Henry A. Plattner, both of San Francisco, for appellant.

John J. O'Toole, City Atty. and Henry Heidelberg, Deputy City Atty., both of San Francisco, for respondents.

STURTEVANT, Justice.

The plaintiff commenced this action to recover damages for injuries sustained when one of the cars operated by defendant City and County ran over and crushed one of his legs. The defendants answered and the action was tried before the court sitting with a jury. The jury returned a verdict in favor of the defendants and from the judgment based on that verdict the plaintiff has appealed.

[1] The accident occurred near the intersection of Second and Market streets. Second street intersects Market street on the south side. In Market street there are four street railway tracks. The Market Street Railway Company uses the two middle tracks and the Municipal cars use the two outer tracks. The distance between the Municipal track and the Market Street Railway track is six feet. The over-hang of the cars, including both systems, is three feet nine inches. Between the Municipal car and the Market Street Railway car the clearance is two feet three inches. Pedestrians sometimes stand in the space between the two cars while the cars are in motion. At about 7:30 p. m. on the evening of August 10, 1935, car number 7 had come up Market street and was in the act of taking the cross over to the southerly Market Street Railway track. Car No. 5 had come down Market and stopped to allow car No. 7 to be operated as just stated. Car No. 21 had come down Market street and stopped about five feet behind car No. 5. Car No. 31 had come down Market street and stopped about five feet back of car No. 21. One of the "C" cars, operated by the municipality, was being operated toward the east on the southerly track occupied by those cars. A Yellow cab was being driven behind the "C" car traveling in the same direction. William Kitto, the conductor on car No. 5, was standing on the rear platform. Dr. Wilson, a passenger, was sitting on that car on a rear seat on its northerly side. The plaintiff Gillette was motorman on car No. 21 and was standing at the front end of that car. The defendant Godfrey was the motorman on the "C" car and was standing at the motor operating it as his car traveled to the east. The witness Beggs occupied a seat at the left of Godfrey and on the same side as car No. 21. The witness Campbell was driving the Yellow cab. The witness Owens was a passenger riding in the Yellow cab and was seated approximately in the middle of the back seat. While the Market Street Railway cars were stopped as above mentioned, the defendant Godfrey drove his car toward the east passing car No. 31, car No. 21, and stopped about a car length ahead opposite car No. 5. In doing so the plaintiff was hit by the "C" car, and he fell under one of the wheels, and suffered the injury complained of. The plaintiff introduced evidence to the effect that when his car came to a stop he leaned out of the car and conversed with Kitto. That a little later he stepped out of his car, around to the south side of car No. 5, took hold of the middle stanchion with his right hand, that Kitto had hold of the same stanchion with his left hand, and the two were conversing when the plaintiff was struck. The plaintiff then stood one foot from the step of car No. 5 and was facing northeast—his back turned to the Municipal track. The defendants introduced evidence to the effect that the plaintiff was not standing in the street but that he was leaning out of the side of car No. 21. The testimony of the eye witnesses is distinctly conflicting. A physical fact not controverted is that at the front end of the "C" car there are three handles. One of the handles on the left hand side of the front end of the car was broken in the middle at the time of the accident. It was the theory of the plaintiff that the "C" car was operated at a speed in excess of that prescribed by law and that its gong was not sounded. An ordinance of the City and County of San Francisco limits the speed of street cars at the point where the accident occurred to a speed not exceeding fifteen miles per hour. There was evidence the "C" car was operated at a speed of twenty-five to thirty miles per hour but there was also evidence it was being operated at a speed between ten or twelve miles an hour. There was evidence that as the "C" car proceeded down Market street and as it passed car No. 21, no gong was sounded. However there was also evidence that as it proceeded by said car the gong was being continuously sounded. There was evidence that as the "C" car proceeded down the street the plaintiff Gillette was seen standing in the street. In that connection it should be noted the plaintiff called the defendant Godfrey as a witness under section 2055, C.C.P. and while giving testimony he testified that: "The weather and visibility were good. I could see all the way from Twin Peaks to the Ferry. My eyesight was good. The only thing to obstruct my view from my platform to the Ferry were some people who got off a 17 car. They were standing on the municipal tracks. There was nothing else between my car and Sansome street except that there were some people standing in the safety zone at Sansome street. I was looking straight ahead but I did not see Mr. Gillette at any time." Both Campbell and Owens, riding in the cab, did not see Gillette until they saw him under the car wheels. Both were looking

straight ahead and had a clear view between the Municipal car and the Market Street Railway cars. If he had been standing in Market street talking to Kitto he would have been directly in line of the vision of each. Witnesses testified they saw Gillette lean out of his car. If he did so the instant the "C" car passed by his car, and leaned far enough, the accident could have so happened as to break the car handle as above mentioned. Godfrey testified the accident happened in that manner. So did the witness Campbell. Such facts were evidence of an unavoidable accident. From the foregoing facts it must be conceded there was an abundance of evidence supporting the verdict returned by the jury.

[2, 3] The plaintiff claims the attorney for the defendants was guilty of misconduct which constituted prejudicial error. We have numbered the claims 1 to 13, inclusive. He claims when the jury was being selected the defendants' counsel asked: "(1) Do you know any of the attorneys for the Market Street Railway? (2) Have you any bias or prejudice against the City and County of San Francisco because the City and County of San Francisco endeavored the best it could to keep the Market Street Railway Company from being allowed to charge a seven cent fare? (3) Have you any bias or prejudice against me individually because I conducted the fight against the one-man car system? (4) If it further appears that the Market Street Railway paid all the doctors' bills in this case—? (5) If the doctors tell you that their bills have been paid by the Market Street Railway, would that cause you to be biased or prejudiced against the City and County of San Francisco?" Plaintiff also complains that of some of the witnesses these questions were asked: "(6) You have not paid any of those doctors any money, have you? (7) Do you know who has paid those doctors? (8) Did you give any written statement to the Market Street Railway concerning the occurrence of the accident?" Plaintiff further contends that counsel, in the presence of the jury, stated: "Their names (Owens and Campbell) were handed to the Market Street Railway, and they were also handed to the Municipal Railroad. (9) I was going to ask if he gave his name to the police officer. (10) We all know Officer Foley wrote out a police report and those police reports generally contain the names of witnesses. (11) There was only one independent witness produced by the Market Street Railway Company, and I told you there would be only one, notwithstanding the fact that the Market Street Railway had other witnesses. (12) Now I don't accuse him of lying, because it is very easy to imagine certain things are true. It is true where your treasure is, that is where your heart is too. They possibly think they remember, but every bit of testimony they give is from the Market Street's and Gillette's standpoint in this case. (13) There is a conflict here, and according to the Market Street Railway's theory—." The plaintiff contends that each claim presents a reversible error and that the errors were repeated and continued throughout the trial. To these contentions there are several different answers. In the trial court there was no assignment of error as to propositions 1, 6, 7, 8, 9, 10, 11, or 13. There was no objection as to 4, 5, 9, 10, or 13. There was no request made to the trial court to admonish the jury regarding 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, or 13. As to number 4, a request was made and it was promptly granted. Expressing no approval whatever of the conduct of counsel, nevertheless on the record as made the plaintiff may not complain. Kershaw v. Tilbury, 214 Cal. 679, 690, 8 P.2d 109. Moreover, considering each purported assignment in the light of the issues that were before the court, it is patent all references to the Market Street Railway Company were not objectionable. (See Labor Code, secs. 3850–3862, St.1937, pp. 273–275.)

A complaint is made because the trial court gave two instructions on the subject of unavoidable accident. The plaintiff claims that under no view of the evidence was the accident unavoidable. As we have shown above we think there was.

[4] The court instructed the jury as follows: "I instruct you that the law presumes that the plaintiff Gillette saw that which, in the exercise of ordinary care, he could have seen." The plaintiff contends the instruction was contrary to the evidence. Not so. There was no direct evidence as to what Gillette saw.

[5] Instruction No. 38 told the jury that the fact the plaintiff was struck did not raise a presumption the defendant was negligent. That was sound law. 19 Cal.Jur. 707.

Acting on the request of the defendants the trial court gave Instructions 31, 50 and 55. They were as follows:

"31. Where the evidence is as consistent with a neglect of duty or care on the part of the injured person as it is with a neglect of duty or care on the part of the person charged with causing the injury, the injured party cannot recover in an action for damages for the injuries sustained."

"50. The tracks of a street railway company are in themselves a sign of danger and one standing in the vicinity of the tracks of a street railway company must exercise his faculties of sight and hearing and watch and listen for cars traveling in his direction. If he fails so to do and in consequence thereof is injured, he is guilty of contributory negligence and cannot recover against the street railway company."

[6–8] "55. Plaintiff herein had no legal right to voluntarily place himself in a position of danger, if any, or to maintain said position if you believe that he had an opportunity of escaping therefrom by the exercise of ordinary diligence, and if you find from all the evidence in this case that plaintiff herein did place himself in a position of danger and maintained that position after opportunity to escape therefrom, such acts and conduct upon the part of plaintiff herein, if any, constitute negligence upon his part and prevent his recovery of damages in this case."

The plaintiff says that each was, in effect, a formula instruction. He also says that it has been debated whether No. 31 should ever be given. Sheldon v. James, 175 Cal. 474, 166 P. 8, 2 A.L.R. 1493. But when, as in this case, a plaintiff relies principally on the application of the doctrine of the last clear chance, he contends the giving of each of the instructions constituted prejudicial error. That contention must be sustained. Each instruction wholly ignored the element of proximate cause. Each was, in effect, an instruction to the jury, under the conditions specified in each instruction, to bring in a verdict in favor of the defendants. But that was not the law. Although the plaintiff may have been negligent, if his negligence was not a proximate cause of his injuries it did not constitute a defense. 19 Cal.Jur. 561. "So even though a person has negligently placed himself in a position of danger, he may recover provided the one who injures him, upon observing his position of peril has the last clear chance to avoid injury; and if an injury has occurred only through or by means of some intervening cause, from which the injury follows as a direct and immediate consequence, the law refers the damage to the last cause and refuses to trace it to that which was more remote." 19 Cal.Jur. 562. The rule last stated was directly applied by instructions 56, 57, and 58, which were given of the trial court's own motion. They were correct statements of the law applying the doctrine of the last clear chance. They were in direct conflict with instructions 31, 50, and 55. When, as here, instructions in direct conflict on a material factor in one's case have been given, the judgment must be reversed for it cannot be known whether the jury followed the correct or the incorrect instructions. The defendants resist the attack by calling to our attention the fact that the trial court also instructed the jury that all of the instructions were to be read together. That fact is not helpful. In effect, when the trial court gave the jury instructions 31, 50, and 55, it told the jury to follow them. When it gave instructions 56, 57, and 58, in effect it told the jury to follow them. And when it gave instruction No. 1, "You are cautioned not to select a single instruction, or a portion of an instruction alone, but to consider all of the instructions in determining any issue in the case," it was not helpful. The jury could not follow two wholly inconsistent divergent lines which were directly in conflict. Under all of these circumstances the error is prejudicial and the judgment must be reversed. Starr v. Los Angeles Ry. Corp., 187 Cal. 270, 280, 201 P. 599.

[9] The plaintiff requested the trial court to give two instructions on the last clear chance doctrine. It refused but of its own motion gave three instructions on said subject. The plaintiff complains because one of those instructions contained a provision, "That the defendant had actual knowledge of plaintiff's perilous situation." The complaint is without merit. Herbert v. Southern Pacific Co., 121 Cal. 227, 232, 53 P. 651.

As shown above the plaintiff's case contained facts from which it could be claimed that he was guilty of contributory negligence. But it is equally clear he contended at all times that his acts were not a proximate cause of his injury and that at all times he contended the doctrine of last clear chance was applicable. Those contentions were of the gravamen of his case. The evidence was sharply conflicting and, as we have shown, instructions 31, 50, and 55, took from the jury the consideration of those contentions.

It follows that the judgment must be reversed and it is so ordered.

We concur: NOURSE, P. J.; SPENCE, J.

41 Cal.App.2d 766

UNITED FARMERS ASS'N OF CALIFORNIA v. KLEIN et al.

BEGGS BROS. FRUIT CO. et al. v. UNITED FARMERS ASS'N OF CALIFORNIA.

Civ. 11554.

District Court of Appeal, First District,
Division 2, California.

Nov. 29, 1940.

Hearing Denied Jan. 27, 1941.

1. Arbitration and award 🔑72

In proceeding for confirmation of arbitration award where no motion had been made to vacate, modify, or correct award, and there was no bill of exceptions or statement of proceedings before committee, and errors, if any, of arbitrators did not appear on face of award, and, except to recite words of statute, party against whom award was made did not plead fraud, corruption, error, or mistake by arbitrators, sustaining committee's objection to offer to prove details of proceedings before committee was proper. Code Civ.Proc. §§ 1288, 1289.

2. Arbitration and award 🔑68

Where alleged errors by arbitrators in arbitration proceedings were not presented in a bill of exceptions or statement of case duly authenticated by arbitrators and did not appear on face of arbitration award, the errors, if any, could not be reviewed by courts.

3. Monopolies 🔑17(1)

An arbitration agreement between members of organization of produce dealers was not void as being in "restraint of trade" in violation of statute so as to preclude a valid arbitration proceeding concerning a fine against a member, where contract between members was severable and only covenant which it was claimed that member breached was a covenant under terms of which members agreed not to open their shops to receive produce on Sunday until 11 p. m., since such covenant was not unreasonable as matter of law. Civ.Code, § 1673.

See Words and Phrases, Permanent Edition, for all other definitions of "Restraint of Trade".

4. Contracts 🔑10(1)

An arbitration agreement between members of organization of produce dealers was not unenforceable on ground that agreement was "unilateral" and lacking consideration, where agreement was made by one party with each of more than 300 other parties, and each party made same promise to every other party, and promise constituted a consideration.

See Words and Phrases, Permanent Edition, for all other definitions of "Unilateral".

5. Damages 🔑85

An arbitration agreement between members of organization of produce dealers was not void on ground that agreement called for imposition of a "fine" or "penalty" for violation of contract between members, where organization's arbitration committee, in connection with proceedings imposing so-called fine against a member for alleged violation of contract, decided that "fine", wherever used in contract, was intended as meaning liquidated damages, and evidence sustained finding in committee's proceedings for confirmation of award against member that award was not a penalty, forfeiture, or fine.

See Words and Phrases, Permanent Edition, for all other definitions of "Fine" and "Penalty".

6. Arbitration and award 🔑66

That a person, named as one of the arbitrators in contract between members of organization of produce dealers, did not participate in hearing by organization's arbitration committee concerning imposition of so-called fine against member for violating contract, did not warrant courts in disturbing committee's award, since, nothing to contrary appearing in record, it would be assumed that all parties agreed to proceed and did proceed before other arbitrators named in contract.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceedings, consolidated for trial and judgment, by the United Farmers Association of California against A. M. Klein and others for declaratory relief, and by the Beggs Brothers Fruit Company and others against the United Farmers Association of California for confirmation of an arbitrators' award. From an adverse judgment, the United Farmers Association of California appeals.

Affirmed.

Hearing denied; EDMONDS and HOUSER, JJ., dissenting.

Leonard Comegys, of Los Angeles, for appellant.

Redmond & Redmond, of Los Angeles, for respondents.

STURTEVANT, Justice.

The United Farmers Association of California, the defendants, and several hundred others, are engaged in the produce business in or about Los Angeles. Heretofore they formed an organization and entered into a written agreement. In that written agreement a body was named as the Los Angeles Markets Arbitration Committee. It named the defendants Klein, Greenfield, Moreno, Teague, Anderson, and Simpson as members of the committee. It also named Homer A. Harris as manager. On July 14, 1936, the plaintiff, The United Farmers Association of California, was by the manager fined $175. That fine not having been paid, on July 17, 1936, it was fined the additional sum of $150. The fines not having been paid, the manager claiming to act under said written agreement caused proceedings in arbitration to be commenced. Such proceedings were held before the defendants as members of the arbitration committee named and designated in the written agreement. A hearing was had on July 24, 1936. The arbitration committee, on September 11, 1936, signed findings of fact and conclusions of law and executed an arbitrators' award. Thereafter the committee and the manager caused proceeding No. 407,462 (records of the trial court) to be commenced in which a petition for confirmation of said award was made. The plaintiff, The United Farmers Association of California, commenced action No. 407,629 (records of the trial court) asking for declaratory relief. Answers were filed in both proceedings. Later an order was made consolidating said proceedings for trial and judgment. On January 11, 1938, the trial court made findings of fact and conclusions of law against The United Farmers Association and from the judgment based on said findings the latter has appealed.

[1, 2] When the proceeding came on for hearing in the trial court the committee introduced in evidence each and all of the documents constituting the judgment roll in the proceeding before the arbitration committee. Thereafter Homer A. Harris, the manager of the Los Angeles Markets Arbitration Committee, was called as a witness by The United Farmers Association. He was asked by The United Farmers Association of California to produce certain other books and papers. Counsel for the committee objected on the ground that the same were incompetent. In reply to a question by the trial court as to the purpose of producing said books, counsel for The United Farmers Association answered that it was such party's intention to prove by the witness Harris and other witnesses to be called all of the details of the proceedings had before the so-called arbitration committee showing all of the steps taken with their respective dates, the date when each of the papers and documents considered by said board were actually prepared and filed with said board, and to show all of the evidence produced before the hearing held by said board either by the production of a transcript of such evidence and proceedings, or by secondary evidence thereof in case such transcript could not be found. The objection was sustained. No motion to vacate the award, Code Civ.Proc., sec. 1288, and no motion to modify or correct the award, Code Civ. Proc. sec. 1289, was made. In open court certain stipulations were made by counsel regarding the form of the record and thereupon the cause stood submitted. The appellant contends the trial court erred in sustaining said objection to its offer. We think the contention has no merit. Of the proceedings before the arbitration committee, there was no bill of exceptions or statement of the case. Except to recite the words of the statute the appellant made no attempt to plead fraud, corruption, gross error, or mistake on the part of the arbitrators. Under these circumstances it is quite clear that the trial court did not err in making the order complained of. In the first place the ap-

pellant's pleading was wholly insufficient to present its contention. 6 C.J.S., Arbitration and Award, § 124[2] [c]; Thornton v. McCormick, 75 Iowa 285, 39 N.W. 502, 504; Thompson v. Edwards, 220 Ky. 239, 294 S.W. 1095. In the second place whatever alleged errors the arbitrators made in their procedure, not being presented in a bill of exceptions or statement of the case duly authenticated by the arbitrators, and not appearing on the face of the award, could not properly be reviewed by the courts. Tyson v. Wells, 2 Cal. 122, 131; Peachy et al. v. Ritchie, 4 Cal. 205, 207; In re Connor, 128 Cal. 279, 281, 60 P. 862. There is nothing in Utah Const. Co. v. Western Pac. Ry. Co., 174 Cal. 156, 162 P. 631, at variance with what we have said. In that case by the agreement to arbitrate the parties agreed that the arbitrator should prepare his award in writing and attach to it a transcript of the proceedings and evidence taken before him. That was done. Later, on appeal, with said documents before it, 174 Cal. on page 163, 162 P. on page 634, the court said: "The only questions remaining for consideration arise out of the claim that, under the qualification of the submission above mentioned, a mistake in the conclusions of law upon the findings should be considered a mistake appearing upon the face of the award, and good ground for vacating it if it affects the substantial rights of the plaintiff on the merits of the case, the theory being that in that event, as he did not decide according to the legal right, he has exceeded his limited power under the agreement in making the award as he did." Clearly the court was there considering alleged mistakes claimed to appear on the face of the award.

[3] In its next point the appellant asserts the arbitration agreement was illegal and void as being in restraint of trade and competition and so could not be the basis of a valid arbitration proceeding. In reply it should first be noted that by an express provision the contract between the parties was severable. It was not claimed that any covenant was breached except a covenant under the terms of which the parties agreed not to open their shops to receive produce on Sunday until 11 p. m. That covenant was not as a matter of law unreasonable. That being so the contract was not void as being in violation of the terms of section 1673 of the Civil Code. Grogan v. Chaffee, 156 Cal. 611, 105 P. 745, 27 L.R.A.,N.S., 395.

[4] It is next claimed the arbitration agreement was unenforceable against the appellant as it was unilateral and therefore lacking in consideration. We find no merit in that claim. The agreement was not unilateral. It was made by one party with each of more than three hundred other parties. Each party made the same promise to each and every other party. Furthermore, such promise constituted a consideration. 6 Cal.Jur. 187.

[5] Again it claims the agreement was void because it called for the imposition of a fine or penalty. To that claim there are many answers. The subject was fully presented to and considered by the arbitration committee and it made full and complete findings thereon. In doing so it held that the word "fine" wherever used in the contract was intended by the parties to be, and was used as meaning, liquidated damages. After the hearing, in the trial court the latter made a finding, "That the award of the board (the arbitration committee) is not a penalty, forfeiture or fine." Neither from the face of the award nor anything contained in the record can we say said finding is not sustained. Dyer Bros. Iron Works v. Central Iron Works, 182 Cal. 588, 189 P. 445.

The next point made by the appellant is based on the claim that the arbitration committee committed errors. But an inspection of the award does not disclose any errors.

[6] It is claimed that E. J. Fleming was named as one of the arbitrators in the contract but that he did not participate in the hearing. Assuming such to be the facts they do not warrant the courts in disturbing the award. Nothing to the contrary appearing in the record, it will be assumed all parties agreed to proceed and did proceed before the other arbitrators who were named in the contract. Phipps v. Tompkins, 50 Ga. 641.

As we have indicated above the award on its face was not defective in any respect and the trial court so found. The appellant specifies other findings of the trial court and claims such other findings were not supported by the evidence before the trial court. Assuming they were not, such additional findings did not constitute reversible error.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

41 Cal.App.2d 797

PEOPLE v. LITTLE.

Cr. 459.

District Court of Appeal, Fourth District, California.

Dec. 4, 1940.

Rehearing Denied Dec. 17, 1940.

See 108 P.2d 63.

1. Names 🔑18

In prosecution for conspiracy where defendant claimed that codefendant, with whom defendant had gone through marriage ceremony, was defendant's wife and therefore unable to enter into a conspiracy with defendant, reviewing court was bound to presume that defendant and codefendant were same persons as ones named in previous proceedings for divorce and to annul a marriage where there was no evidence to contrary and names of persons involved in previous proceedings were same as those of defendant and codefendant, and when prosecutor attempted to call codefendant as witness against defendant, defendant objected on ground that parties were married, since where there is an identity of name, the law presumes an identity of person. Code Civ. Proc. § 1963, subd. 25.

2. Husband and wife 🔑107

A husband and wife cannot conspire together to commit a crime, but to give life to such rule, alleged conspirators must be husband and wife, which implies a valid marriage.

3. Husband and wife 🔑107
Marriage 🔑11

Where codefendant and defendant had spouses living and undivorced on November 19, 1938, at time of their attempted marriage to each other, marriage was void and codefendant and defendant did not become husband and wife until they went through a second ceremony on March 9, 1940, after their disabilities had been removed, and hence defendant and codefendant could conspire to commit crimes between July 1, 1938, and January 1, 1940. Civ.Code, § 61.

4. Conspiracy 🔑47

A "conspiracy" may be established by circumstantial evidence or by reasonable inferences drawn from the evidence.

See Words and Phrases, Permanent Edition, for all other definitions of "Conspiracy".

5. Conspiracy 🔑47

Evidence sustained implied finding that defendant and codefendant, who had been employed as bookkeeper and collector in city water department, conspired to embezzle money from city, notwithstanding that there was no direct evidence of express agreement between defendant and codefendant to steal money.

6. Criminal law 🔑1159(1)

Where a man and woman, though not married, are living together in relation of husband and wife and embark on joint undertaking to improve their common property for their mutual benefit, and expend large sums of money for such purpose and for their common benefit, and woman has access to public funds in considerable amounts and furnishes man with considerable sums to be used for their common benefit, which sums are greatly in excess of her income, and embezzlement of public funds by woman is proved beyond possibility of doubt, and the man makes statements indicating his knowledge that woman was embezzling money furnished to him, implied finding of a jury that they agreed and conspired to embezzle money cannot be disturbed on appeal.

7. Embezzlement 🔑24

Evidence warranting inference that defendant aided, abetted and advised codefendant, who was employed as bookkeeper and collector in city water department, in embezzling city funds, justified conviction for embezzlement as against contention that defendant could not be guilty of embezzlement of public funds of city because defendant was not a person charged with the receipt, safekeeping, transfer or disbursement of public moneys. Pen.Code, §§ 31, 424.

8. Embezzlement 🔑24

A person who is not an official may be guilty, as a principal, in the crime of misuse of public funds. Pen.Code, §§ 31, 424.

9. Municipal corporations ⚷205

To sustain conviction of defendant as principal for crime of falsifying monthly reports of collections in city water department, wherein codefendant was employed as bookkeeper and collector, there should have been evidence from which a reasonable inference might be drawn that defendant knew that false statements were being made in reports by codefendant and that defendant aided and abetted or advised and encouraged codefendant in making them.

10. Municipal corporations ⚷205

Conviction of defendant as principal for falsifying public accounts in city water department wherein codefendant, who embezzled city funds and gave them to defendant, was employed as bookkeeper and collector, was not authorized where there was no evidence in record that defendant knew or suspected that codefendant's records or accounts were falsified.

◆

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

John Nathan Little was convicted of conspiracy, embezzlement, and keeping false accounts and falsifying accounts under an indictment wherein Lillian O. Richards and John Nathan Little were jointly charged in various counts with conspiracy to unlawfully appropriate to their own use $28,500 alleged to have been the property of the city of El Centro, with 18 separate embezzlements of public funds of the city of El Centro, and with nine separate crimes of keeping false accounts and making false entries in monthly accounts of the water department of the city of El Centro, and John Nathan Little appeals.

Affirmed in part and reversed in part.

S. P. Williams, of El Centro, for appellant.

Earl Warren, Atty. Gen., Eugene M. Elson, Deputy Atty. Gen., and Elmer W. Heald, Dist. Atty., and Ralph I. French, Deputy Dist. Atty., both of El Centro, for respondent.

MARKS, Justice.

Defendants Lillian O. Richards and John Nathan Little were jointly indicted by the grand jury of Imperial county and charged in various counts: With conspiracy to unlawfully appropriate to their own use $28,500 alleged to have been the property of the city of El Centro; with eighteen separate embezzlements of the public funds of the city of El Centro; with nine separate crimes of keeping false accounts and making false entries in monthly accounts of the water department of the city of El Centro.

Near the close of the trial Mrs. Richards withdrew her plea of not guilty to the conspiracy count, to one of the embezzlement accounts and to one of the counts charging the keeping of false accounts and making false entries in the accounts of the water department. She entered her pleas of guilty to those three charges. Prosecution on the other charges against her was discontinued. She has taken no appeal.

It was agreed between counsel and the trial court that the charges against defendant Little be considered as three: (1) the conspiracy; (2) the embezzlements; (3) keeping false accounts and falsifying accounts. The jury found him guilty of the three crimes. He has appealed from the judgment and from the order denying his motion for new trial.

We will hereafter refer to John Nathan Little as the defendant. He presents three grounds for a reversal of the judgment: (1) That at all times material here Mrs. Richards was his wife and therefore legally unable to enter into a conspiracy with him; (2) that the verdicts and judgment are not supported by any evidence against him; (3) misconduct of the district attorney.

Mrs. Richards and defendant went through a marriage ceremony on November 19, 1938, in Tucson, Arizona, and assumed the relation of and were known as husband and wife until early in January, 1940. At the time of their purported marriage they both had spouses living from whom they had not been divorced. Mrs. Richards had her marriage with defendant annulled for that reason on February 17, 1940.

On August 11, 1938, John Nathan Little obtained an interlocutory decree of divorce from Emma Lee Little in the superior court of Imperial county. A final decree of divorce was rendered on August 30, 1939, and was entered on the following day.

In the same court Lillian Sherman was given an interlocutory decree of divorce from George H. Sherman on September 15, 1938. A final decree of divorce was rendered and entered on October 11, 1939.

[1] It is urged that there is no evidence showing that the John Nathan Little named in the decree of annulment and in the interlocutory and final decrees of divorce is the same person who is defendant here. There is no merit in this contention because where there is an identity of name the law presumes an identity of person. Subd. 25, sec. 1963, Code Civ. Proc. It follows that as there was no evidence offered to the contrary we must presume that the Lillian O. Richards named in the annulment proceedings is the same person as the Lillian O. Richards named as a defendant here and that the John N. Little named as defendant in the annulment proceedings and the John Nathan Little named as plaintiff in the divorce case against Emma Lee Little is the John Nathan Little who is defendant here.

Defendant urges there is no evidence that the Lillian Sherman who obtained a divorce from George H. Sherman was the same person as Lillian O. Richards. This argument fails to take into consideration an important part of the record. The district attorney attempted to call Mrs. Richards as a witness against defendant. Objection was made to her testifying on the ground that she was then the wife of defendant; that defendant and Lillian Sherman (Mrs. Richards) had been married in Las Vegas, Nevada, on March 9, 1940. It being thus admitted that Lillian Sherman and Mrs. Richards were names of the same person and as there was no evidence to the contrary we must again presume "Identity of person from identity of name."

[2] The Attorney-General concedes that a husband and wife cannot conspire together to commit a crime. See, People v. Miller, 82 Cal. 107, 22 P. 934; People v. MacMullen, 134 Cal.App. 81, 24 P.2d 794. To give life to this rule the alleged conspirators must actually be husband and wife, which implies a valid marriage. Because a man and woman, not legally qualified to be married to each other, go through a void marriage ceremony, cannot make them husband and wife.

Subject to certain exceptions not appearing here, section 61 of the Civil Code declares void a purported marriage between a man and woman when either or both of them have living an undivorced wife or husband. In People v. Glab, 13 Cal.App.2d 528, 57 P.2d 588, 591, it was said: "An enlightening discussion of void and illegal marriages and the distinction between void and voidable unions is found in Re Estate of Gregorson, 160 Cal. 21, 116 P. 60, 62, L.R.A.1916C, 697, Ann.Cas.1912D, 1124, wherein Mr. Justice Sloss lays down the rule that 'a marriage prohibited as incestuous or illegal and declared to be "void" or "void from the beginning" is a legal nullity, and its [in] validity may be asserted or shown in any proceeding where the fact of such marriage may be material.' The same case is also authority for the proposition that although section 80 of the Civil Code provides a means for judicial determination of void marriages, that does not undertake to establish an exclusive method of questioning the validity of the purported marriage. Says Justice Sloss: 'The judgment merely declares an existing fact—viz., that the marriage is void—and this fact may be shown even though it may not have been so adjudicated.'"

[3] As both Mrs. Richards and defendant had spouses living and undivorced on November 19, 1938, at the time of their attempted marriage to each other, that ceremony was illegal and void and there was no marriage at all. They did not become husband and wife until they went through a second ceremony on March 9, 1940, after their disabilities had been removed. It follows that between July 1, 1938, and January 1, 1940, they were not husband and wife and could conspire together to commit the crimes here charged.

In considering the sufficiency of the evidence to support the verdicts and judgment it will be necessary to summarize the evidence as briefly as is possible in order to give a picture of the crimes admittedly committed by Mrs. Richards and defendant's relation to them and to her.

The city of El Centro owned and operated its water system. Mrs. Richards was employed as bookkeeper and collector for this enterprise. She commenced her duties sometime in 1935 and ended her services about January 8, 1940. Her salary was $125 per month during the early part of her employment. It was increased to $139 per month, probably after July 1, 1939.

A meter reader, employed by the city, read the meters. After the 20th of each month he turned his records in to her showing the amount of water used by each consumer during the month preceding each reading. Mrs. Richards computed the cost of the water used by each consumer and entered the results on her records. She then billed each customer for the amount owing to the city. These bills were made out on postcards and were mailed to the consumers. A stub was attached to each card showing the amount of the bill. When the bill was paid the card was receipted and the stub detached and kept as an office record. The total daily collections and the total of the amounts appearing on the stubs were supposed to balance. Deposits of the collections in a bank were supposed to have been made when sufficient money had been received by her. At the end of each month Mrs. Richards made a verified report of her collections to the city clerk. She had charge of these operations and attended to all of them personally except when she was absent from the office when an assistant from the office of the city clerk relieved her. On her return she would balance the cash collected by the assistant with the amounts shown on the stubs. The accounts of the assistants balanced on all occasions except four. On these occasions the variances were adjusted by the assistant.

The proved shortages in Mrs. Richards' accounts commenced in July, 1938, and continued monthly until January 1, 1940. Mrs. Richards kept account of the money which she abstracted. She removed and kept stubs showing total receipts equaling the amount of money taken. She deposited the balance of the money in the bank. After July 1, 1938, her monthly reports of money collected showed only the amounts of the deposits made by her and were false statements as they did not show, as collected, the money she embezzled.

Her monthly shortages in 1938 were in the following amounts: July—$1,369.93; August—$1,382.99; September—$1,567.07; October—$1,598.94; November—$1,589.96; and December—$1,607.26. In 1939 they were as follows: January—$1,766.97; February—$642.38; March—$1,242.83; April—$2,246.53; May—$857.20; June—$1,390.39; July—$1,906.21; August—$2,296.16; September—$2,216.74; October—$1,854.15; November—$1,345.90; and December—$1,979.49. Her total defalcations were $28,861.10 in eighteen months.

About July, 1937, Mrs. Richards purchased 255 acres of land near the town of Dexter, Oregon. A considerable balance was owing on the purchase price. On September 1, 1938, this property was conveyed to Lillian O. Little and John N. Little. Probably in August, 1938, defendant went to Oregon and started extensive improvements on this property. He rebuilt the dwelling, built a capacious chicken house, bought and attempted to raise 2,500 small chicks, bought an electric brooder, a harvester, trucks, tractors and various farming implements.

Mrs. Richards and defendant opened a joint account in the First National Bank at Eugene, Oregon, on September 20, 1938. The account was closed on January 17, 1940. There was $6,284.30 deposited in this joint account of which $1,500 was probably borrowed by them from the bank.

Mrs. Richards sent more than $7,400 to Oregon between October 1, 1938, and November 1, 1939. This money was transmitted by telegraph and by bank drafts. By far the greater portion of this amount was sent to defendant and the telegraph money orders and bank drafts were endorsed and cashed by him. Smaller amounts were sent direct to creditors to pay bills contracted by defendant in connection with improvements made on the farm and purchases made by him which we have already mentioned. The telegrams transmitting the money were sent and the bank drafts were purchased in various cities in Imperial county and in San Diego and Riverside. Mrs. Richards invariably used cash in these transactions.

One witness testified that in July, 1938, he saw defendant and Mrs. Richards with currency lying on a bed in front of them; that defendant said to her, "You can get more and there is more where this came from * * *"; that during the same month defendant said to this witness that he was going to the police station and "bust" Mrs. Richards "wide open".

Another witness testified that in November, 1938, defendant exhibited a roll of bills "about as big as my arm" and said to her, in effect, that many people in El Centro would like to know where John Little got his money but that it was none of their business. This was corroborated by another witness.

Other witnesses who had worked on the farm in Oregon testified that in 1939 defendant gave one of them an envelope containing some papers, remarking that "there were some slips in there that Lillian (Mrs. Richards) would give her interest in heaven to have, but they might send her to hell"; that the envelope and its contents were subsequently destroyed. Neither of these witnesses could read so the contents of the envelope remained undisclosed.

Another witness testified that on or about October 13, 1939, defendant gave him for temporary safekeeping an envelope which defendant said contained over $700 in currency; that the envelope was stamped and addressed and had been "used"; that on another occasion defendant offered him a $100 bill in payment of a small purchase.

It is also in evidence that on one occasion defendant came into the water department office in El Centro; that he was angry and said to Mrs. Richards, "Get that stuff ready, we are leaving here and you are going with me."

Another witness testified that in Eugene, Oregon, defendant borrowed a dollar from him, saying he wanted to "wire the old lady for some money"; that he said to defendant, "It is pretty easy getting money, a pretty easy way of getting money, will she send it?"; that defendant replied, "You're damned right she will, I know too much."

There is also evidence that defendant made statements to witnesses concerning Mrs. Richards and her employment that were proven false.

Defendant urges that this evidence is insufficient to establish conspiracy as there is no evidence of any agreement between the parties that Mrs. Richards should abstract money from her water collections.

[4] It is true that there is no direct evidence of an express agreement between the parties to steal the money. Such direct evidence is rarely obtainable in conspiracy cases as knowledge of an express agreement to commit a crime is usually locked within the minds of the conspirators. However, a conspiracy may be established by circumstantial evidence or by reasonable inferences drawn from the evidence. People v. Paz, 1 Cal.App.2d 262, 36 P.2d 657; People v. Goldaber, 17 Cal.App.2d 195, 61 P.2d 975. In Revert v. Hesse, 184 Cal. 295, 193 P. 943, 946, the Supreme Court approved the following: "'The law recognizes the intrinsic difficulty of proving a conspiracy. * * * The conspiracy may sometimes be inferred from the nature of the acts done, the relation of the parties, the interests of the alleged conspirators, and other circumstances.' Woodruff v. Hughes, 2 Ga.App. 361, 58 S.E. 551; Jernigan v. Wainer, 12 Tex. 189." See, also, People v. Beck, 60 Cal.App. 417, 213 P. 61; People v. King, 30 Cal.App.2d 185, 85 P.2d 928.

[5, 6] We believe the evidence in this case amply sustains the implied finding of the jury that defendant and Mrs. Richards conspired together to embezzle money from the city of El Centro. Mrs. Richards' salary was never more than $139 per month. Over a period of thirteen months she sent defendant, personally, and to creditors to pay bills contracted by him, over $570 per month. Besides, it was proven that defendant, on at least three occasions, had considerable sums of currency in his possession. On at least two occasions his statements indicated that this money came from Mrs. Richards. Undenied statements attributed to him indicated his knowledge of the illegal source of her income. Where, as here, a man and a woman, though not married, are living together in the relation of husband and wife, where they embark on a joint undertaking to improve their common property for their mutual benefit, where they expend large sums of money for this purpose and for their common benefit, where the woman has access to public funds in considerable amounts and where she furnishes the man with considerable sums of money to be used for their common benefit, which sums are greatly in excess of her income, where the embezzlement of public funds by the woman is proved beyond the possibility of doubt, where the man makes statements indicating his knowledge that the woman was embezzling the money furnished to him, the implied finding of the jury that they agreed and conspired together to embezzle the money cannot be disturbed on appeal.

[7] This same evidence summarized by us in support of the finding of the conspiracy also supports the finding of embezzlement.

Defendant contends that he cannot be guilty of embezzlement of public funds of the city of El Centro because he was not the "person charged with the receipt, safekeeping, transfer, or disbursement of public moneys". Sec. 424, Pen.Code.

[8] Section 31 of the Penal Code provides in part as follows: "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, * * * are principals in any crime so committed." What we have already said indicates our conclusion that defendant was properly found guilty of the embezzlements as the inference is strong that he aided and abetted and advised and encouraged Mrs. Richards in her criminal acts. If authority be needed to support the conclusion that a person who is not an official may be guilty, as a principal, in the crime of misuse of public funds, it may be found in the case of People v. West, 3 Cal.App.2d 568, 40 P.2d 278.

Defendant maintains there is no evidence sustaining the verdict and judgment against him of falsifying public accounts. This charge relates to the method used to conceal the embezzlements and not to the embezzlements themselves. Knowledge of the defalcations would not import knowledge of the plan used to conceal them.

[9] The evidence demonstrates that Mrs. Richards falsified her monthly reports of collections. This is the crime of which defendant stands convicted as a principal. To support that conviction there should be evidence from which a reasonable inference might be drawn that defendant knew that these false statements were being made by Mrs. Richards and that he aided and abetted or advised and encouraged her in making them.

[10] The only evidence in the entire record indicating that defendant knew that Mrs. Richards was filing monthly reports of her collections and that those reports were false is contained in her testimony before the grand jury, a portion of which was read to the jury. However, this evidence was admitted against Mrs. Richards alone and the jury was instructed not to consider it as evidence against defendant. After Mrs. Richards entered her pleas of guilty this evidence was stricken from the record in its entirety. After this evidence was stricken there was no evidence remaining indicating that defendant had even a suspicion that Mrs. Richards was filing any statements of her collections or that any of her records or accounts were falsified. It follows that the judgment pronounced on defendant for falsifying public accounts must be reversed.

Defendant complains of remarks of the district attorney during his argument to the jury. We have examined the record and can find nothing sufficiently prejudicial to cause a reversal of the judgment.

The portions of the judgment pronounced on defendant under count one of the indictment and under counts two to nineteen, inclusive, of the indictment, and also the portion of the order denying the motion for new trial under those portions of the judgment are affirmed. The portion of the judgment pronounced on defendant under counts twenty to twenty-eight, inclusive, of the indictment, and the portion of the order denying the motion for new trial under those counts are reversed.

We concur: BARNARD, P. J.; GRIFFIN, J.

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41 Cal.App.2d 777

BYRON JACKSON CO. v. WOODS et al.

Civ. 11172.

District Court of Appeal, First District, Division 1, California.

Nov. 29, 1940.

1. Indemnity 🔑8

Under indemnity agreement whereby owners of major part of stock of tool company, which sold its business and assets, agreed to indemnify purchaser against all claims or demands which might be made against purchaser by the tool company, its creditors, persons having claims against the company, or company's stockholders, indemnitors agreed only to indemnify purchaser against claims and demands incurred or occurring up to time of agreement and sale, and any liability created by purchaser either under name of the company or in purchaser's own name after purchaser took over the assets of the company, did not come within terms of indemnity agreement but was an independent liability of purchaser.

2. Indemnity ⚷9(2)

Under indemnity agreement whereby stockholders of tool company which sold its business agreed to indemnify purchaser against all claims which might be made against it, purchaser could not recover from indemnitors expenses incurred in defending suit against purchaser and indemnitors by retailer against whom judgment had been obtained for patent infringement in selling company's and purchaser's tools, notwithstanding suit included some claims which might have been covered by indemnity agreement, where at time of sale of business there was no agreement requiring company or purchaser to sell such tools to retailer, but purchaser continued to sell such tools in name of company and thereafter in purchaser's own name, and hence expenses were incurred in defending against liability created by purchaser's own acts.

3. Contribution ⚷5

There can be no contribution between joint tort-feasors nor in such cases will the law inquire into their comparative culpability.

4. Indemnity ⚷9(2)

Under indemnity agreement whereby stockholders of tool company which sold its business agreed to indemnify purchaser against all claims which might be made against it, purchaser could not recover from indemnitors expenses incurred in defending suit against purchaser and indemnitors by retailer against whom judgment had been obtained for infringement of patent in selling company's and purchaser's tools, notwithstanding retailer's charges that purchaser defrauded retailer might have been groundless or not sustainable, since fact that charges were made was sufficient to require purchaser to defend itself against them, and indemnitor is not liable for costs incurred by indemnitee in defending suit for indemnitee's wrongful acts.

5. Indemnity ⚷9(2)

An indemnitee cannot recover against an indemnitor for counsel fees or costs incurred and voluntarily paid by him in defending a suit for damages caused by indemnitee's own wrongful acts.

6. Indemnity ⚷9(2)

Under indemnity agreement whereby stockholders of tool company which sold its business agreed to indemnify purchaser against all claims which might be made against it, purchaser could not recover from indemnitors expenses incurred in defending suit against purchaser and indemnitors by retailer against whom judgment had been obtained for infringement of patent in selling company's and purchaser's tools, notwithstanding suit was settled prior to trial by indemnitors, where purchaser was defending against liability created by its own acts independent of any liability covered by indemnity agreement.

7. Indemnity ⚷15(7)

Under indemnity agreement whereby stockholders of tool company which sold its business agreed to indemnify purchaser against all claims which might be made against it, purchaser which sought partial reimbursement from indemnitors for expenses incurred in defending suit against purchaser and indemnitors by retailer against whom judgment had been obtained for infringement of patent in selling company's and purchaser's tools, on theory that some of tools which were part of basis of judgment against retailer had been purchased before execution of indemnity agreement, had burden to establish what part of tools sold by retailer had been purchased before date of agreement and what part thereafter.

◆

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Action by the Byron Jackson Company against W. T. Woods and others to recover on an indemnity agreement. From a judgment for defendants, plaintiff appeals.

Affirmed.

Chickering & Gregory, Donald Y. Lamont, and Paul L. May, all of San Francisco, for appellant.

Keyes & Erskine, of San Francisco, and Freston & Files, of Los Angeles, for respondents.

KNIGHT, Justice.

On August 10, 1928, Byron Jackson Company purchased the business and assets of the U. S. Tool Company, and as part of the sales transaction Hugh E. Stock (since deceased), W. T. Woods, O. C. Dunn and Herbert W. Erskine, owners of more than two-thirds of the issued stock of the U. S. Tool Company, executed an indemnity agreement whereby they agreed to "indemnify and hold harmless Byron Jackson Pump Co., a Delaware corporation, of and from any and all claims or demands of whatsoever kind or nature that at any time may be made against said Byron Jackson Pump Co. by: (1) said U. S. Tool Company, (2) any of the creditors of U. S. Tool Company, (3) any person or persons having any claim or claims of whatsoever kind or nature against U. S. Tool Company, or (4) any of the stockholders of U. S. Tool Company". Eight years later Byron Jackson Company brought the present action against Woods, Dunn, Erskine and the legal representative of the estate of Hugh E. Stock, deceased, to recover the sum of $4,537.36, claiming that the same was due under the terms of said agreement. Judgment was given for defendants, and plaintiff appeals.

The complaint alleged that the sum of money sued for represented the amount of expenses, including attorneys' fees, incurred by appellant in connection with a damage suit brought by International Supply Company, a retail dealer in oil drilling tools, against appellant, respondents, the U. S. Tool Company and the Empire Steel Products Company, Inc., which suit was settled by respondents prior to trial. The basis of the International suit was a large money judgment for patent infringement, which had been obtained against International on account of the sale to the trade by International of certain "rock-bit" cones used in oil drilling operations, which had been manufactured by the three companies named in the International suit and by them sold to International for resale to the trade.

The important events which led up to the filing of the International suit, and the circumstances attending the settlement thereof by respondents, were as follows: Originally these "rock-bit" cones were manufactured by the Empire company and sold to International. While these sales transactions were being carried on, and some time previous to June, 1927, the Hughes Tool Company, a manufacturer of oil drilling tools competing with the Empire Company, commenced a patent infringement suit against International, charging it with the infringement of the Hughes patents in the sale of these cones. The Empire Company then wrote International a letter to the effect that it would protect the latter against the results of any patent infringement litigation. Thereafter Empire sold its business to the U. S. Tool Company, which continued to manufacture said cones and sell them to International under a similar letter of guarantee. In April, 1928, the United States District Court entered a decree in the Hughes patent infringement suit, denying relief to the Hughes Company and holding in effect that the cones sold by International did not infringe on the Hughes patents. The Hughes company took an appeal, and pending the appeal the U. S. Tool Company sold its business to appellant, and the indemnity agreement, which is the basis of this action, was executed. Appellant continued to operate the U. S. Tool Company's plant until October 8, 1928, when it was shut down and the equipment and other assets moved to the main Byron Jackson plant. While operating the U. S. Tool Company's plant appellant continued to manufacture said cones and other supplies, and sell the same to International under the name of the U. S. Tool Company; and thereafter appellant continued to manufacture said cones at its own plant and to sell them to International up to December, 1929, and to the trade generally until June, 1931, under its own name. Immediately after the acquisition of the U. S. Tool Company the manager of appellant was advised of the pending Hughes suit against International for patent infringement, and was also informed that if appellant continued to manufacture and sell said "rock-bit" cones and the Hughes suit was sustained, appellant would be liable. The manager replied that nevertheless appellant would continue to manufacture and sell said cones, and hold the indemnitors if liability was established against appellant. Subsequently the mid-continent manager of appellant advised the International that appellant would continue the manufacture of these cones and sell the same to International under the same arrangements as with the U. S. Tool Company, and accordingly it continued to do so.

In April, 1931, the judgment of the United States District Court in the Hughes patent infringement action was reversed by the United States Circuit Court of Appeals, and thereafter final judgment was entered against International and in favor of the Hughes Tool Company in the sum of $37,880.27 and costs, representing the profits the Hughes Company would have made if it instead of International had sold the cones which International had sold between May, 1927, and December, 1929. Immediately thereafter, and on May 15, 1931, appellant notified the trade that on June 1, 1931, it would discontinue the manufacture of these cones.

International then commenced its action against appellant, the U. S. Tool Company, respondents, and the Empire Company, to recover $42,226.32 which was the amount of damages assessed by the United States Circuit Court of Appeals in the Hughes patent infringement action, plus costs, interest and attorneys' fees. Appellant was served with process, and after demurrer had been sustained to the original complaint, it appeared in the action by filing a demurrer and an answer to the amended complaint. Respondents filed a separate demurrer to the original complaint, and afterwards an answer to the amended complaint; and before trial of the case negotiated a settlement with International, pursuant to which they paid International the sum of $10,750. Thereupon International released all claims and demands, not only against respondents, who made the settlement, but against appellant and the other defendants as well; and caused a dismissal of the action to be entered accordingly. Appellant had nothing to do with the negotiations for the settlement, nor did it contribute anything toward the amount paid. Following such settlement and dismissal appellant commenced the present action.

[1] As shown by the findings, the trial court adopted the view, contended for by respondents, and which in our opinion should be sustained, that appellant in defending against the International suit was defending against certain liability created by its own acts, for which damages were claimed; that such acts were independent of any liability covered by the indemnity agreement, and that therefore respondents were not liable under the terms of the said agreement for the payment of appellant's expenses in defending itself, even though the suit included other claims which might have been covered by the indemnity agreement. In other words, the trial court took the position, as do respondents on this appeal, that by the terms of the indemnity agreement respondent agreed only to indemnify appellant against claims and demands incurred or accruing up to the time of the agreement and the sale of the U. S. Tool Company to appellant—August 10, 1928; and that any liability created by appellant, either under the name of the U. S. Tool Company or its own name, after it took over the assets of the U. S. Tool Company, did not come within the terms of the indemnity agreement, but was an independent liability of appellant.

[2] In this connection the evidence shows that at the time of the sale of the U. S. Tool Company to appellant, there was no agreement of any kind between the U. S. Tool Company and International requiring the former to sell its products to International. It could have ceased doing so at any time. Therefore, when appellant took over the U. S. Tool Company's business, it likewise was not required either to manufacture the cones or to sell the same to International. But it continued to do so for several months in the name of the U. S. Tool Company, and thereafter in its own name. Consequently, whatever liability arose from its actions subsequent to the taking over of the U. S. Tool Company was its own responsibility, and cannot be said to come within the terms of the indemnity agreement.

[3] Appellant contends, however, that the allegations of the complaint in the International suit, attributing certain acts to appellant, do not charge appellant with a liability to International separate or independent from its liability for U. S. Tool Company's obligations, or if so, that no damages are claimed therefor except such as are stated to result from the claims covered by the indemnity agreement. There is no merit in either contention. For instance, among other things, in the second and sixth causes of action in the International complaint it is alleged that appellant, with full knowledge of the patent infringement guaranty under which the International was buying cones from the U. S. Tool Company, took over the business and assets of the U. S. Tool Company and thereafter "continued to manufacture said cones and other supplies, and to sell and deliver the same to plaintiff [International] under the name of U. S. Tool Company until on or about October 8, 1928, on or about which date said Byron Jackson Company continued the manufacture and distribution of said products under the name of said Byron Jackson Company, and thereafter continued to manufacture and sell said products to plaintiff". And again, in the eighth cause of action it was alleged that "Thereafter the defendant Byron Jacskon Company continued the manufacture and sale of said products which were then the subject of said litigation. Plaintiff alleges that had it not been for the conduct and acts of the defendant Byron Jackson Company aforesaid and had not said defendant led plaintiff to believe that said defendant had undertaken and

agreed to carry out the terms of said guaranty and indemnity agreements, plaintiff would not have continued to purchase said articles, or any of them, from the defendant Byron Jackson Company, but, on the other hand, would have ceased the purchase and sale of said articles and would have taken immediate steps to protect itself in the said litigation which was then on appeal." Moreover, in the ninth, tenth and eleventh counts of the complaint, appellant was charged as a joint tort-feasor with other defendants therein, in a conspiracy to defraud International; that is to say, it was charged with being in pari delicto with other defendants; and under well-settled rules there can be no contribution between joint tort-feasors, nor in such cases will the law inquire into their comparative culpability. 31 Cor.Jur., p. 454.

[4, 5] Thus it will be seen that the complaint not only charged appellant with committing wrongful acts after it acquired the U. S. Tool Company, to which the indemnity agreement does not apply, but it charged appellant also, along with other defendants, with committing acts intended to defraud the International and with being a party to and a participant in a fraudulent conveyance. Nor does it matter that the charges made against appellant in the International complaint may have been groundless, or for other reasons could not have been legally sustained. The fact that they were made was sufficient to require appellant to defend itself against them; and under the general rule an indemnitee cannot recover against an indemnitor for counsel fees or costs incurred and voluntarily paid by him in defending a suit for damages caused by the indemnitee's own wrongful acts. 31 Cor.Jur., p. 437.

[6] Furthermore, the situation is not altered by the fact that respondents settled the International suit. It is apparent that in doing so they were not compelled to take care of appellant's liability; and because they were successful in bringing about a dismissal of the action against appellant and all other defendants sued upon a payment by them of less than one-fourth of the demand sued for cannot be said to have operated to their prejudice.

[7] Appellant makes the further contention that even though an independent liability of appellant was joined in the International suit with claims covered by the indemnitors' agreement, appellant nevertheless is entitled to partial reimbursement for the expenses of defending the action. This contention is based upon the fact that some of the cones sold by International, and which were part of the basis of the Hughes judgment against International, had been purchased by International from the U. S. Tool Company before the date of the execution of the indemnity agreement on August 10, 1928. However, in order to entitle appellant to such apportionment, the burden was upon appellant to establish what part of the cones sold by International had been purchased before August 10, 1928, and what part thereafter. Some testimony was adduced on this subject, but it was entirely insufficient to form any basis for an intelligent apportionment. Therefore, in the absence of sufficient proof no apportionment of the expenses could be made.

The remaining points argued are merely incidental to those already discussed and decided, and likewise are without merit.

The judgment is affirmed.

We concur: PETERS, P. J.; WARD, J.

41 Cal.App.2d 828

NATIONAL AUTOMOBILE INS. CO. v. CUNNINGHAM.

Civ. 2466.

District Court of Appeal, Fourth District, California.

Dec. 5, 1940.

Hearing Denied Feb. 3, 1941.

1. Trial 🔑165

On motion for nonsuit at close of plaintiff's case, all evidence must be construed most strongly against defendant, and every reasonable inference, fairly deducible, and every favorable presumption fairly arising from evidence produced, must be considered as facts in favor of plaintiff.

2. Trial 🔑165

On motion for nonsuit, if evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, court must take the view most favorable to plaintiff.

3. Trial ⚷165

On motion for nonsuit, all evidence in favor of plaintiff must be taken as true, and contradictory evidence must be disregarded.

4. Trial ⚷165

On motion for nonsuit, court has nothing to do with question of credibility of witnesses, nor with testimony tending to create a conflict.

5. Death ⚷31(6)

A widow, as surviving heir at law of husband who was killed in automobile accident, had cause of action against owner of automobile with which husband collided, for pecuniary loss suffered by widow because of death of husband. Code Civ.Proc. § 377.

6. Workmen's compensation ⚷2188, 2193, 2217

An employer who pays or becomes obligated to pay compensation by reason of injury or death of employee may bring an action against another who is responsible therefor, and such action does not abate by reason of death of employee. St.1937, p. 273, §§ 3851, 3852.

7. Workmen's compensation ⚷2191

An employer's insurance carrier which pays or is obligated to pay workmen's compensation is "subrogated" to rights of employer and may enforce such rights in its own name. St.1937, p. 273, §§ 3851, 3852.

See Words and Phrases, Permanent Edition, for all other definitions of "Subrogated".

8. Workmen's compensation ⚷2194, 2217

Where Industrial Accident Commission made an award against employer's insurance carrier in favor of wife of deceased employee who was killed in collision with automobile, insurance carrier was "subrogated" to right of action of wife against owner of automobile with which employee collided, and such action was not abated by death of employee. Code Civ.Proc. § 377; St.1937, p. 273, §§ 3851, 3852.

9. Automobiles ⚷192(1)

Any negligence of driver of automobile is imputed to owner permitting driver to drive. Vehicle Code, § 402, St.1937, p. 2353.

10. Death ⚷30

The death of driver of automobile abates cause of action against driver, but does not bar cause of action against owner, whose liability is primary up to $5,000 for death of any one person in any one accident.

11. Automobiles ⚷244(2)

The testimony of eyewitnesses to accident is not necessary to support finding of negligence of driver of automobile involved in collision, if such finding is made in trial court.

12. Automobiles ⚷245(13, 60, 79, 90)

In action arising out of collision between automobiles approaching from opposite directions, evidence as to whether drivers of automobiles were negligent and contributorily negligent, and as to proximate cause of accident, was for jury. Vehicle Code, §§ 510, 531, St.1935, pp. 176, 183, and § 525, St.1937, p. 619.

13. Appeal and error ⚷782

An attempted appeal from order granting nonsuit would be dismissed. Code Civ. Proc. § 963.

Appeal from Superior Court, San Bernardino County; G. R. Freeman, Judge.

Action by the National Automobile Insurance Company against Lillian Cunningham to recover amount of workmen's compensation award from the defendant. From a judgment and order of nonsuit, the plaintiff appeals.

Judgment reversed and appeal from order of nonsuit dismissed.

Hearing denied; CURTIS, EDMONDS, and HOUSER, JJ., dissenting.

Lowell E. Lathrop and Walter S. Coen, both of San Bernardino (Donald E. Ruppe, of Los Angeles, of counsel), for appellant.

Kenneth J. Murphy, of Los Angeles, and Harry H. Parsons, of San Bernardino, for respondent.

MARKS, Justice.

This is an appeal from a judgment entered in favor of defendant after the trial judge had granted her motion for a nonsuit, and also an attempted appeal from such order.

[1-4] The rules governing the granting of a motion for nonsuit are clearly set forth in 9 California Jurisprudence 551, as follows: "A motion for nonsuit involves the legal effect of admitted facts. When made at the close of plaintiff's case it in purpose and effect operates as a demurrer to the evidence, and must therefore assume that all the evidence in favor

of the plaintiff, if relevant to the issues, is true. It is, therefore, well settled that upon a motion for nonsuit, particularly when made at the close of plaintiff's case, all the evidence must be construed most strongly against the defendant. Every favorable inference, fairly deducible, and every favorable presumption fairly arising from the evidence produced must be considered as facts in favor of the plaintiff. If the evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, the court must take the view most favorable to the plaintiff. All the evidence in favor of the plaintiff must be taken as true, and if contradictory evidence has been given it must be disregarded. On such motion the court has nothing to do with the question of the credibility of the witnesses, nor with the testimony tending to create a conflict." See Gomez v. Lindberg, 11 Cal.App.2d 730, 54 P.2d 1153.

The sole question presented is this: Is there any substantial evidence or reasonable inferences to be drawn from such evidence that would support a judgment for plaintiff?

John Thurman Ellis was employed by Louis D. Mortora who was transacting business under the name of San Bernardino Provision Company with his principal place of business in the city of San Bernardino. On January 5, 1938, there had been a mistake in a delivery to a customer in Pomona and another in a delivery made in Glendora. Mortora sent Ellis to correct these mistakes. He left San Bernardino at about five-thirty that evening. He was killed while on this business of his employer in an automobile collision which happened at about six o'clock on the Valley boulevard about seven miles east of Ontario and about twenty-two miles west of San Bernardino. The accident happened on the direct route between San Bernardino and Pomona which lies westerly from the former city.

The other car involved in the accident was owned by defendant and was being driven by Emil Graefen with her consent. Graefen died from injuries received in the accident.

Plaintiff was the insurance carrier for Mortora. Ellis left surviving him, his wife, Goldie C. Ellis, as his surviving heir. The industrial accident commission made an award against plaintiff and in favor of Mrs. Ellis in the sum of $5,000, death benefit, besides hospital care and funeral expenses. Part of these benefits were paid and plaintiff, being obligated for the balance, has brought this action to recover the amount of the award from defendant.

[5-7] Mrs. Ellis, as the surviving heir at law of her deceased husband, had a cause of action against defendant for the pecuniary loss which she suffered because of the death of her husband. Sec. 377, Code Civ.Proc. An employer who pays or becomes obligated to pay compensation by reason of the injury or death of an employee may bring an action against another who is responsible therefor, sec. 3852, Labor Code, St.1937, p. 273, and such action does not abate by reason of the death of the employee. Sec. 3851, Labor Code. Where the compensation is either paid by the insurance carrier of the employer or it is obligated to pay the same, the carrier is subrogated to the rights of the employer and may enforce such rights in its own name. Morris v. Standard Oil Co., 200 Cal. 210, 252 P. 605.

[8] Plaintiff was therefore subrogated to the right of action of Mrs. Ellis by reason of the judgment rendered in her favor by the industrial accident commission. As she had a cause of action to recover her pecuniary loss resulting from the death of her husband, such death did not abate that right of action and plaintiff can maintain this action to recover the pecuniary loss suffered by Mrs. Ellis subject to the limitations imposed by the statutes.

[9, 10] When the owner of an automobile permits another to drive it, any negligence of the driver is imputed to the owner. Sec. 402, Vehicle Code, St.1937, p. 2353. While the cause of action against the driver of the car abates on his death, such death does not bar the cause of action against the owner whose liability is primary up to $5,000 for the death of any one person in any one accident, Sayles v. Peters, 11 Cal.App.2d 401, 54 P.2d 94.

The only witness who was near the scene of the fatal accident is Frank P. Green. He was driving easterly on the Valley boulevard at about six o'clock in the evening of January 5, 1938, on his own right hand side of the road at a speed of about forty miles an hour when his automobile received a blow from the rear. The impact caused his car to swerve to his left over the white line which bisects the pavement longitudinally. He observed another automobile approaching from the east with its headlights illuminated. It was traveling on the northerly half of the pavement. He succeeded in avoiding a collision by bringing his car to the southerly half of the pavement and stopping it on the southerly shoulder.

Immediately after his automobile was struck he heard brakes screeching and then the crash of a collision. He returned to the scene of the collision and found a Ford automobile lying on its right side across the northerly half of the pavement with its front end near the center line and a Chevrolet automobile standing on its wheels almost directly behind the Ford. The front wheels of the Chevrolet were on the northerly oiled shoulder of the highway about three feet from the rear of the Ford. Both automobiles were headed southeasterly. It was subsequently learned that Emil Graefen was in the Ford and John Thurman Ellis in the Chevrolet. No other vehicles were near the place of the accident.

The only other witness to give any evidence bearing upon the cause of the accident was Charles Castle, a member of the California Highway Patrol. He reached the scene of the collision a short time after it happened. He testified that about 185 feet westerly from where the two cars came to rest "tire marks" commenced on the northerly half of the pavement and continued easterly for about 75 feet when they returned to the southerly half of the pavement and became "skid marks". These skid marks extended for 50 or 60 feet and ended about 50 or 60 feet westerly from where he found the Ford. About eight feet easterly from the end of the skid marks there commenced metal scratches on the pavement and aluminum had been ground into the concrete. This witness defined "tire marks" as marks made by tires when the wheels were rolling forward in the direction the car was traveling, and "skid marks" as marks made by the tires when the car is sliding sideways.

The aluminum weather stripping on the right side of the Ford was partially ground off and there were various scratches in the metal on the same side. The Chevrolet showed no sign of having been off its wheels. Photographs showing the damages suffered by the two cars would support the inference that as far as the Chevrolet was concerned the principal point of impact had been on its left side near or just in front of where the cowling joined the hood.

With these facts in evidence we believe that the case should have gone to the jury and that the motion for nonsuit was improperly granted. This evidence will support the following reasonable inferences showing negligence on the part of Emil Graefen (secs. 531, 510, 525, Vehicle Code, St. 1935, pp. 183, 176 and St.1937, p. 619; Gornstein v. Priver, 64 Cal.App. 249, 221 P. 396); that the Ford was being driven easterly and the Chevrolet westerly at and before the time of the collision; that the Chevrolet was being driven on its own right hand side of the highway with its lights illuminated; that Graefen drove the Ford into the rear of the Frank P. Green car; that the Ford then went out of control and proceeded easterly on its left hand side of the highway for about 75 feet; that it turned or was turned towards its own right hand side of the highway and skidded sideways for a considerable distance; that it turned over on its right side and slid onto its left hand side of the roadway to the point of impact.

[11] It is not necessary that there be the testimony of eye-witnesses to an accident in order to support a finding of negligence on the part of the driver of an automobile involved in a collision if such finding be made in the trial court. Eastman v. Rabbeth, 128 Cal.App. 534, 17 P.2d 1009.

[12] Under the facts here presented the questions of the negligence of Graefen, the contributory negligence of Ellis and the proximate cause of the accident were all questions of fact for the jury and not questions of law for the court.

[13] The judgment is reversed. The attempted appeal from the order granting the nonsuit is dismissed. Sec. 963, Code Civ.Proc.

We concur: BARNARD, P. J.; GRIFFIN, J.

PEOPLE v. RICCIARDI et al.

Civ. 12505.

District Court of Appeal, Second District, Division 1, California.

Dec. 3, 1940.

Rehearing Denied Dec. 26, 1940.

Hearing Granted Jan. 30, 1941.

1. Eminent domain 🔑106
Highways 🔑85

Owners of property abutting on highway not only had right to use of street in common with all other members of the public, but also had private easement of ingress and egress which they were entitled to enjoy without substantial impairment for public purposes, unless justly compensated therefor.

2. Highways 🔑85

The interest in a street which is peculiar and personal to an abutting lot owner and which is different from that of the general public is the right to have free access to the property substantially in manner he would have enjoyed the right in case there had been no interference with such street.

3. Highways 🔑85, 87

The private easements possessed by an owner abutting on a street are the rights of ingress and egress by means of adjacent portion of street, the right to receive light from space occupied by street and the circulation of air therefrom, and right to have street space kept open so that signs or goods displayed in and upon the property may be seen by passers-by.

4. Eminent domain 🔑106

Liability for damages to property not taken in connection with proposed street improvement could not be avoided by pleading or proving that owners of the property could reach street from another direction and by using a newly constructed service road, although the service road could be considered in estimating amount of damage suffered from loss of direct access.

5. Eminent domain 🔑106

The partial impairment of right enjoyed by owners of property abutting on street to have their customers come to their place of business without unreasonable hindrance or interruption constituted a legal injury, differing only in degree from their total destruction.

6. Eminent domain 🔑106

The constitutional provision that private property shall not be taken or damaged for public use without just compensation entitles the owner of property abutting on a highway to recover for loss of direct ingress and egress. Const. art. 1, § 14.

7. Eminent domain 🔑221

In proceeding to condemn property for widening state highway, whether infringement of abutting owners' right is special and has resulted in a substantial impairment of such right is for the jury.

8. Trial 🔑194(10)

In proceeding to condemn property for widening state highway, instruction that service road to be constructed was to be considered as an integral part of public highway, and that if abutting owners had reasonable access to the service road they were not entitled to damages for alleged interference with direct egress or ingress was properly refused because invading jury's province.

9. Trial 🔑194(10)

In proceeding to condemn property for widening state highway, instruction that abutting owners' access to proposed highway would not be interfered with and that owners would not be entitled to recover damages for alleged injuries to right of ingress and egress was properly refused because usurping jury's function.

◆

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Eminent domain proceeding by the People, acting through the Department of Public Works, against Antonio Ricciardi and others, to condemn a portion of defendants' property for widening of a state highway. From portion of judgment awarding damages to property not taken, plaintiff appeals.

Affirmed.

Lincoln V. Johnson, Clifford D. Good, Holloway Jones, and George C. Hadley, all of San Francisco (C. R. Montgomery and Robert E. Reed, both of Sacramento, of counsel), for appellant.

Holbrook & Tarr and Leslie R. Tarr, all of Los Angeles, for respondents Antonio Ricciardi and Malvina Bontinck Ricciardi.

WHITE, Justice.

This proceeding is one in eminent domain instituted by plaintiff to condemn a portion of defendants' property for the purpose of widening a state highway fronting thereon. Defendants are the owners of property located at the northeast corner of Rosemead and Ramona boulevards in the county of Los Angeles, both of which are state highways. The property in question is improved with a modern slaughterhouse and retail meat market, both set back from the highway so as to afford parking facilities. Facing Rosemead boulevard is a residence with a large storage basement. Ingress and egress is afforded the property in its entirety along both boulevards, with driveways leading into the property from the two highways. The proposed improvement involves the separation of the grade of Rosemead boulevard and the tracks of the Pacific Electric Railway Company on Ramona boulevard to permit of the construction of an underpass on Rosemead. The last-named boulevard is one of the main arteries of traffic from downtown Los Angeles to the district of Rosemead and points north and east. The railway tracks along Ramona boulevard constitute the main interurban line of the railway company from Los Angeles to San Bernardino.

At present Rosemead boulevard fronting on defendants' property is 60 feet wide. By the proposed improvement it is intended to make such boulevard 280 feet wide. It will consist of four lanes, two in the underpass, and two outer lanes on each side thereof, designated as service roads, the latter being 30 feet wide. Rosemead boulevard will commence to pass under Ramona boulevard at a point southerly thereof and will come to grade northerly thereof at Glendon way, the latter of which is the first cross or insecting street north of defendants' property, approximately 525 feet north thereof at the farthest point.

Ramona boulevard will consist of a four-lane highway, with a free way on each side of the railway tracks. The outer lane on Rosemead boulevard will run into the outer lane on Ramona boulevard at the corner of defendants' property. The outer lanes join the inner lanes of Rosemead at the aforesaid Glendon way. On Ramona boulevard they join the main-traveled portion some distance easterly of defendants' property. The outer lanes are all at the grade of defendants' property. It should be noted, however, that as part of the underpass there will be constructed upon the westerly portion of the property taken from defendants a wall varying from 10 to 7 feet in height, which will, of course, change the grade of the main highway designated as Rosemead and which will effectually block all ingress and egress to and from Rosemead boulevard except by traversing the service road to Glendon way and then making a left turn into the boulevard.

Following trial by jury, a verdict was rendered awarding defendants for what is designated parcel 1 the sum of $9,000, and the further sum of $15,000 as damages to the remaining property by reason of the severance and the construction of the improvement in the manner proposed. For what was referred to as parcel 2 the jury awarded the sum of $350, allowing no damages to the remaining portion of the property. Upon this appeal it is the award for damages to the remainder of defendants' property occasioned by the severance of parcel 1 that is in the main challenged by appellant.

[1, 2] As a first ground for reversal of the judgment herein, it is urged that there is no evidence in this case of damage to the right of ingress or egress, in that the record is barren of testimony showing any interference with such ingress and egress to and from defendants' property abutting the highway. In this claim appellant cannot be sustained. As abutting property owners on the highway in question, respondents not only possessed the right to the use of the street in common with all other members of the public, but they also had a private right or easement for the purposes of ingress and egress to and from their property. Not only are they entitled not to have this right taken away or destroyed for public purposes without just compensation, but they are entitled not to have the right in question substantially impaired or interfered with for public purposes unless justly compensated therefor. McCandless v. City of Los Angeles, 214 Cal. 67, 71, 4 P.2d 139; Eachus v. Los Angeles Ry. Co., 103 Cal. 614, 37 P. 750, 42 Am.St.Rep. 149. It has been held, and we are in accord with the holding, that the interest in the street which is peculiar and personal to the abutting lot owner and which is distinct and different from that of the general public, is the right to have free access to his lot and building substantially in the manner he would have enjoyed the right in case there had been no interference with such street. Indiana, B. & W. Ry. Co. v. Eberle, 110 Ind. 542, 11 N.E. 467, 59 Am. Rep. 225.

[3-6] In the instant case appellant asserts that the evidence discloses no impairment of access to the public highway, but rather establishes only such damage as results from inconvenience and circuity of travel after leaving the property via the service road and from "loss of visibility" of the property resulting alone from diversion of traffic through the underpass, and that all of such damage is damnum absque injuria. The private easements possessed by an abutting owner are thus defined in Williams v. Los Angeles Ry. Co., 150 Cal. 592, 594, 89 P. 330: (1) the right of ingress and egress to and from the lot over and by means of the adjacent portion of the street; (2) the right to receive light from the space occupied by the street and to the circulation of air therefrom; (3) the right to have the street space kept open so that signs or goods displayed in and upon the lot may be seen by the passers-by, in order that they may be attracted as customers to patronize the business carried on thereon. Surely it cannot with reason be argued that the elimination of access to both Rosemead and Ramona boulevards which respondent possessed and the substitution of the service road did not impair or even destroy a great part of the value of respondents' property. Appellant cannot relieve itself of liability by pleading or proving that the owners of the property may reach the same from another direction, viz., by Glendon way and the newly constructed service road. The thing of which respondents have been deprived for the public good is direct access to a public highway. True, the installation of the service road and the purpose it serves was to be considered in estimating the damage suffered, for it is manifest that the damages are not so great as they would be if access to the highway were entirely cut off. But respondents are entitled to receive whatever damages they sustained by reason of the impairment of their easement of direct access to the highway. That, after completion of the improvement, respondents could not make use of the highway in the same manner as they could prior to that time, is too clear to call for further discussion. It is equally apparent that respondents' right to have their customers come to their place of business without unreasonable hindrance or interruption was also impaired. The partial impairment of these rights constituted a legal injury, differing only in degree from their total destruction. As was said in Fairchild v. Oakland & Bay Shore Ry. Co., 176 Cal. 629, 169 P. 388, 389, respondents' right of access in the case at bar "is precisely one of those rights of action for the damaging of property which, if it did not exist before, came into existence by virtue of our constitutional amendment granting a recovery for the damage as well as for the taking of property for public use". The fact that respondents were left a means of ingress and egress other than the one impaired or destroyed is not a controlling factor in the determination of their right to recover, but is only a circumstance materially affecting the amount of damages to which they may be entitled. The enlargement of the constitutional provision (sec. 14, art. I, Const. of Calif.), by prescribing that "private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner", entitles such owner to recover for injuries of the type sustained in the case at bar, which are over and above the common injury sustained by other abutters on the street or the general public. Reardon v. City and County of San Francisco, 66 Cal. 492, 506, 6 P. 317, 56 Am.Rep. 109. In the case before us such injury was occasioned by the property having no frontage whatever left on Rosemead boulevard. It is only by continuing south and the service road that access may be had to the portion of Ramona boulevard provided for west-bound traffic exclusively. The property is cut off from all direct access to Rosemead boulevard. This condition is occasioned by the construction of the concrete wall along the westerly portion of the land taken, and which will support the slopes occasioned by the change of grade on Rosemead boulevard adjacent to respondents' property, and which wall, as heretofore pointed out, varies in height from 10 to 17 feet as the depth of the underpass cut increases.

[7] Contrary to appellant's claim, it is the law that whether the infringement of respondents' right is special and peculiar to their property and has resulted in a substantial impairment of such right is a question of fact, and was therefore properly submitted to the jury. McCandless v. City of Los Angeles, supra.

Finally, appellant assigns as error the giving of and refusal to give certain instructions. It would unduly prolong this opinion to herewith set forth the challenged instructions which were given. Suffice it to say that they were in conformity with the law as herewith expounded. Instruction No. 17 is fully supported by the holding in Eachus v. Los Angeles Ry Co., supra, and McCandless v. City of Los Angeles, supra. The last-cited case also furnishes authority for the law embodied in instructions Nos. 19, 21 and 22, while instruction No. 18 was authorized by the provisions of section 14 of article I of our state Constitution, and instruction No. 20 is in harmony with the decision in Lane v. San Diego Elec. Ry. Co., 208 Cal. 29, 33, 280 P. 109.

[8] Appellant's proposed instruction No. 22 was properly refused. By it the jury would have been advised in part as follows:

"* * * In this respect, I instruct you that the service road to be constructed, fronting defendants' property, is to be considered by you as an integral part of the public highway, and if the defendants have reasonable access to said service road they are not entitled to any damages for any alleged interference with egress to or from their property.

"Any inconvenience suffered by the defendants after they leave the boundaries of their property after the construction of the improvement in the manner here proposed will be the same as that suffered by the public generally. Such inconvenience is not to be considered by you as the defendants are not entitled to any damage therefor."

This instruction clearly invaded the province of the jury by advising them concerning an issue of fact upon which it was their prerogative to find. McCandless v. City of Los Angeles, supra.

[9] Appellant's proffered instruction No. 23 was clearly a usurpation of the jury's functions, in that by it the triers of fact would have been instructed that as a matter of law under the evidence presented "* * * the defendants' access to the proposed highway will not be interfered with in any respect, that is to say, their access to the highway will not be substantially impaired, and under the law defendants are not entitled to recover damages for any alleged injuries to their right of ingress and egress." Upon the authority of McCandless v. City of Los Angeles, supra, and for the reasons hereinbefore in this opinion stated, it was a question of fact whether the infringement of respondents' right was special and peculiar to their property, as also was the question whether such infringement resulted in a substantial impairment of their right.

By reason of the foregoing, it follows that the judgment from which this appeal is taken should be, and it is, affirmed.

We concur: YORK, P. J.; DORAN, J.

EVERETT v. DAVIS et al.*

Civ. 11304.

District Court of Appeal, First District,
Division 1, California.

Nov. 29, 1940.

Hearing Granted Jan. 28, 1941.

1. Waters and water courses 🔑115, 118

One has no right to obstruct the flow onto his land of what are technically known as "surface waters" but the term does not include all waters which may be on or moving across the surface of land without being collected into a natural water course but is confined to waters falling on the land by precipitation or arising thereon in springs.

See Words and Phrases, Permanent Edition, for all other definitions of "Surface Waters".

2. Waters and water courses 🔑115, 118

One has the right to protect himself and his land against "flood waters" which are waters escaping from a natural water course at time of flood or overflow and for such purpose may obstruct the flow onto his land even though such obstructions cause them to flow onto the land of another.

See Words and Phrases, Permanent Edition, for all other definitions of "Flood Waters".

3. Waters and water courses 🔑38, 51, 78

One cannot obstruct or divert the flow of a natural "water course" by which is not meant the gathering of errant water while passing through a low depression, swale or gully but a stream in the real sense with a definite channel with beds and banks within which they flow at times when the streams of the region habitually flow.

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* Subsequent opinion 115 P.2d 821.

See Words and Phrases, Permanent Edition, for all other definitions of "Water Course".

4. Waters and water courses ⚷115, 124

Where waters on leaving mouth of wash which was a natural water course spread over defendant's land and were not confined to a definite channel and water did not consist of waters falling on the land by precipitation or rising thereon in spring, waters were "flood waters" and defendant could not be enjoined from confining the waters to fifteen foot channel across his land to highway ditch notwithstanding that flow of water in highway ditch during rainy season was increased and that sand, silt and gravel that were formerly deposited on defendant's land were deposited in ditch filling it and causing waters to flow over adjoining landowners' land.

5. Waters and water courses ⚷115

"Surface waters" are waters falling on and naturally spreading over land and they may come from seasonal rains, melting snows, swamps or springs or from all of them and consist of surface drainage falling on or flowing from and over tracts of land before such waters have found their way into a natural water course.

6. Waters and water courses ⚷38

A "stream" is a water course having a source and terminus banks and channels through which waters flow at least periodically and it usually empties into other streams, lakes or the ocean, but it does not lose its character as a water course even though it may break up and disappear.

See Words and Phrases, Permanent Edition, for all other definitions of "Stream".

7. Waters and water courses ⚷38

Streams are usually formed by surface waters gathering together in one channel and flowing therein and the waters then lose their character as "surface waters" and become "stream waters".

See Words and Phrases, Permanent Edition, for all other definitions of "Stream Waters".

8. Waters and water courses ⚷115

"Flood waters" are distinguished from "surface waters" by the fact that the flood waters have broken away from a stream while surface waters have not yet become part of a water course.

9. Waters and water courses ⚷38, 115

The term "flood waters" is used to indicate waters which escape from a water course in a great volume and flow over adjoining lands in no regular channel, though the fact such errant waters make for themselves a temporary channel or follow some natural channel, gully or depression does not affect their character as "flood waters" or give to the course which they follow the character of a natural "water course".

10. Waters and water courses ⚷115

Flood waters escaping from a stream are not "surface waters" and do not lose their character as flood waters while flowing wild over the country.

11. Waters and water courses ⚷126(3)

In suit in equity by adjoining landowner to enjoin defendant landowner from confining flood waters within a definite channel reasonableness of the method adopted by defendant to protect himself from flood waters was for the court.

12. Waters and water courses ⚷118

A landowner may use such means as are reasonable under all circumstances to protect himself against flood waters.

13. Injunction ⚷189

In suit for injunction court of equity has broad powers and should exercise them so as to do substantial justice between the parties.

14. Waters and water courses ⚷126

In suit by adjoining owner to enjoin defendant from confining flood waters to definite channel, equity court could properly consider the physical solution for the problem of disposing of flood waters in determining reasonableness of the means adopted by defendant to protect his property from flood waters.

KNIGHT, J., dissenting.

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Suit for an injunction by Clarence A. Everett against John A. Davis and others. From a judgment for the plaintiff as against all defendants except the Southern

Pacific Company, defendants other than the Southern Pacific Company appeal.

Reversed.

Charles F. Blackstock, of Oxnard, for appellants.

Durley & Downes and Henry C. Downes, all of Oxnard, for respondent.

PETERS, Presiding Justice.

All defendants, with the exception of the Southern Pacific Company, appeal from a judgment enjoining them from erecting or maintaining certain embankments and fences on the lands of defendant Davis. The trial court found that these structures diverted the natural flow of surface waters across the lands of defendant Davis into a narrow stream so that instead of such waters being spread out and the sand, silt and gravel contained therein deposited on Davis' lands, such waters, with their deposits, were forced onto the lands of plaintiff, to plaintiff's substantial damage.

The lands involved on this appeal are situated in the Moorpark district located in the eastern part of Ventura county. Plaintiff Everett owns two parcels of land, the northerly parcel consisting of eighty acres and the southerly parcel of one hundred and twenty-six acres. The eighty-acre parcel lies north of a road known as Los Angeles avenue, which runs east and west. This road separates the northerly parcel from the one hundred and twenty-six acre parcel which lies to the south of that road. Both parcels are composed of good productive soil and are highly improved. The lands of defendant Davis are contiguous to the northerly parcel owned by plaintiff Everett, lie immediately to the east of said lands, and are bounded on the south by Los Angeles avenue. Immediately east of the defendant Davis' land, and north of Los Angeles avenue, are the lands owned by Mary Estes, not a party to this action. South of Los Angeles avenue, east of plaintiff Everett's one hundred and twenty-six acre parcel, are the Bristol lands which are not involved in this action. Immediately east of the Bristol lands and south of Los Angeles avenue are the Hitch lands. Crossing the lands of Estes, defendant Davis and plaintiff Everett's northerly parcel, is the right of way of the Southern Pacific Company, owned in fee by it. This right of way, on which tracks are constructed, runs in a general southwesterly direction across the three tracts mentioned, in the southern half of such tracts.

North of the railroad right of way the country is hilly and rolling. A large portion of this northern country drains into a canyon or ravine that runs through the Estes property onto defendant Davis' land known as Estes wash. Although the trial court did not expressly so find, the evidence shows, and the parties to this appeal all concede, that Estes wash, in times of rain, is a natural watercourse, draining a large area to the north. The mouth of Estes wash is on defendant Davis' property north of the railroad tracks. Prior to the construction of the railroad the water from Estes wash, in the rainy season, debouched from the mouth of the canyon, and spread out over defendant Davis' lands. The railroad was constructed in 1902. The railroad is higher than the surrounding country. When the railroad was constructed a culvert or bridge was built in the right of way about three hundred feet west of the east boundary of defendant Davis' land, and by the construction of an artificial channel, the waters flowing down Estes wash have been controlled and directed so that they pass under this bridge or culvert. Thereafter, the water has flowed under the bridge and over defendant Davis' land. The court found that after flowing under the culvert, the waters from Estes wash, bearing gravel, sand and silt, during the rainy season have "spread out over the land of Davis, and have run across same without flowing in any channel or watercourse; and that, in thus spreading out, the gravel and sand have been deposited upon the said lands of John A. Davis, forming a debris cone, having its apex at said bridge or culvert". This finding, in so far as it finds that the waters spread out over defendant Davis' land without flowing in any watercourse, and other findings to the same effect, are challenged by defendants as being unsupported by the evidence. We have read the record. The evidence on this point is somewhat unsatisfactory, but we are not inclined to hold such findings are not supported. We are inclined to the belief that the evidence shows that the detritus cone, built up at the mouth of Estes wash by the sand, gravel and debris in the waters debouching therefrom, is an alluvial fan causing the waters to spread out in a fan shape over defendant Davis' land. In other words, this debris cone is practically uniform in its slope, the elevation contours being practically in concentric circles from the apex at the bridge.

In 1916 the county of Ventura constructed a highway ditch bordering the north side of the highway on Davis' land, and leading to the land of Everett. The trial court found that since 1916 the balance of the waters from Estes wash, after flowing across defendant Davis' land north of the highway and south of the railroad track, and, after having deposited most of the gravel, sand and silt contained therein on the land of Davis, which also absorbed some of such water, ran into this highway ditch. This ditch caused the water to run westerly down to the land of plaintiff Everett. The court also found that the embankment built by the railroad north of the tracks caused the waters flowing under the bridge to flow in a general southeasterly direction. In 1932, the Southern Pacific Company, with the knowledge of defendant Davis, but without his consent, built across its right of way, and partially on Davis' land south of the tracks, a woven wire fence and a dirt embankment for a distance of about two hundred and fifty feet to carry the waters away from the tracks. This fence and embankment were built from the east side of the culvert and were so constructed that they diverted the waters from their natural southeasterly course to a more southwesterly direction, in the direction of the lands of plaintiff. The court found, however, "that the erection and maintenance of such fence and embankment, for the said approximate distance of two hundred and fifty feet, would not cause of itself, injury to the lands of plaintiff".

After the construction of the railroad fence and embankment, defendants Davis and Hitch built a woven wire fence and embankment from the west side of the culvert paralleling the one built by the railroad for two hundred and fifty feet, and then continued such fence and embankment, and the ones constructed by the railroad, in a general southwesterly direction to the highway ditch at a point about five hundred feet east of the lands of plaintiff Everett. The effect of these structures has been to confine the waters of Estes wash to a fifteen-foot channel across Davis' land to the highway ditch. The trial court also found that the effect of thus confining the waters to this narrow channel has been not only to increase the flow of the highway ditch during the rainy season, and so to increase the flow onto plaintiff Everett's land, but also the sand, silt and gravel that were formerly deposited on defendant Davis' land are now deposited in the ditch, with the result that the ditch is filled up causing the water to overflow onto plaintiff Everett's lands. The court expressly found that these waters, while on the lands of defendant Davis, were surface and were not flood waters. The court also found that the diversion of these waters onto plaintiff Everett's lands caused serious and permanent injuries to said lands. Based on these findings, the court entered its judgment enjoining the defendants, other than the Southern Pacific Company, from maintaining the diversion fences and embankments, and ordering the defendants to remove these fences and embankments. No relief was granted as against defendant Southern Pacific Company.

From these findings it appears that, prior to the construction by defendants of the fences and embankments complained of, water that had been accumulated from a large drainage area was debouched onto defendant Davis' land through the mouth of Estes wash. The effect of the structures constructed by defendants has been to convey the waters from Estes wash across Davis' land, without materially changing their natural course, but without permitting them to spread out over Davis' lands. As already pointed out, although the trial court made no express finding to that effect, it is conceded by all concerned on this appeal, and the evidence shows, that Estes wash, northerly from its mouth is a natural watercourse. The court made no finding as to whether or not the artificial channel constructed by the railroad company in 1902 leading from the mouth of Estes wash to the railroad track had acquired the status of a natural watercourse, by reason of its permanent nature, its uninterrupted use as a watercourse, and the acquiescence of all concerned, under the rule stated in San Gabriel V. C. Club v. Los Angeles County, 182 Cal. 392, 188 P. 554, 9 A.L.R. 1200, and Chowchilla Farms, Inc. v. Martin, 219 Cal. 1, 25 P.2d 435. Nor did the court make any finding as to whether the highway ditch constructed by the county of Ventura in 1916 had acquired the status of a natural watercourse under the rule of these cases. There can be no doubt that the waters in Estes wash are stream waters, flowing in a natural watercourse.

These waters, prior to the construction of the fences and embankments here involved, after debouching from the canyon, did not run in any natural channel across Davis' land, but, after depositing most of their sand, gravel and silt, eventually found their way into the highway ditch, and then ran down to plaintiff Everett's property.

[1-3] The legal question presented by this state of facts can be simply stated: Are such waters surface waters, or are they flood waters? If they are surface waters, as held by the trial court, the defendants were not legally entitled to divert them from their natural flow, or to concentrate them in such a way as to cause them to flow in a manner different from their natural manner to the damage of Everett. If they are flood waters they can be treated as a "common enemy", against which defendants were entitled to protect themselves in a reasonable manner. These principles are clearly stated in the leading and frequently cited case of Horton v. Goodenough, 184 Cal. 451, at page 452, 194 P. 34, at page 35, as follows: "The primary rules of law governing such a case are simple enough and well settled, and are three in number. First, one has no right to obstruct the flow onto his land of what are technically known as surface waters. Heier v. Krull, 160 Cal. 441, and authorities therein cited at page 444, 117 P. 530. But by 'surface waters' are not meant any waters which may be on or moving across the surface of the land without being collected into a natural water course. They are confined to waters falling on the land by precipitation or rising thereon in springs. Putting it conversely, they do not include waters flowing out of a natural watercourt, but which yet were once a part of a stream and have escaped from it, 'flood waters' in other words. McDaniel v. Cummings, 83 Cal. 515, 23 P. 795, 8 L.R.A. 575; Farnham on Waters, § 278. Second, one has the right to protect himself against 'flood waters,' that is, waters of the character last described, and for that purpose to obstruct their flow onto his land, and this even though such obstruction causes the water to flow onto the land of another. Barnes v. Marshall, 68 Cal. 569, 10 P. 115; Lamb v. Reclamation District, 73 Cal. [125] 126, 14 P. 625, 2 Am.St.Rep. 775; De Baker v. [Southern Cal.] Ry. Co., 106 Cal. 257, 39 P. 610, 46 Am.St.Rep. 237; Sanguinetti v. Pock, 136 Cal. 466, 69 P. 98, 89 Am.St.Rep. 169. Third, one may not obstruct or divert the flow of a natural water course. But by a 'water course' is not meant the gathering of errant water while passing through a low depression, swale, or gully, but a stream in the real sense, with a definite channel with bed and banks, within which it flows at those times when the streams of the region habitually flow." (Citing cases.)

[4] Tested by these standards, it is clear that the waters here involved are flood waters and are not surface waters. These waters did not consist of waters "falling on the land by precipitation or rising thereon in springs". Nor, it can be added, do they consist of surface waters flowing from an upper owner onto Davis' land. These waters were "once a part of a stream and have escaped from it—flood waters, in other words". In the Horton case the water came down Jepson canyon. In times of high water defendant's lands were seriously injured. Defendant and others, in an attempt to protect their lands, erected obstructions which diverted the flow onto plaintiff's lands. The trial court found that the waters thus diverted were "surface or flood waters", and granted plaintiff an injunction. In reversing the case the Supreme Court held that the waters were clearly flood waters and were not surface waters. The only factual distinction between the Horton case, supra, and the instant one, is that, after debouching from Jepson canyon over the debris cone at the mouth of the canyon, the waters were normally confined to a regular channel across defendant's lands, but overflowed the banks thereof in periods of high flow. But this is a distinction without a legal difference. If stream waters which debouch from a canyon, and during periods of high flow overflow the banks of the natural channel, are flood waters, so are waters that have once been confined to a natural channel and debouch from the mouth thereof without then running in a channel. Certainly, the legal nature of these waters does not change because, perchance, in one case there is a channel, but an inadequate one to carry the water, while in the other there is no well-defined channel. Another case, factually similar to the Horton case, is San Gabriel V. C. Club v. Los Angeles County, 182 Cal. 392, 188 P. 554, 9 A.L.R. 1200; see, also, Fenton & Thompson R. Co. v. Adams, 221 Ill. 201, 77 N.E. 531, 112 Am.St.Rep. 171.

Plaintiff contends that this factual distinction compels a holding that in the instant case the waters are surface waters, relying on such cases as Thomson v. La Fetra, 180 Cal. 771, 183 P. 152; Rudel v. Los Angeles County, 118 Cal. 281, 50 P. 400, and LeBrun v. Richards, 210 Cal. 308, 291 P. 825, 72 A.L.R. 336. It would serve no useful purpose to analyze the facts of these cases, all of which are clearly distinguishable from the instant case. Whatever doubt may have existed as to whether waters once confined in a natural channel and escaping from the end thereof are flood waters, has been set at rest by the recent decision of the Supreme Court in Mogle v. Moore, Cal.Sup., 104 P.2d 785. In that case defendant owned two parcels of land divided by a strip designated as "Comet Avenue". The plaintiff owned two parcels also divided by this strip below the defendant's property. The waters here involved came down Cucamonga canyon, and then a part thereof flowed down West Cucamonga creek. Over a period of years, by artificial changes and by natural development, this creekbed came to carry considerable waters in periods of high flow. During such periods the water flowed down the creek and ultimately reached the upper boundaries of defendant's lands at Comet avenue. These waters then flowed generally over defendant's land. Defendant, by the construction of fences and other means, conveyed these waters down Comet avenue in a narrow channel to plaintiff's lands, where they did the damage of which complaint was made. The trial court enjoined defendant. This was reversed. The court discussed the basic principles involved as follows (104 P.2d 788):

"West Cucamonga creek did not lose its character as a watercourse nor did its waters lose their character as stream waters after 1916, because the stream bed was dry for periods of time. Cederburg v. Dutra, 3 Cal.App. 572, 86 P. 838. It is thoroughly established in California that 'A constant flow of water is not essential to the existence of a watercourse.' 25 Cal.Jur. 1036, and cases cited. It is sufficient if, during some seasons, water does in fact flow in the stream bed.

[5-10] "Surface waters are defined as waters falling upon and naturally spreading over lands. They may come from seasonal rains, melting snows, swamps or springs, or from all of them. Surface waters consist of surface drainage falling on or flowing from and over a tract or tracts of land before such waters have found their way into a natural watercourse. 26 Cal.Jur. p. 279, and cases cited.

"A stream is a watercourse having a source and terminus, banks and channel, through which waters flow, at least periodically. Streams usually empty into other streams, lakes, or the ocean, but a stream does not lose its character as a watercourse even though it may break up and disappear. Hellman, etc., Bank v. Southern Pacific Co., 190 Cal. 626, 214 P. 46. Streams are usually formed by surface waters gathering together in one channel and flowing therein. The waters then lose their character as surface waters and become stream waters. Lindblom v. Round Valley Water Co., 178 Cal. 450, 173 P. 994; Horton v. Goodenough, 184 Cal. 451, 194 P. 34; Gray v. Reclamation District No. 1500, 174 Cal. 622, at page 650, 163 P. 1024. As we have observed, a continuous flow of water is not necessary to constitute a stream and its waters stream waters. San Gabriel Valley Country Club v. Los Angeles County, 182 Cal. 392, 188 P. 554, 9 A.L.R. 1200.

"Flood waters are thus correctly described in 26 California Jurisprudence 280; 'Flood Waters are distinguished from surface waters by the fact that the former have broken away from a stream, while the latter have not yet become part of a watercourse. The term "flood waters" is used to indicate waters which escape from a watercourse in great volume and flow over adjoining lands in no regular channel, though the fact that such errant waters make for themselves a temporary channel or follow some natural channel, gully or depression does not affect their character as flood waters or give to the course which they follow the character of a natural watercourse.'

"It is also thoroughly settled that flood waters escaping from a stream are not surface waters and do not lose their character as flood waters while flowing wild over the country. In Horton v. Goodenough, supra, it was said (184 Cal. 451, 194 P. 37): 'The waters are plainly flood waters breaking out of their channel and running wild, and as such each property owner threatened has the right to protect himself against them as best he can, under the authority of the decisions we have already cited, the most notable of which is Lamb v. Reclamation District (73 Cal. 125, 126, 14 P. 625, 2 Am.St.Rep. 775), supra. The waters are not surface waters in the technical sense, for they have already been gathered into a stream whence they have escaped.'

"A similar rule is announced in LeBrun v. Richards, 210 Cal. 308, 291 P. 825, (828), 72 A.L.R. 336, with the added remark that 'Flood waters are those which escape from a stream or other body of water and overflow the adjacent territory.'"

The court then quotes that portion of the Horton case, supra, that is quoted above in this opinion, and then holds (104 P.2d 790):

"When we apply these rules of law to the facts found by the trial court the following conclusions are inevitable: (1) West Cucamonga creek is a watercourse and the water flowing in it constitutes a stream; (2) The surface waters running off from Upland and vicinity become stream waters when they gather in West Cucamonga creek; (3) When the stream waters of West Cucamonga creek leave its watercourse in times of flood they become storm waters; (4) Those waters remain storm waters when running wild over the adjacent country.

"It makes no difference in the ultimate decision of this case, on the facts found, whether we do or do not regard the man-made channel on Comet avenue as a part of West Cucamonga creek and a watercourse. The facts found are not sufficient to determine that question. We will therefore assume that it was not a watercourse. The flood waters escaped from the original channel of the West Cucamonga creek at the John G. Clock property. They then became flood waters, the common enemy against which threatened property owners had the right to protect themselves. Those flood waters followed the man-made channel to the lands of defendants. On leaving that man-made channel they remained flood waters. Defendants had the right to protect their property against those flood waters even to the damage of plaintiffs, their lower neighbors. There is no finding that what defendants did to protect their property was improperly done. It follows that in so far as the judgment enjoins defendants from properly protecting their property from the waters escaping from West Cucamonga creek through the channel on Comet avenue, it cannot be sustained."

After holding that Thomson v. La Fetra, supra, and similar cases, were not controlling, the court discussed the exact point here involved as follows (104 P.2d 790):

"Plaintiffs also urge that the waters which flooded their property cannot be classified as flood waters because they did not escape over the banks of West Cucamonga creek during a period of great storms, but, either through an opening at the end of the creek, or through the end of the man-made channel on Comet avenue.

"We are not impressed with this argument. As we have already seen, stream waters escaping from the channel of a watercourse during periods of great storms become flood waters. *That they cannot fall within any accepted definition of surface waters is clear whether they escape over the stream banks or at the end of the channel.* Therefore, they are not surface waters. That they are not stream waters when they leave the channel is fully settled by the cases already cited. By this process of elimination we are forced to the conclusion that the waters which escaped from West Cucamonga creek could have been only flood waters. We are fortified in this conclusion by Sanguinetti v. Pock, supra, where it was held that storm waters which filled a natural swale, not a watercourse retained the character of flood waters. A property owner may protect his property from overflow from flood waters." (Italics ours.)

It should be added that the dissenting opinion in the Mogle case does not challenge these well-settled principles. It contends, however, that the majority opinion has misconstrued the facts, and that the case is one where a natural stream has been diverted from its natural channel to the injury of a lower owner. That problem is not involved on this appeal.

This case, and the reasoning upon which it is based, are conclusive on the present appeal.

[11-14] It should be mentioned that the trial court, in the instant case, made no finding as to the reasonableness of the means taken by defendants to protect their properties. That will be an issue on the retrial. Although some loose language appears in some of the cases that a property owner may take "any means" to protect himself from flood waters, the proper rule is that such means must be reasonable under all the circumstances. This limitation is recognized in all the better reasoned cases. Jones v. California Development Co., 173 Cal. 565, 160 P. 823, L.R.A.1917C, 1021; Horton v. Goodenough, supra; San Gabriel V. C. Club v. Los Angeles County, supra; Mogle v. Moore, supra; 26 Cal.Jur. p. 291, § 508. It should also be remembered that this is an equity case. The equity

courts possess broad powers, and should exercise them so as to do substantial justice between the parties. If a physical solution of the problem here presented exists so that the parties by cooperation, keeping in mind their relative rights, can solve such problem, the equity court may properly consider such physical solution in determining what is a reasonable means of protecting defendants' properties. Tulare Dist. v. Lindsay-Strathmore Dist., 3 Cal.2d 489, 45 P.2d 972; Peabody v. City of Vallejo, 2 Cal.2d 351, 40 P.2d 486.

The judgment appealed from is reversed.

I concur: WARD, J.

KNIGHT, Justice (dissenting).

I dissent. The waters which are the subject of the present controversy, during certain periods of each year flow for a number of miles within a well-defined watercourse down what is known as Estes wash, to the natural end of the watercourse located on appellants' lands, which have been adapted to the growing of ordinary field crops. There the waters spread out and mostly disappeared; and such was the condition for many years. By means of artificial structures appellants began diverting the water from the end of the watercourse over and across their lands in such a manner as to cause great damage to respondent's land, upon which there is a valuable growing orchard.

The majority opinion holds as a matter of law and contrary to the trial court's finding that the waters so diverted are flood waters; and as will be noted, the opinion is grounded principally upon the decision in the recent case of Mogle v. Moore, Cal.Sup., 104 P.2d 785, which was rendered by the District Court of Appeal of the Fourth District, 96 P.2d 147, and subsequently adopted by the Supreme Court, one member dissenting. According to the definitions therein set forth, all waters flowing down the so-called Estes wash must be classified as stream waters; and by the same decision it is held that stream waters are not subject to diversion. In defining stream waters the court says [104 P.2d 789]: "A stream is a watercourse having a source and terminus, banks and channel, through which waters flow, at least periodically. Streams usually empty into other streams, lakes, or the ocean, but a stream does not lose its character as a watercourse even though it may break up and disappear. Hellman, etc., Bank v. Southern Pacific Co., 190 Cal. 626, 214 P. 46. Streams are usually formed by surface waters gathering together in one channel and flowing therein. The waters then lose their character as surface waters and become stream waters. Lindblom v. Round Valley Water Co., 178 Cal. 450, 173 P. 994; Horton v. Goodenough, 184 Cal. 451, 194 P. 34; Gray v. Reclamation District No. 1500, 174 Cal. 622, at page 650, 163 P. 1024. As we have observed, a continuous flow of water is not necessary to constitute a stream and its waters stream waters. San Gabriel Valley Country Club v. Los Angeles County, 182 Cal. 392, 188 P. 554, 9 A.L.R. 1200."

Moreover, the majority opinion herein expressly finds that the waters of Estes wash are stream waters, and the evidence fully supports such finding. Thus in the majority opinion it is said: "* * * it is conceded by all concerned on this appeal, and the evidence shows, that Estes wash, northerly from its mouth, is a natural watercourse. * * * There can be no doubt that the waters in Estes wash are stream waters, flowing in a natural watercourse." But the majority opinion goes on to hold in effect that instantly the stream waters reach and start to leave the end of the channel, and regardless of the volume or quantity thereof or the fact that they may there spread and disappear, they cease entirely to be stream waters and become flood waters, and consequently may be treated as a "common enemy" and diverted to respondent's damage. It may be granted that this view finds support in certain language used in dealing with the facts in the Mogle case, to the effect that flood waters are such as "escape over the stream banks *or at the end of the channel*". However, it would seem that the above italicized words fail to fit in to the generally accepted definition of flood waters previously stated in said decision, to-wit: "The term 'flood waters' is used to indicate waters *which escape from a watercourse* in great volume and flow over adjoining lands in no regular channel * * *." In other words, as said in Le Brun v. Richards, 210 Cal. 308, 291 P. 825, 828, 72 A.L.R. 336: "Flood waters are those *which escape from a stream* or other body of water and overflow the adjacent territory"; and in the case of Horton v. Goodenough, 184 Cal. 451, 194 P. 34, 37, the language used is "*breaking out of their channel* and running wild". (Emphasis added.) Regardless of the apparent conflict in the statement of the rule, it is my judgment that the present case falls squarely within the law laid down in Thomson v. La Fetra, 180 Cal. 771, 183 P. 152, and should be decided in accordance therewith. The law declared therein is correctly summarized in the syllabus as follows: "The rule applicable to waters which are a 'common enemy' cannot be invoked in favor of land owners who to prevent injury to their lands from seasonal waters from a canyon erected a wooden structure which turned the waters on to the lands of others, since the water not being in any sense flood water, the changing of its course and casting it upon other lands amounted to a trespass. The rule applicable to waters which are a 'common enemy' has application only to flood waters in the strict sense, that is to say, to waters escaping because of their height from the confinement of a stream and running over the adjacent country."

For the reasons stated, it is my conclusion that the judgment herein should be affirmed.

41 Cal.App.2d 817

OTT v. GOTFRIED.

Civ. 12587.

District Court of Appeal, Second District, Division 2, California.

Dec. 5, 1940.

Venue 🔑52(4)

In action instituted in superior court of Los Angeles county to recover balance due on contract payable at Los Angeles for purchase price of certain lands located in Imperial county where defendant cross-complained for cancellation of contract for fraud, denial of defendant's motion for change of venue to Imperial county for convenience of witnesses was not an abuse of discretion, where, according to affidavits, defendant's witnesses would be able to give testimony to disprove alleged deceptive statements, but plaintiff's affidavits named witnesses who would testify that no such fraudulent statements were made.

Appeal from the Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Action by Josephine Ott against M. A. Gotfried to recover balance due on a contract for purchase price of certain land, wherein defendant filed a cross-complaint for rescission and cancellation of contract and return of money already paid. From an order denying defendant's motion for a change of place of trial, defendant appeals.

Affirmed.

See, also, 103 P.2d 207.

Whitelaw & Whitelaw, of El Centro, for appellant.

August J. O'Connor and George J. Hider, both of Los Angeles, for respondent.

MOORE, Presiding Justice.

Defendant appeals from an order denying his motion for change of place of trial of the action to Imperial county on the ground of convenience of witnesses. Affidavits in opposition to said motion were filed and the court, after a hearing on the merits, denied the motion.

The action was brought to recover the balance due on a contract payable at Los Angeles, for the purchase price of certain lands located in Imperial county. Defendant admitted the contract but denied that anything was due thereon. He pleaded fraudulent representations as to the effective inducements to the execution of the agreement and filed a cross-complaint setting forth the same allegations and demanded a rescission and cancellation of the contract sued upon and the return of $2,500 already paid on the purchase price.

The question for determination is whether the court abused its discretion in denying the motion for change of venue.

The allegations of fraudulent representations consisted of the following: (1) that the land is good for growing vegetables and melons; (2) that the land was in alfalfa for ten consecutive years; (3) that the land was without alkali or water table. It will be noted that the first allegation is of an opinion while plaintiff avers, and designates witnesses who will testify, that neither of the two statements of fact were made.

In setting forth the names of his witnesses who reside in Imperial county and the substance of the testimony which each would give at the trial, defendant presented only witnesses who according to the affidavits would be able to give testimony to disprove the alleged deceptive statements. Not one was named as a witness who could testify that the alleged fraudulent representations were in fact made. On the contrary, plaintiff's affidavit named three witnesses who would testify at the trial that no such fraudulent statements were made, and one of the witnesses was the attorney of defendant who was present at the time of the sale. Inasmuch as the primary issue in the controversy was whether the fraudulent representations were made by plaintiff, the trial judge was confronted with the question whether it would be fair to require the plaintiff to travel to Imperial county for a trial or whether or not she had made the alleged false statements to the defendant. He properly decided in the negative.

Moreover, it must have appeared to the trial court from the affidavits that defendant had a familiar knowledge of the land in question prior to his purchase and that he, therefore, did not rely upon any statement of plaintiff as a basis of making the purchase. Also, notwithstanding that the defendant entered into possession of the land in April of 1938, yet on May 13, 1939, only two months before filing suit, in a letter to plaintiff he made no mention of any claim of having been deceived by plaintiff, but on the contrary requested an extension of the time within which to pay sums that were due and advised plaintiff that she ought to know that "these shippers can make a fortune one year and lose everything the next".

The defendant contends that inasmuch as there is no contradiction of his averments that his named witnesses will give testimony as to the wretched quality of the soil of the land in question, it was the bounden duty of the trial judge to grant the motion. But this by no means follows. A trial of the falsity of the alleged misrepresentations is secondary in importance to the trial of the fact as to whether the alleged inducing statements were made. The authorities relied upon by defendant in support of his claim that the court should have granted the order (Carr v. Stern, 17 Cal.App. 397, 407, 120 P. 35; Bartholomae Oil Corp. v. Associated Oil Co., 203 Cal. 176, 263 P. 516; Thompson v. Brandt, 98 Cal. 155, 32 P. 890; Perky v. Perky, 190 Cal. 492, 213 P. 492; Freeman v. Dowling, 219 Cal. 213, 25 P.2d 980; Security Inv. Co. v. Gifford, 179 Cal. 277, 176 P. 444; First-Trust Joint Stock Land Bank v. Meredith, 16 Cal.App.2d 504, 60 P.2d 1023, 62 P.2d 369; and Ryan v. Inyo, etc., 41 Cal.App. 758, 183 P. 251) are not in point. These are cases in each of which the losing party had no witnesses whose convenience would be served by holding the trial where the cause was instituted, or he had no witnesses residing outside of the county of the proposed place of trial, or his witnesses resided outside of the state and their journey to the proposed county was as convenient as to the original county, or his claims were equally balanced with those of his adversaries, or his witnesses were experts whose convenience was not to be considered.

The trial judge did not abuse his discretion in denying the motion. Order affirmed.

We concur: WOOD, J.; McCOMB, J.

41 Cal.App.2d 824

PEOPLE v. COWEN.

Cr. 1740.

District Court of Appeal, Third District. California.

Dec. 5, 1940.

1. **Indictment and Information** 🔑137(1)

Refusal to set aside indictment for forgery on ground that names of only part of witnesses who appeared before grand jury were indorsed on indictment was not error.

2. **Criminal law** 🔑589(1), 1186(4)

Where transcript of testimony of all witnesses who testified before grand jury was not delivered to defendant within 10 days after filing of indictment, denial of defendant's motion at commencement of trial for continuance on ground that transcript had not been served was error but was not prejudicial, where trial court ordered transcript served forthwith, and transcript was handed to defendant's counsel on second day of trial, which lasted 10 days thereafter. Pen.Code, § 925; Const. art. 6, § 4½.

3. Forgery ⚷44

Evidence *held* sufficient to prove corpus delicti and existence of a criminal agency in prosecution of former county supervisor for forgery in connection with claims against county for work and materials. Pol.Code, § 4076.

4. Criminal law ⚷372(12)

In prosecution of former county supervisor for forgery in connection with claims against county for work and materials, evidence of other forged claims, not included in indictment, was admissible to prove a general scheme or design to defraud county. Pol.Code, § 4076.

◆

Appeal from Superior Court, Humboldt County; Arthur Coats, Judge.

J. A. Cowen was convicted of forgery, and he appeals.

Affirmed.

Blaine McGowan, of Eureka, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

Mr. Justice TUTTLE delivered the opinion of the court.

Defendant was found guilty by a jury upon four counts of an indictment, each charging him with the crime of forgery. He now appeals from the judgment of conviction and order denying motion for new trial.

Defendant had, for a number of years, held the office of supervisor of Humboldt County. As such officer he was, from time to time, called upon to approve claims against the county for work and materials furnished the county under his direction, as provided in section 4076 of the Political Code. Under the provisions of said section the claimant was obliged to sign and file the following affidavit: "The undersigned, being duly sworn, says: That the above claim and the items as therein set out are true and correct; that no part thereof has been heretofore paid, and that the amount therein is justly due this claimant, and that the same is presented within one year after the last item thereof has accrued."

Each count of the indictment involved one of said claims, and the record shows that they were paid by the county.

No attack is made upon the sufficiency of the evidence. The proof of guilt is so overwhelming that such contention could not seriously be advanced. The four claims set forth in the indictment, all based upon labor performed, were introduced in evidence. The first purported to be that of Bill Thompson. It was for $88, and that name appeared as the affiant. It purported to be assigned to Messerle & Waldorf, grocers, who cashed it for defendant. The same observation applies to the other three claims, except for the difference in names and amounts. The second purported to be the claim of W. C. Butler, and the amount was $44. The third bore the name of W. C. Butler, and the amount was $44. The fourth purported to be the claim of W. Dart, and the amount was $64. All of said claims were presented to the auditor by the assignee, and thereafter warrants were cashed by them.

William Thompson testified that he did not sign the claim which bore his name, and that he was not in Humboldt County when the work described in said claim was performed. It was proven that W. C. Butler died on October 24, 1937, many months prior to the dates of the claims which purported to be signed by him—February 25, 1938, and October 14, 1938. W. Dart testified that the signatures on the claim which bore his name were not his own, and that he had done no work for Humboldt County since 1930.

A handwriting expert testified that the names of the said purported claimants, both as affiants and as assignors, were in the handwriting of defendant. He was also shown a number of other claims which had been cashed by the county. He testified that the signatures of the purported claimants were all in the handwriting of defendant. Defendant denied that he forged any of the said signatures, but testified that the signature "J. A. Cowen" which appeared on each claim over the designation "Supervisor and ex-officio Road Commissioner" was in his own handwriting. Such claims were admitted in evidence.

[1] It is first contended that the trial court erred in refusing to set aside the indictment, upon the ground that only the names of three witnesses were endorsed on the same, when in fact there were a number of other witnesses who appeared before the Grand Jury, and whose names were not so endorsed. Such a contention might have some weight if it were made prior to 1927, when the omission was made a ground for setting aside an indictment. In that year section 995 of the Penal Code was amended

by omitting entirely therefrom the following ground: "When it appears by the testimony of the foreman or secretary of the grand jury that the names of the witnesses examined before the grand jury, or whose depositions may have been read before them, are not inserted at the foot of the indictment, or indorsed thereon."

The point is without merit.

[2] It is next contended that a transcript of the testimony of all witnesses who testified before the Grand Jury was not delivered to him within ten days after the filing of the indictment. Pen.Code, sec. 925. Only the transcript of the testimony of witnesses Dick, Thompson and Dart were so delivered. It is also provided in said section that if the transcript is not so delivered, the court shall continue the trial. At the commencement of the trial, defendant's counsel moved for a continuance upon the ground that such transcript had not been so served. The court denied the motion, but ordered the transcript served forthwith. It was handed to defendant's counsel on the second day of the trial, which lasted ten days thereafter. While we are of the opinion that the court erred in refusing to continue the trial, we can find no prejudice resulting from the ruling.

[3] It is next urged by appellant that there was a failure to prove the corpus delicti. From the foregoing summary of the evidence, it is obvious that the facts forming the basis of the several counts of forgery were proven, together with the existence of a criminal agency. 8 Cal.Jur., p. 165, sec. 247. The contention is without merit.

Error is predicated upon the refusal of the court to give a number of instructions. We find that the jury were fully and fairly instructed, and that the trial court properly rejected said instructions.

[4] Evidence of the other forged claims, not included in the indictment, was properly received to prove a general scheme or design to defraud the county. 8 Cal.Jur., p. 69, sec. 173.

We find no error which has resulted in a miscarriage of justice. Const., art. VI, sec. 4½.

The judgment is affirmed, and also the order denying motion for new trial.

We concur: PULLEN, P. J.; THOMPSON, J.

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41 Cal.App.2d 820

SHIPP et al. v. LOUGH.

Civ. 12637.

District Court of Appeal, Second District, Division 2, California.
Dec. 5, 1940.

1. Automobiles 🔑181(1)

"Willful misconduct" as basis for automobile guest's recovery from host for injuries is an act done under circumstances disclosing a knowledge that injury to guest would be a probable result, or showing a wanton and reckless disregard of probable consequences.

See Words and Phrases, Permanent Edition, for all other definitions of "Willful Misconduct".

2. Automobiles 🔑181(1)

"Willful misconduct" as basis for automobile guest's recovery from host for injuries must be based on actual knowledge or that which in the law is esteemed to be the equivalent of actual knowledge of the peril to be apprehended from the failure to act, coupled with conscious failure to act to the end of averting injury.

3. Automobiles 🔑181(7)

A motorist whose automobile was equipped with new tires and good brakes but whose automobile skidded into approaching automobile as result of slippery surface of short stretch of asphalt paving was not guilty of "willful misconduct" on which guest could base recovery for injuries.

◆

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Action by Maurice Shipp, a minor, etc., and others against Lyman Lough to recover for injuries sustained by the minor while riding as a guest in automobile of the defendant. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Russell H. Pray, of Long Beach, for appellants.

Joseph A. Ball, of Long Beach, for respondent.

MOORE, Presiding Justice.

Plaintiffs appeal from the judgment of the court based upon a directed verdict.

The action is founded upon the claim of plaintiffs that Maurice Shipp, a minor, while a guest in the automobile of defendant, suffered certain injuries by reason of the wilful misconduct of defendant.

It appears that on the 26th of March, 1939, defendant, accompanied by plaintiff Maurice Shipp, left Long Beach for the purpose of driving to Palm Springs, where Maurice was to enter a beauty contest. It was raining at Long Beach and it rained upon the car at various points along the road until they reached a point near Banning, where they collided with a westbound Buick coupe driven by one Backus.

The charge of wilful misconduct is predicated upon the claims that defendant drove at an excessive speed; that Maurice protested the excessive speed; that the pavement was slippery; that defendant's windshield wiper was defective; that he attempted to pass another car in the face of oncoming traffic and that he was driving on the wrong side of the highway.

The evidence is that while rain had fallen upon the highway, it was a rough concrete pavement up to a point five hundred yards from the point at which the accident occurred. While for a distance the concrete had been covered with a layer of asphalt and was slippery, there is no evidence that defendant had any knowledge of the change in the nature of the surface. In fact, he was not familiar with the highway; his last drive upon it at the point of the accident was in 1936.

Defendant was not speeding on a curve. The evidence shows that, from 500 feet from the point of accident eastward, the curve is gradual and does not prevent a view of the highway ahead. The driver of the Buick testified that "it was a straight-a-way at the culvert", the place at which the accident occurred. There is no evidence that any defect in the windshield wiper prevented its keeping a clear vision for the defendant driver.

At the time of the collision defendant was not passing another automobile. He was attempting to pass another car when he discovered the approach of the Buick. When he applied his brakes in order to return to his former position in the line of traffic, he skidded head-on into the Buick. His was a clear attempt to withdraw from the danger of an approaching car, while the collision resulted from the slippery surface of the highway of which he had no former knowledge. At the time that he pulled into the left side of the highway in order to pass another car, he was traveling at a speed not to exceed forty-five miles per hour. He had driven from Long Beach at speeds ranging from fifty to sixty-five miles per hour, his tires were new and his brakes effective. At the time that he pulled out to pass the car ahead of him, the highway was clear for at least two hundred feet ahead.

[1, 2] The facts of this case show nothing more than simple negligence. Defendant's only negligence was in commencing to pass his own line of traffic at not to exceed forty-five miles per hour. With new tires and competent brakes, such speed could be nothing more than a lack of care and not a disregard of the probable consequences. Lennon v. Woodbury, 3 Cal.App.2d 595, 40 P.2d 292. Gross negligence, which was the basis for recovery on the part of a guest prior to 1931, has been defined as "such a lack of care as may be presumed to indicate a passive and indifferent attitude toward results, while willful misconduct involves a more positive intent actually to harm another or to do an act with a positive, active, and absolute disregard of its consequences" (Weber v. Pinyan, 9 Cal.2d 226, 70 P.2d 183, 187, 112 A.L.R. 407); it is an act done under circumstances disclosing a knowledge that injury to the guest would be a probable result, or showing a wanton and reckless disregard of probable consequences. Francesconi v. Belluomini, 28 Cal.App.2d 701, 83 P.2d 298; Meek v. Fowler, 3 Cal.2d 420, 45 P.2d 194; Howard v. Howard, 132 Cal.App. 124, 22 P.2d 279; Walker v. Bacon, 132 Cal.App. 625, 23 P.2d 520; Turner v. Standard Oil Co., 134 Cal.App. 622, 25 P.2d 988; Sanchez v. Rissen, 12 Cal.App.2d 152, 55 P.2d 292; Candini v. Hiatt, 9 Cal.App.2d 679, 50 P.2d 843; Lennon v. Woodbury, 3 Cal.App.2d 595, 40 P.2d 292. To constitute wilful misconduct, there must be actual knowledge or that which in the law is esteemed to be the equivalent of actual knowledge of the peril to be apprehended from the failure to act, coupled with the conscious failure to act to the end of averting injury. This case finds its precedent in McLeod v. Dutton, 13 Cal.App.2d 545, 57 P.2d 189, and Hall v. Mazzei, 14 Cal.App.2d 48, 57 P.2d 948, in which, while there was some evidence of negligence, there was no proof of a combination of facts such as are deemed essential to constitute wilful misconduct.

[3] Where the driver operates his car at sixty-five to seventy miles per hour,

is acquainted with a curve in the road which he cannot negotiate by reason of his speed, and his vision is limited to one hundred yards by reason of the sharpness of the curve, and the roadway is but eighteen feet wide and it has been raining (Wright v. Sellers, 25 Cal.App.2d 603, 78 P.2d 209); or where it has been raining and the driver is familiar with the curves of the paved mountain road over which he is passing, knowing the likelihood of skidding, his vision limited to one hundred feet, his speed of seventy miles per hour is inherently dangerous, and his guest has accordingly protested. (Jackie Coogan Prod. v. Industrial Accident Comm., 21 Cal.App.2d 225, 68 P.2d 750); or where the driver proceeds at an excessive speed in the face of oncoming traffic, the surface of the road is oiled and contains dips and soft shoulders (Fisher v. Zimmerman, 23 Cal.App.2d 696, 73 P.2d 1243); or where the driver, in the face of heavy traffic, driving at an excess speed, crosses four lanes of traffic near an intersection (Francesconi v. Belluomini, supra); or where the driver of a Ford car having no lights drives at an excessive speed on the wrong side of the road in the nighttime (Petersen v. Petersen, 20 Cal.App.2d 680, 67 P.2d 759); or where the driver is familiar with the road, knew the curve and was "acquainted with its alignment", the pavement is eighteen feet wide and he is traveling at fifty-five to sixty miles per hour and continues at the same speed ignoring the protests of his guest (Haas v. Jones, 29 Cal.App.2d 650, 85 P.2d 579, 580); or where the driver speeds at fifty-five to sixty miles per hour and passes a "Caution" sign three hundred feet from a curve (Berryman v. Quinlan, 29 Cal.App.2d 608, 85 P.2d 202); or where the driver was going too fast to negotiate a turn, knew that danger was likely to result and ignored protests as he approached the curve (Chandler v. Quinlan, 25 Cal.App.2d 646, 78 P.2d 235)—under such a combination of facts as occurred in any one of the cited cases it has been held that the driver was justifiably held guilty of wilful misconduct. There is no such combination of circumstances in the case of the defendant here as would warrant a finding of wilful misconduct on his part. Parsons v. Fuller, 8 Cal.2d 463, 468, 66 P.2d 430.

The judgment is affirmed.

We concur: Wood, J.; McComb, J.

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41 Cal.App.2d 784

GENERAL CASUALTY CO. OF AMERICA v. JUSTICE'S COURT OF SAN DIEGO TP., SAN DIEGO COUNTY.

Civ. 2395.

District Court of Appeal, Fourth District, California.

Dec. 2, 1940.

1. Bail 🔑39

The object of requiring bail is not pecuniary compensation to the state, but to compel presence of accused in court to the end that justice may be administered.

2. Bail 🔑74(1)

Generally, where performance of a condition in a bail bond is rendered impossible by either an act of the obligee or of the law, the surety is no longer liable.

3. Bail 🔑75

Where defendant, who was charged in justice's court in three separate counts with violation of the Vehicle Code, pleaded guilty as to first count, was absolved on second count, and was found guilty on third count, but execution of sentence on first count and pronouncement of sentence on third count were stayed, surety on bail bond was liable for defendant's nonappearance on day set therefor, at least as to the third count. Vehicle Code, §§ 332, 481, 502, St.1935, pp. 142, 170, 174; Pen.Code, §§ 19a, 954, 1215, 1300.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Mandamus proceeding by the General Casualty Company of America against the Justice's Court of San Diego Township, County of San Diego, State of California, to compel the Justice's Court to vacate an order for forfeiture of bail. Judgment for defendant, and plaintiff appeals.

Affirmed.

J. A. Donnelley, of San Diego, for appellant.

James B. Abbey, Dist. Atty., by Bertram McLees, Jr., Deputy Dist. Atty., both of San Diego, for respondent.

GRIFFIN, Justice.

Respondent herein adopts appellant's statement of facts set forth in its opening brief. They may be thus summarized: On

December 26, 1936, one Grover C. Treadway, in an action entitled People v. Grover C. Treadway, No. 1431, of the records of the Justice's Court of San Diego Township, now the Municipal Court of the City of San Diego, was charged in three separate counts with the violation of sections 502, 332 and 481 respectively of the California Vehicle Code, and on December 28, 1936, that court fixed the bail for Treadway in the amount of $500. On that date appellant posted its bond No. 2210B, in the usual statutory form, in the sum of $500.

The case came to trial on January 25, 1937. Treadway entered a plea of guilty to the charge of violation of section 502 of the Vehicle Code, as set forth in the first count. On the same day, on motion of the District Attorney, the second count, i. e. violation of section 332 of the Vehicle Code, was dismissed by that court. On the same day, Treadway was found guilty by that court upon the third count, i. e., violation of section 481 of the Vehicle Code. At that time Treadway waived time for the pronouncement of judgment on the first count and the court sentenced him to serve nine months in the county jail and to pay a fine of $250. The court then proceeded to grant him a stay of execution of the sentence on that count until January 27, 1937. On motion of Treadway, time for the pronouncement of judgment on the third count was set for January 27, 1937. Thereafter, at his request, a further stay of execution of judgment on the first count was granted from January 27, 1937, to February 20, 1937. Time for the pronouncement of sentence on the third count was likewise continued from January 27, to February 20, 1937. Thereafter, at the request of the attorney for Treadway, time for the pronouncement of judgment on the third count was continued from February 20, 1937, to March 6, 1937, and a further stay of execution on the first count was granted to the same date. On March 6, 1937, the defendant failed to appear and the Justice's Court entered its order declaring the surety bond forfeited. On June 5, 1937, appellant herein filed a motion in the Justice's Court to discharge the order forfeiting the surety bond on the ground that the order of forfeiture was improperly made in that the court had no power or authority to declare a forfeiture of a bond where after the pronouncement of judgment of imprisonment in a criminal case the court granted a stay of execution, and the defendant failed to appear to render himself up to the execution of the judgment. The motion was heard on June 23, 1937, and on that date said court made its order denying the motion.

The petitioner and appellant then filed a petition for writ of mandate in the Superior Court of San Diego County, praying that the Justice's Court be ordered to discharge or vacate the order of forfeiture entered on March 6, 1937. An alternative writ of mandate was issued by the Superior Court and on July 19, 1937, the matter was heard. It was stipulated by counsel for the respective parties that the continuances above mentioned in the Justice's Court from January 27, 1937, to March 6, 1937, were at the request of Treadway or his attorney and that the facts set forth in the petition for writ of mandate were true and correct and the case was argued upon those facts. The Superior Court denied the petition for writ of mandate and from that judgment this appeal has been taken.

The question presented is this: Where a surety company bail bond is posted for the release of a defendant charged in one complaint with three separate misdemeanors, and where in subsequent proceedings on the complaint the second misdemeanor charged is dismissed, and the defendant pleads guilty to the first charge and is sentenced thereon but execution of the sentence is stayed at the defendant's request for a total of 40 days, and on a third charge the defendant is found guilty but pronouncement of sentence is continued from time to time at the defendant's request for a period of 40 days, is the surety company liable on its bail bond if at the end of said 40-day period the defendant fails to appear for enforcement of the sentence on the first charge and for pronouncement of sentence on the third charge?

It is argued by appellant that when the Justice's Court imposed a judgment on the first count upon the defendant of nine months' imprisonment in the county jail and a fine of $250, that it was the duty of the court under the provisions of section 1215 of the Penal Code and the holding of In re Clark, 70 Cal.App. 643, 234 P. 109; People v. Mendosa, 178 Cal. 509, 173 P. 998; and In re Howard, 72 Cal.App. 374, 237 P. 406, to forthwith order that the defendant be committed to the custody of the proper officer and by such officer detained until the judgment was complied with, and that the court had no authority to grant a stay of execution of the judgment; that the imposition of judgment of imprisonment upon the defendant had the immediate effect of exonerating the sureties on his bond, citing People v. McReynolds, 102 Cal. 308, 36 P. 590; and Seaboard Surety Corp. v. Municipal Court, 121 Cal.App. 470, 9 P.2d 313; and that it is not necessary that the court make an actual order that the defendant be committed to custody in order to discharge the bail, for the law implies that upon sentence being passed, the proper legal steps will follow, and that it has been held that in such a case the defendant is in the implied custody of the officer, regardless of actual court order, citing Roberts v. Gordon, 86 Ga. 386, 12 S.E. 648; Fortenberry v. State, 47 Tex.Cr.R. 84, 79 S.W. 538; and Phillips v. State, 100 Ark. 515, 140 S.W. 734; and that a bail bond is liable for the appearance of the defendant up until the time of his conviction, but defines conviction to be the time of the sentence or judgment of the court upon the verdict or decision, citing People v. MacGregor, 147 App.Div. 488, 131 N.Y.S. 783; Suggs v. State, 129 Tenn. 498, 167 S.W. 122; Ex parte Williams, 114 Ala. 29, 22 So. 446; Miller v. State, 158 Ala. 73, 48 So. 360, 20 L.R.A.,N.S., 861; and State v. Romaine, 47 Okl. 138, 148 P. 79.

Respondent in reply argues that the passing of sentence on the first charge followed by a stay of execution granted at defendant's request did not terminate the surety's liability under the bail bond. Respondent concedes that the general rule is that where a bailed defendant is convicted, sentenced, actually committed to and taken into custody by the sheriff, his bail is exonerated as to the charge on which he is sentenced, but argues where actual custody is not taken, authorities are far from agreement, and cites Able v. State ex rel. Saye, 79 Okl. 282, 193 P. 969, 20 A.L.R. pp. 594, 596, which reads: "No general rule can be laid down upon this subject because the conditions of bail bonds or recognizances vary in different jurisdictions, and in different courts, and have changed from time to time in the same jurisdictions or courts."

In that portion of the annotation dealing specifically with the effect of judgment or sentence (20 A.L.R. 629, et seq.) the author makes this observation: "The weight of authority seems to hold that the liability of bail terminates with the pronouncement of judgment or sentence upon the defendant, especially where the bond or recognizance does not contain a condition requiring the latter to abide the final order or judgment of the court, or, if convicted, *to render himself in execution thereof.*" (Italics ours.) See, also, Commonwealth v. Turpin, 98 Ky. 9, 32 S.W. 133; State v. Schenck, 138 N.C. 560, 49 S.E. 917, 3 Ann.Cas. 928; Commonwealth v. Casper, 6 Pa.Co.Ct.R. 382; State v. Thompson, 62 Ind. 367; Detroit Fidelity & Surety Co. v. United States, 6 Cir., 36 F.2d 682; State v. Blum, 57 N.D. 619, 223 N.W. 697; State v. Helgerson, 59 S.D. 516, 241 N.W. 325; County of Los Angeles v. Maga, 97 Cal.App. 688, 276 P. 352.

Continuances of the hearing of the action against a defendant freed from custody under a bail bond have been generally held valid even though without the knowledge or consent of the sureties on the ground that such continuances do not contravene the conditions of the bond. County of Los Angeles v. Grannis, 88 Cal.App. 391, 263 P. 835; State v. Cooper, 147 Minn. 272, 180 N.W. 99; State v. Staley, 200 N.C. 385, 157 S.E. 25.

[1] The object of requiring bail is not pecuniary compensation to the state, but to compel the presence of the accused in court to the end that justice may be administered. County of Los Angeles v. Maga, supra.

In the bail bond given in the instant case, the surety undertakes, among other duties, that the defendant "if convicted, *will appear for judgment* and *render* ——*self in execution thereof;* * * *" (Italics ours.) This is the identical condition construed by the Turpin, Blum and Helgerson cases cited herein.

From the statement of facts presented, we do not favor the construction, as suggested by respondent, that the court intended the continuance herein mentioned to operate as an attempted exercise of authority under the probation law. In re Howard, 72 Cal.App. 374, 237 P. 406; Ex parte Slattery, 163 Cal. 176, 124 P. 856; In re Collins, 8 Cal.App. 367, 97 P. 188.

We therefore must approach the question as to what effect the order (that the execution of the judgment on the first count be stayed to a date certain) had upon the remaining count. Whether the order staying the execution was within the inherent power of the court to make and was valid under the holding in In re Collins, supra, or whether under People

v. Mendosa, supra, the order was void and the court was without authority to suspend the execution of the sentence without admitting the defendant to probation, becomes immaterial, we think, in the instant case. Here, it is clear, the defendant appeared only for the purpose of plea and pronouncement of judgment on the one count and for trial on the remaining count. The time when he should again appear for the purpose of *"rendering himself in execution thereof"* was definitely fixed and at his request. It is apparent from the record of the proceedings that neither he nor his surety at the time of the pronouncement of judgment, intended to surrender the defendant from the custody of the surety to the officer to whose custody he was committed at the time of giving bail, as provided in section 1300 of the Penal Code.

It was held in Commonwealth v. Turpin, supra, that (from syllabus): "The conditions of a bail bond, given in a prosecution for a misdemeanor, wherein the surety undertakes that his principal, 'if convicted, shall render himself in execution thereof,' are not fulfilled by the appearance in court of the principal at the time fixed, or by his trial and conviction; and though the court may have allowed the principal to go from custody for the purpose of obtaining the amount of the fine imposed, the surety will be held liable upon his disappearance without its payment."

It therefore must follow that whether the order to appear for the purpose of executing the judgment be valid or invalid, the defendant on March 6th, at the time for pronouncement of judgment on the third count, and at the time fixed for him to "render himself in execution", of the judgment on the first count, was not in actual or legal custody of the officer above mentioned. The judgment was still in full force and unsatisfied (In re Howard, supra, 72 Cal.App. page 379, 237 P. 406; In re Clark, supra), and defendant failed to "render himself in execution thereof". He also was at liberty and failed to appear "for judgment" as to the third count.

In State v. McAllister, 54 N.H. 156, cited with approval in County of Los Angeles v. Maga, supra, the accused, who had been admitted to bail on a criminal charge in the state court, was convicted of a federal offense. While awaiting the execution of sentence he escaped and was at large when his bond in the state court was declared forfeited. The court held that the sureties were not exonerated and that the defendant's voluntary absence under the circumstances afforded no justification or excuse for his sureties' failure to produce him, citing cases.

[2] As a general proposition of law, where the performance of a condition is rendered impossible by either an act of the obligee or of the law, the surety is no longer liable. County of Los Angeles v. Maga, supra; Detroit Fidelity & Surety Co. v. United States, supra. We see no application of this principle to the facts of the present case.

In State v. Blum, supra, it was held that an undertaking of bail was not discharged where the sentence was imposed after plea of guilty and that the sureties on an undertaking of bail were liable because of defendant's failure to comply with an order of court to surrender himself in execution of sentence. To the same effect is State v. Helgerson, supra, holding that bondsmen undertaking that a defendant should render himself in execution of judgment are not released where, after sentence, commitment was stayed without their knowledge. Merely a reading of section 954 of the Penal Code, in which is contained the authority for the joinder of two or more counts in one complaint, demonstrates that each count in a criminal complaint is to be considered as completely independent of the others, so far as concerns the determination of the guilt or innocence of the defendant thereunder. Cases construing the section place this construction thereon.

In the case of People v. Carr, 6 Cal.2d 227, 57 P.2d 489, the court had before it the question whether or not consecutive sentences of one year each could be imposed upon a defendant convicted of four misdemeanors, each charged as a separate count in one information. The defense contended that section 19a of the Penal Code prohibited sentences in excess of one year on any one complaint. The court rejected this contention, saying: "A person who commits two or more misdemeanors is subject to the possible imposition of two or more separate punishments. He may be tried separately and sentenced separately on each; or he may be charged with a number of crimes in separate counts in one information. The use of a single information is sanctioned by law and is a decided convenience, but in no way does it change the separable character of the offenses charged, nor does it alter the rules governing punishment. * * * In our opinion the crimes, and the punishment therefor, are unaffected by the procedural choice of single or separate informations * * *." Other cases in accord with this rule are People v. Moon, 7 Cal.App.2d 96, 45 P.2d 384; and People v. Ranney, 123 Cal.App. 403, 407, 11 P.2d 405.

[3] Had the three misdemeanors been charged against the defendant in three separate complaints and had the defendant been required to furnish a separate bond on each complaint, petitioner's argument would be without foundation whether the three bonds were all furnished by the same or three separate sureties. By reason of the above cited decisions the three counts in the criminal complaint filed against the defendant Treadway must be treated as separate, independent charges for all purposes except the convenience of trial. So considered, it becomes apparent that the proceedings under the first count can have no connection with or effect on the third count since the defendant was at liberty at all times, and a day certain had been fixed for his appearance for the pronouncement of judgment as to the third count. The two counts were not tried together. They dealt with the quite separate and distinct crimes of driving while under the influence of intoxicating liquor and failure to stop after being involved in a traffic accident.

While respondent cites no cases directly in point on the question here involved, the cases of County of Los Angeles v. Maga, supra; McDonald v. Commonwealth, 213 Ky. 570, 281 S.W. 538, 45 A.L.R. 1034; State v. Crosby, 114 Ala. 11, 22 So. 110; Havis v. State, 62 Ark. 500, 37 S.W. 957; State v. McAllister, supra; and Wheeler v. State, 38 Tex. 173, are analogous. In view of the conclusions reached it becomes unnecessary to determine the effect of the stay of execution as to the first count. The conclusion that the bail was not exonerated at least as to the third count is fully supported by the cases cited herein.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.

BULLARD v. RIVERSIDE COUNTY DRAINAGE DIST. IMPROVEMENT NO. 3 et al.

Civ. 2486.

District Court of Appeal, Fourth District, California.

Dec. 11, 1940.

Hearing Denied Feb. 6, 1941.

1. Drains ⇨2(2)

Though drainage district improvement was organized under the Drainage District Improvement Act of 1903, it was partially controlled by some of the provisions of the Drainage District Improvement Act of 1919, where the district was not completed at the time the Drainage District Improvement Act of 1919 went into effect. St.1903, p. 354, as amended by St.1915, p. 359; St.1919, p. 731.

2. Drains ⇨68

The Legislature by the Drainage District Improvement Act of 1903 intended to provide the machinery for raising sufficient funds to pay the principal and interest on the bonds as they became due and did not contemplate that there would be any defaults in any of the payments so that no question should arise as to interest on any bond after maturity. St.1915, pp. 370, 373, §§ 8e, 9.

3. Mandamus ⇨115

Since the levying of an annual assessment provided for in statute to furnish funds to pay principal and interest accruing on bonds of a drainage district improvement, as well as the maintenance and repair of the works of the district, is made a duty to be performed, it is probable that a bondholder could have compelled a levy of such an assessment if the revenues under the statute providing for assessment on various parcels of land within the district failed to provide sufficient money to pay the principal and interest as they became due. St.1915, pp. 370, 373, §§ 8e, 9.

4. Drains ⇨2(2)
Evidence ⇨83(2)

Where drainage district improvement was organized under the Drainage District Improvement Act of 1903, but was not completed until the Drainage District Improvement Act of 1919 went into effect, and district issued bonds under the act of 1903 in 1920, and court was not informed when proceedings to organize district were started, court was required to presume that duty laid on public officials was performed according to law and that proceedings to organize the district were instituted prior to the effective date of the act of 1919, but that they were not completed when the act of 1919 took effect, and hence under the act of 1919, the provisions of the act of 1903 would control as to issuance of the bonds by the district, the assessments to pay them, and other such provisions. St.1919, p. 749, § 27; St.1903, p. 354, as amended by St.1915, p. 359.

5. Drains ⇨18

Where the issuance of bonds by drainage district improvement and assessments to pay them were controlled by the Drainage District Improvement Act of 1903, holder of bonds was not entitled to payment of any interest accruing after maturity. St.1903, p. 354, as amended by St.1915, p. 359.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by John Bullard against the County of Riverside, Drainage District Improvement No. 3, and others for declaratory relief to determine plaintiff's right to recover the principal and interest on bonds issued by the County of Riverside, Drainage District Improvement No. 3. From a judgment in favor of the defendants, the plaintiff appeals.

Judgment affirmed.

Hearing denied; CURTIS, HOUSER, and CARTER, JJ., dissenting.

R. J. Welch, Jr., and H. M. Dougherty, both of Riverside, for appellant.

Earl Redwine, of Riverside, for respondents.

MARKS, Justice.

Plaintiff brought this action in declaratory relief to determine his right to recover the principal and accruing interest of two bonds for $1,000 each issued by the County of Riverside, Drainage District Improvement No. 3. The case was heard on an agreed statement of facts and judgment was rendered for defendants. This appeal followed.

[1] The County of Riverside, Drainage District Improvement No. 3 (hereinafter called The District), was organized under the Drainage District Improvement Act of 1903 (Stats.1903, p. 354, as amended Stats.1915, p. 359), hereinafter called the Improvement Act of 1903, and its bonds were issued on the 8th day of November,

1920, after the effective date of the Drainage District Improvement Act of 1919 (Stats.1919, p. 731), hereinafter called the Improvement Act of 1919. While it is not definitely stated in the stipulation, it is rather apparent that The District, while organized under the earlier act, was not completed at the time the act of 1919 went into effect and therefore is partially controlled by some of the provisions of the later act.

The bonds of The District matured on November 8, 1935, when plaintiff presented his bonds for payment. Probably the interest was paid in full to that date, but payment of the principal was refused because there was not sufficient money on hand to retire them. They were also unsuccessfully presented for payment on several subsequent occasions. It is agreed that the principal and interest on all outstanding bonds, other than the interest accruing after maturity on two held by plaintiff, had been paid in full at the date of the stipulation. After the action was filed sufficient money was received to pay the principal of the bonds. This was paid on July 14, 1939, with the stipulation that acceptance of the principal would have no effect on plaintiff's right to demand interest accruing between November 8, 1935, their due date, and July 14, 1939, the date of the principal payment.

It was further stipulated that after all the principal of all of the bonds, together with interest to maturity, had been paid there had accumulated from delinquent installment payments in the special fund out of which the interest could be paid, the sum of $374.35, and further that it was believed that there were outstanding assessments which, if paid, would be sufficient to pay in full the interest claimed by plaintiff.

The bonds had attached to them interest coupons the exact form of which is not in the record. These coupons matured semiannually, the last becoming due on November 8, 1935. The bonds contained the following provisions:

"Under and by virtue of the Drainage District Improvement Act of 1903, an Act of the Legislature of the State of California (and Acts amendatory thereof), the County of Riverside, State of California, will, out of the fund hereinafter designated, at the office of the Treasurer of said County, on the 8th day of November, 1935, pay to the bearer the sum of One Thousand Dollars ($1000.00) in gold coin of the United States of America with interest thereon in like gold coin at the rate of six per cent per annum payable as hereinafter specified.

"This bond is payable out of Drainage District Improvement Fund No. 3 exclusively, as the same appears on the books of the Treasurer of said county, and neither said county nor any officer thereof is holden for its payment otherwise."

The Improvement Act of 1903 provided for the organization of improvement districts and set up the machinery for making the contemplated improvements, the issuance of bonds to pay for the work, the levy of assessments to pay the bonds and accruing interest. It also provided for the levy of taxes on the property within the district to insure the payment of the interest and the retirement of the bonds, when due, and to provide a maintenance fund for maintaining the works in the district. The board of supervisors was made the governing body of the district.

Section nine of that act, as amended by St.1915, p. 373, provides for the assessment on the various parcels of land within the district of the costs of the improvements, the damages to property and incidental expenses, the total of which is to be evidenced by the total of the bonds issued. When the assessments are approved they become liens on the various parcels of land within the district. Each instalment of each assessment is made payable on October 1st of each year over the period in which the payments are made collectible. In this section no provision is made for the collection of anything more than the exact amount of each assessment and there is nothing to indicate that interest payments are contemplated after the due date of the bonds and the last interest coupons attached to them.

In section 8*e* of the act we find the following:

"A special fund to be named 'Drainage District Improvement Fund No. ——' (the number to be that of the district), for the discharge and payment of such bonds and interest thereon and for the payment of the incidental costs and expenses of the organization of any district organized under this act, shall be constituted from funds to be derived from the collection of assessments levied against lands found to be benefited by improvements contemplated to be constructed as specified herein. There shall be each year, at the time of the levy of the general levy of state and county taxes, levied against and upon all lands within said Drainage Improvement District No. ——— (being the district established and as bounded in the order ordering the work to be done) a special assessment upon the lands found to be benefited by such improvement *in an amount clearly sufficient to pay all the principal which has and will become due and all interest which has or will become payable on said bonds in any one year,* and to maintain and repair the works and improvements therein before the proceeds of another assessment levied at the time of the general tax levy of the state and county can be made available for the payment of such bonds and such maintenance and repairs." (Emphasis ours.)

It is therefore apparent that the Improvement Act of 1903 provided two sources of revenue to pay the principal and interest on the bonds as they became due. The first was by the assessment on each parcel of land in the district provided for in section nine. The second was by the annual assessment and tax to be levied under the provisions of section 8*e* which we have just quoted. In this latter respect this act differs from many of the local improvement acts in effect in the state.

[2, 3] It is rather clear from the provisions of the act that the legislature intended to provide the machinery for raising sufficient funds to pay the principal and interest on the bonds as they became due and did not contemplate that there would be any defaults in any of these payments so that no question should arise as to interest on any bond after maturity. As the levying of the annual assessment provided for in section 8*e* to furnish funds to pay the principal and interest accruing on the bonds as well as the maintenance and repair of the works of the district is made a duty to be performed, it is probable that a bondholder could have compelled the levy of such an assessment if the revenues under section nine of the act failed to provide sufficient money to pay the principal and interest as they became due.

While it is rather clear that the Improvement Act of 1903 did not contemplate the payment of any interest on the bonds after their due date, the situation giving rise to this litigation was created by the adoption of the Improvement Act of 1919 and some of its amendments. Section 27 of that act provides as follows:

"This act shall supersede and repeal an act of the legislature of the State of California approved March 21, 1903, and amendments thereto entitled 'An act to promote the drainage of wet, swamp and overflowed lands, and to promote the public health in the communities in which they lie'; provided, however, that nothing contained herein shall operate to invalidate any proceedings heretofore taken under the provisions of said act approved March 21, 1903, as amended; provided, further, that any district formed under the provisions of the said act of 1903, but not completed at the time this act takes effect, shall be completed, accepted by the board of supervisors and bonds shall be issued in accordance with the provisions of the said act of 1903, but may be issued for all the purposes specified in this act including expenditures made to procure rights of way whether inside of such drainage district or outside thereof, where the board finds it necessary for such district, but such district shall thereafter be maintained under the provisions of section twenty-four of this act. Otherwise this act is not intended to supersede or repeal any other act for the construction of work for drainage purposes, but is intended as an independent and alternative act of the legislature of the State of California."

[4] It is stipulated that the bonds in question here were issued under the Improvement Act of 1903 and that those bonds were issued and dated November 8, 1920, over a year after the Improvement Act of 1919 went into effect. As we are not informed when the proceedings to organize The District were started and as we must presume that a duty laid on public officials was performed according to law, we must presume that the proceedings to organize The District were instituted prior to the effective date of the Improvement Act of 1919, but were not completed at the time that act took effect, in the absence of evidence to the contrary. Therefore, under section twenty-seven of the Improvement Act of 1919, the provisions of the Improvement Act of 1903 would control here as to the issuance of the bonds, the assessments to pay them, and other such provisions. Only the provisions of section 24 of the Improvement Act of 1919 as to the *maintenance* of the works of The District would be operative and controlling. As we have here no question of maintenance, the provisions of the Improvement Act of 1903 must determine the issue presented.

[5] We believe that the case of Meyer v. City & County of San Francisco, 150

Cal. 131, 88 P. 722, 724, 10 L.R.A.,N.S., 110, must be controlling here. The facts are identical with those of the instant case except in unimportant particulars so that the reasoning and conclusions there must be followed. In deciding the precise question now before us, the Supreme Court there said:

"We are of the opinion, however, that in giving judgment on the pleadings the court improperly allowed the interest which accrued on the bonds after their maturity. The act in question provided a scheme for a public improvement, the cost of which was to be paid by a special assessment upon the lands in the district specially benefited thereby. For this purpose the assessment district was created, and upon the real property therein there was imposed the burden of such payment. This burden was laid by the defendant without the consent of the owners of the property. The Legislature has power to do this for the purpose of defraying the expense of public improvements; but such statutes are to be construed in favor of the property-owner, at least to this extent, that the burden imposed cannot exceed that which the terms of the statute, either expressly or by fair implication, authorize. This statute not only does not expressly authorize a charge of interest on the bonds after their maturity, but its provisions fairly imply that such interest was not to be paid. * * * There being no provision for the payment of any interest accruing after maturity, the act must be understood as intending that no such interest was to accrue."

Plaintiff relies upon such cases as Freehill v. Chamberlain, 65 Cal. 603, 4 P. 646; Davis v. Porter, 66 Cal. 658, 6 P. 746; Bates v. Gerber, 82 Cal. 550, 22 P. 1115, and Kendall v. Porter, 120 Cal. 106, 45 P. 333, 52 P. 143, as sustaining his position. These cases involved various questions arising under refunding bonds of the city of Sacramento issued under the provisions of an act approved April 25, 1858 (Stats.1858, p. 267). Certain of the revenue of Sacramento was pledged to pay the bonds without an express limitation on the length of time that revenue could be used for that purpose. The Supreme Court held that such lack of limitation together with the lack of any assurance that the pledged revenue would pay the principal and interest on the bonds when due was sufficient evidence of an intent on the part of the legislature that the revenue be used to retire the bonds until they were actually paid and to permit the bondholders to receive interest on the bonds after their maturity and until their payment in full. These cases were sufficiently distinguished in Meyer v. City & County of San Francisco, supra, so as to make unnecessary their further consideration here.

Plaintiff argues that as section 23 of the Improvement Act of 1919 required the County of Riverside annually to transfer into The District funds, sufficient money with which to pay the interest and principal of the bonds falling due during the year, if The District funds were insufficient for that purpose, the county is responsible for failure to perform that duty and an intention is manifest, that interest be paid to the bondholders until the bonds are paid. While there are several answers to this contention it is only necessary to mention two. First, the provisions of bonds themselves negative any idea of such conclusion. Second, we have already indicated our opinion that under the facts before us the provisions of the Improvement Act of 1903 control on questions of the issuance and payment of the bonds and that the Improvement Act of 1919 has nothing to do with those questions.

The other questions raised by plaintiff are sufficiently answered by what we have already said and by Meyer v. City & County of San Francisco, supra.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

41 Cal.App.2d 896

HASTER v. BLAIR et al.

Civ. 6421.

District Court of Appeal, Third District, California.

Dec. 11, 1940.

Rehearing Denied Jan. 10, 1941.

1. Tenancy in common 🔑1

Although "tenancy in common" is generally used with reference to real property, a tenancy in common may exist in personalty as well.

See Words and Phrases, Permanent Edition, for all other definitions of "Tenancy in Common".

2. Tenancy in common 🔑46

Where property is held under a tenancy in common, a mortgage or incumbrance thereof by a cotenant only affects the interest in the property of the cotenant who was a party to the mortgage.

3. Chattel mortgages 🔑143

Where the record owner of a mining claim had conveyed by unrecorded deeds "unit" interests in mining property and machinery used in connection therewith, but himself, as owner of some units, remained in possession of all property for unit holders, under statute which renders void as against an incumbrancer in good faith any transfer of personal property which is not accompanied by delivery of possession, such conveyance of a "unit" interest was void as against the holder of a chattel mortgage on machinery and tools used in the mine, which was given for value and without notice of the interest of unit holders, and therefore purchaser of machinery at foreclosure of mortgage was entitled to possession thereof as against unit holders who had not joined in the mortgage. Civ.Code, § 3440.

◆

Appeal from Superior Court, Tuolumne County; J. T. B. Warne, Judge.

Action by Thomas Haster against A. L. Blair and others, to recover possession of certain mining machinery, tools, and equipment. From a judgment for plaintiff and order denying motion for new trial, defendants Blair and Metallic Mines, Incorporated, appeal.

Affirmed.

C. H. Grayson, of Sonora, and John Milton Thompson, of Monterey, for appellants.

Rowan Hardin, of Sonora, for respondent.

TUTTLE, Judge.

This action was brought to recover possession of certain mining machinery, tools and equipment. Findings were made in favor of plaintiff upon all issues, and judgment was entered in his favor for such possession, together with damages for the detention of said property. Defendants Blair and Metallic Mines, a corporation, appeal from the judgment, and also from an order denying their motion for new trial.

In 1929, J. W. Newell held under lease from A. G. Metz, certain mining property known as the "Longfellow Group". He was also, at that time, the owner of an adjoining claim known as the "Coolidge Mining Claim". During that year Newell organized what is designated as the "Newell Syndicate", the nature and character of which is not described in the record. It does appear, however, that he sold "units" in said claims, the exact number of which is not shown. Such units were conveyed by a grant and assignment of an undivided 1/60th interest in and to the said lease from Metz, and in the Coolidge Claim owned by Newell. The deed covered all interest of the first party "in machinery and equipment used in connection with said claim or any of the above described properties". Newell remained in possession of said claims at all times, and operated the same for the "unit" holders. One of said "units" was sold to Metz, who thereafter assigned it to appellants. The record shows that plaintiff received one of said "units".

On October 31, 1931, J. W. Newell and four other "unit" holders executed a chattel mortgage to plaintiff, covering the following described personal property situated upon said mining properties:

1 Ingersoll Rand compressor;
1 rock crusher and motor;
1 complete ten stamp mill and motors;
1 tool sharpener;
2 electric water pumps;
1 blacksmith shop and all equipment therein;
2000 feet car rails.

The mortgage was foreclosed, and plaintiff herein acquired whatever title the mortgagors had to said property. Two-thirds of the "unit" holders joined in the execution of said mortgage. Appellants, who were not parties thereto, refused to give possession, and this action was therefore brought.

[1, 2] It is first contended by appellants that they and the other "unit" holders owned said personal property as tenants in common, by reason of the "unit" deed which each received. While definitions of tenancy in common generally relate to tenancy in common in real property, this tenancy can exist in personalty as well as in realty. Higgins v. Eva, 204 Cal. 231–239, 267 P. 1081. Appellants then point to the well-known rule that a mortgage or encumbrance by a cotenant only affects his own interest in the property. 7 Cal.Jur. 360. This statement of the law is correct, and is not controverted by respondent.

To meet the foregoing contention, respondent advances what he terms the following "doctrines of law":

"1st: That the transfer of an undivided interest in the equipment on the Coolidge Mine to Metz was void as to creditors while Newell remained in possession, as there was no change of possession.

"2nd: That said A. G. Metz and the defendants claiming under him are estopped to question the title of plaintiff to said property under the chattel mortgage sale.

"3rd: That a mining partnership in fact did exist between Metz, Newell et al., and Metz was bound by the action of the majority interests of such partnership in the execution of said mortgage."

As to the first contention of respondent, it is based upon the provisions of section 3440 of the Civil Code, which renders conclusively void, as against an encumbrancer in good faith, any transfer of personal property which is not accompanied by an immediate and actual change of possession. It is undisputed that the transfer of the "unit" interest to the assignor of defendants was not accompanied by any actual change of possession of the personal property. It is also clear that plaintiff actually parted with value, having advanced the sum of $2,000 when the mortgage was executed. The record shows that said sum was used for the payment of said personal property and other expenses connected with the mining operations; that said property was situated upon the Coolidge Claim which was owned by Newell (the deed being on record), and was in the actual possession of Newell; that said deed to Metz, conveying the "unit" interest, was never recorded; and that the chattel mortgage recited that the mortgagors "warrant that they are the sole and separate owners of all the within mentioned personal property, and that there are no liens or encumbrances or adverse claims of any kind whatever on any part thereof".

[3] It is the contention of appellant that there is no evidence in the record to show that plaintiff acted in good faith, and that the only inference to be drawn is that he had notice of the interest of Metz in said personal property. We are unable to come to that conclusion. The court could (as it did), well conclude that plaintiff had no knowledge of any claim which Metz might have as a "unit" holder when the mortgage was executed. The case of Brown v. O'Neal, 95 Cal. 262, 30 P. 538, 29 Am.St.Rep. 111, relied upon by respondent, supports his contention, and no attempt to distinguish it is made by appellants in their closing brief. There, two parties owned a stallion in common. One of them sold his interest to a third party for $650. There was no change of possession, the stallion remaining in the possession of the original tenant in common, whose creditor attached and sold the animal under an execution. The party who purchased the interest then brought suit to recover possession. It was held that plaintiff could not recover, as there was no change of possession to him from the tenant in common whose interest he purchased, and the latter remained in possession at all times. In other words, where the tenant in common is in possession of the property, and he transfers his interest to another without a transfer of possession, section 3440 of the Civil Code may be invoked to protect a creditor of that other, and the property may be seized in the same manner as though there had been no attempted transfer. In the instant case, Newell, who was a tenant in common in possession, transferred a "unit" interest to the predecessor of defendants, but there was no transfer of possession. Plaintiff, an encumbrancer in good faith, was entitled to proceed against the property notwithstanding such transfer.

It is contended by appellant that Newell could not sell an interest in the machinery to Metz because it was acquired after the Syndicate was formed. There is nothing in the record to show the date of the formation of the Syndicate, nor any details concerning it. The deed to the "unit" acquired by Metz covers "machinery and equipment", and the instrument is dated October 21, 1929. The mortgage was dated some two years thereafter. It is also contended that Newell could not transfer an interest in the machinery because it belonged to the Syndicate, not to him. There is no evidence that there was any transfer of the machinery by Newell to any Syndicate. So far as we can ascertain from the record, he called himself a Syndicate, and proceeded to issue deeds to the property in the form of "units". The points have no merit. We might add that the foregoing contentions, if they prevailed, would leave appellants without any interest in the personal property, as any interest they might have is derived from a "unit" conveyance from Newell.

It is unnecessary to discuss the other questions presented.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

41 Cal.App.2d 858

PHŒNIX INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 6497.

District Court of Appeal, Third District, California.

Dec. 9, 1940.

Hearing Denied Feb. 6, 1941.

1. Workmen's compensation 🔑1658

Evidence that injured laborer's condition was stationary two and one-half years after accident resulting in injury to laborer's foot warranted finding of Industrial Accident Commission that laborer was permanently disabled.

2. Workmen's compensation 🔑1939

The matter of computing the degree of disability suffered by employee is within exclusive jurisdiction of Industrial Accident Commission, and reviewing court cannot disturb action of commission if there was any evidence before commission justifying the commission's finding.

3. Workmen's compensation 🔑1644

Evidence warranted finding of Industrial Accident Commission that laborer whose foot was injured was 44½ per cent. disabled.

4. Workmen's compensation 🔑556

A general aggravation of a pre-existing disease is an injury in the occupation causing the aggravation.

5. Workmen's compensation 🔑1936

If laborer whose foot was injured had a pre-existing arthritic condition, the matter of determining the percentage of disability to be apportioned to industrial injury was a matter within sound discretion of Industrial Accident Commission.

◆

Proceeding by the Phoenix Indemnity Company against the Industrial Accident Commission of the State of California for writ of review to review a decision on rehearing of the Industrial Accident Commission, wherein it was found that the injured employee had sustained an industrial injury resulting in permanent disability, entitling him to the stated award.

Writ denied.

W. N. Mullen, of San Francisco, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

PULLEN, Presiding Justice.

Petitioner, an insurance carrier, seeks to review a decision on rehearing of the Industrial Accident Commission, wherein it was found that Louis Fontana had sustained an industrial injury which had resulted in a permanent disability amounting to 44½ per cent, entitling the employee to $14.82 a week for 178 weeks.

Petitioner contends the evidence is insufficient to support the finding of permanency of injury; that the percentage of injury did not amount to 44½ per cent, and that the liability for such permanent disability, if any, should have been apportioned between the injury and pre-existing arthritis.

The facts briefly are that Fontana filed an application for adjudgment of claim with the Industrial Accident Commission in July, 1939. At the hearing in August, 1939, it appeared that Fontana was 56 years of age, and had worked for his immediate employer for twenty years as a laborer, doing general work.

On December 24, 1937, he, with three other men were loading prunes from a platform into a freight car. This they did by moving the prunes on a four-wheel truck, which, when loaded, weighed about 1400 pounds, across an iron plate which bridged the space between the platform and the car. The accident was caused by the iron plate slipping and falling between the platform and the car, and the tipping truck caught the injured man's foot between the truck and the side of the car. He was taken to a hospital, and the lower leg was placed in a cast. That night his ankle became swollen and the cast was removed, and then for about twenty days his leg was elevated and heat applied, when a cast was again applied. He wore this cast for about six weeks, and it was then removed and soft bandages applied until June, 1939. During this period he did no work, suffered pain in the foot, and was compelled to use a cane.

Several physicians and surgeons have testified before the commission. Dr. Heggler testified that Fontana called upon him on August 16, 1939, which was over a year and one-half after the injury. He found from his examination and a history of the patient, that about thirty years prior to that time he had suffered an injury to the left knee. The injury for which the patient came for an examination was the injury to the right foot and ankle hereinbefore described. The examining doctor found some atrophy in the right leg and a swelling in the right ankle, with pain and tenderness, and also described in degrees the limitation of motion of the right foot. He also testified as his opinion that Fontana was then unable to pursue his usual employment, and was totally disabled. He also stated the present injury had aggravated the arthritic condition of the earlier injury to the left knee, and to some extent such pre-existing arteriosclerosis aggravated or prolonged his recovery to a moderate degree. It was the recommendation of Dr. Heggler that the applicant receive a four weeks' course of treatment of physiotherapy, and if no improvement be had, that a permanent rating be fixed.

On January 6, 1939, Dr. Dawson, who had, about a year prior thereto, examined Fontana, reported that generalized arteriosclerosis and hyperextension had contributed to the prolongation of the period of recovery, and "since recovery is nowhere yet complete after more than one year's treatment, it is unlikely that any quick degree of improvement will be seen in the future". He also recommended light exercise, and stated: "If this regime is carried out the patient will accomplish a permanent disability of stiffness and its attendant weakness of the right ankle and foot." This doctor also reported in May, 1939, that the applicant would never, in his opinion, be able to do ordinary labor. The referee also saw and examined the injured foot. The former employer of Fontana testified that he was a very fine workman, and that as soon as he was able to work he would re-employ him.

Dr. Harrison, one of the assistant medical directors of the commission, examined Fontana on January 5, 1940, and testified in effect, as to what had been found by the doctors who had made previous examinations. He testified the condition of the applicant was stationary and ready for rating.

Some four months later the referee asked Dr. Harrison what proportion, in his opinion, of the present disability of Fontana was due to the influence of a pre-existing arthritis unaffected by the injury, and what proportion of the disability was due to the acceleration of the pre-existing arthritis by the last injury. In reply the doctor stated he believed the entire disability at that time was due to exacerbation of the previous arthritis. A Dr. Fisher, on February 24, 1940, stated that in his opinion the responsibility for the present condition was 50 per cent to injury and 50 per cent to arthritis.

[1] From the foregoing there is ample evidence to support a finding of permanency of condition. Two years and a half intervened between the accident and the last examinations of the doctors, and one doctor at least stated positively, and others inferentially, that the condition of the applicant was stationary. There is nothing to indicate the applicant was exaggerating his symptoms nor his inability to get about.

[2, 3] The matter of computing the degree of disability suffered by an employee is within the exclusive jurisdiction of the Industrial Accident Commission, and a reviewing court has no power to disturb such action providing there was any evidence before the commission to justify such a finding. Ford Motor Co. v. Industrial Acc. Comm., 202 Cal. 459, 261 P. 466; Hines v. Industrial Acc. Comm., 215 Cal. 177, 8 P.2d

1021. We are convinced there was here ample evidence upon which to base a finding of a 44½ per cent disability.

As to the contention of petitioner that an apportionment should have been made between the injury and a pre-existing condition or disease, we have a man 56 years of age, who had for twenty years engaged in common labor. So industrious and efficient was he that his employer was ready to reemploy him as soon as he could go back to work, Prior to the accident in question he had never suffered from arthritis nor been compelled to take time off, and it was the opinion of certain of the doctors, and a fact adopted by the commission, that the latter injury was an agency which produced the disability.

[4, 5] In Tanenbaum v. Industrial Acc. Comm., 4 Cal.2d 615, 52 P.2d 215, the court states that general aggravation of a pre-existing disease is an injury in the occupation causing the same. If there was a pre-existing arthritic condition, the matter of determining the percentage of disability to be apportioned to the industrial injury is a matter within the sound discretion of the commission.

We find no error in the findings and award of the commission. The writ is denied.

We concur: THOMPSON, J; TUTTLE, J.

41 Cal.App.2d 866

PEOPLE v. DUTTON.

Cr. 3363.

District Court of Appeal, Second District, Division 1, California.

Dec. 10, 1940.

Hearing Denied Jan. 8, 1941.

1. Criminal law 🔑1170½(1)

Questioning of state's witness by prosecuting attorney, which disclosed that witness had met accused at a prison camp, was not conduct prejudicial to accused, where accused as a witness in his own behalf and on direct examination subsequently testified that he had previously been convicted of a felony, and since, having voluntarily testified in his own behalf, accused could himself have been cross-examined by way of impeachment as to a prior felony conviction.

2. Criminal law 🔑369(1)

In prosecution for violation of the Corporate Securities Act, where testimony as to the issuance by accused of securities other than those involved in the charges on trial did not indicate that such issuance was without appropriate permit of the corporation commissioner as required by the act, such evidence was not objectionable as constituting proof of offenses other than those charged in the indictment. Gen.Laws 1937, Act 3814.

3. Criminal law 🔑372(1)

In prosecution for violation of the Corporate Securities Act, one of the essential facts to be proved by prosecution is the accused's plan or design to do the act with which he is charged, and, therefore, evidence of other similar acts by accused is admissible as proof of conduct showing the accused's plan. Gen.Laws 1937, Act 3814.

4. Criminal law 🔑767

In prosecution for violation of the Corporate Securities Act, where it appeared as a matter of law that the documents introduced as exhibits by the prosecution were securities within the meaning of the term "security" as defined by the act, an instruction which charged jury that such exhibits were securities was not erroneous as an unauthorized exercise of judicial power granted by constitutional provision that court may instruct jury as to the law applicable to the facts of the case. Gen.Laws 1937, Act 3814, § 2; Const. art. 6, § 19.

5. Licenses 🔑42(5)

In prosecution for violation of the Corporate Securities Act where documents upon proof of the issuance of which without proper permit the state relied for conviction were clearly securities within the meaning of the term "security" as defined in the Corporate Securities Act, whether or not such documents, which were introduced as exhibits, constituted securities was not a question of fact for the jury but one of law upon which the court alone could pass. Gen.Laws 1937, Act 3814, § 2; Const. art. 6, § 19.

6. Criminal law 🔑823(1)

In prosecution for violation of the Corporate Securities Act, an instruction that all of prosecution's exhibits were securities was not misleading or prejudicial, where instructions positively charged jury that in order to convict accused jury must find beyond a reasonable doubt that accused acted in contravention of the Corporate Securities Act with reference to the specific document relied upon in each separate and specific count of the information. Gen.Laws 1937, Act 3814.

7. Criminal law ⟾1186(4)

In prosecution for violation of the Corporate Securities Act, the case viewed in its entirety, including stipulation that accused did not have a permit from the commissioner of corporations to execute or deliver the documents mentioned in the information, *held* not to warrant disturbance of the judgments of conviction, under constitutional provision that no judgment shall be set aside or new trial granted for error in instructing jury, in pleading, or in any matter of procedure, unless it appears that such error has resulted in a miscarriage of justice. Gen.Laws 1937, Act 3814; Const. art. 6, § 4½.

◆

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Don Dutton was convicted of violating the Corporate Securities Act, and he appeals.

Affirmed.

Robert E. O'Neill and Stanley Visel, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In two informations filed by the district attorney of Los Angeles county defendant was charged with the crimes of violation of the Corporate Securities Act (Stats. 1917, p. 673, and amendments thereto; Deering's Gen.Laws, Act 3814) and grand theft. By the information in case No. 79037 (hereinafter referred to as the first information) he was charged in counts I, VII, VIII, IX, X, XII and XIV with violation of the Corporate Securities Act, and in counts II, III, IV, V, VI, XI and XIII with grand theft. The second information (No. 79336) contained three counts of violation of the Corporate Securities Act. Defendant entered a plea of not guilty to each count and admitted, as charged, that he had suffered a previous conviction of a felony.

The jury returned verdicts finding defendant guilty upon counts I, VIII, IX, X, XII and XIV of the first information and I, II and III of the second information, all charging violation of the Corporate Securities Act, and upon counts IV, V, VI and XIII of the first information, charging grand theft. Upon the remaining counts defendant was acquitted. Defendant's motion for a new trial was granted as to all the counts charging grand theft and such charges subsequently dismissed. His appeal herein is prosecuted from the judgment of conviction entered upon the verdicts finding him guilty upon nine counts of violation of the Corporate Securities Act, in each of which counts it was alleged that he sold and issued, and caused to be sold and issued, a "security" without first having applied for and obtained from the commissioner of corporations of the state of California a permit so to do.

From the evidence adduced by the prosecution, it appears that in September, 1938, appellant and one L. S. Kirby obtained a lease upon some mining property in Shasta county. The lease was taken in the name of Kirby as lessee, and it was agreed orally that Kirby was to operate the property and appellant was to equip it. In April, 1939, this lease was declared forfeited and canceled, and a new lease was executed, running to one Gleason as lessee, who apparently was acting on behalf of appellant. In November, 1938, appellant obtained from James R. Wilkinson the sum of $1,000 and delivered to Wilkinson an instrument entitled "Assignment of Royalty Interest", purporting to convey a 2 per cent royalty interest in the leased property, and as additional security delivered to Wilkinson a deed of trust executed by Kathryn J. Wilson upon her home property. This transaction forms the basis of count I of the first information. Mrs. Wilson testified that in consideration of her executing this deed of trust, as well as another deed of trust to a Miss Amber Slipp, she was promised by appellant a 2 per cent or 3 per cent interest in the mine. Subsequently, in June, 1939, appellant delivered to Mrs. Wilson an assignment executed by Gleason of the lease that had been taken in Gleason's name as lessee. The following month, at Mrs. Wilson's request, the property was taken "out of her name" through the execution by her of an instrument presented by appellant which assigned the lease to one Harrington, reserving to Mrs.

Wilson a "16% net royalty" after a "15% landowner's royalty" had been paid. These transactions with Mrs. Wilson form the basis of counts VIII and IX of the first information.

The charges in counts X and XII of the first information were founded upon the issuance by appellant in June, 1939, to a Miss Amber Slipp of a purported "limited partnership interest" providing for the payment to her of 10 per cent of the profits from the operation of the property, and the subsequent issuance of another such agreement, said to supersede the prior agreement, granting to the same party a 15 per cent interest. Miss Slipp also received a $2,000 deed of trust executed by Mrs. Wilson, for which the latter was orally promised an additional 3 per cent interest (count IX of the first information). Under count XIV of the first information it was shown that on July 11, 1939, one Bernice Meeks gave appellant $200 and received therefor a "limited partnership agreement" providing that she should receive 1 per cent of the proceeds of the operation of the property.

In December, 1939, a Mrs. Steenson paid to appellant the sum of $1,000 and received in return an assignment by Mrs. Wilson of the sum of $1,030 from Mrs. Wilson's share of the estate of Arthur Gallagher, deceased, and a 1 per cent "limited partnership agreement". For their services in finding Mrs. Steenson for him, appellant gave to a Miss Cristion a "limited partnership agreement" for ½ per cent and to a Miss Wriswall and a Harry Grove a similar instrument granting them a 1 per cent interest to be shared equally. The three counts of the second information are based upon the issuance of these three percentage agreements.

It was stipulated that at no time had appellant obtained a permit from the commissioner of corporations with reference to any of the instruments in question. The facts hereinabove set forth were not denied by appellant at the trial, and his defense was confined to a showing that the money he received was not obtained with intent to defraud, and was in fact expended upon the mining property. Appellant does not contend that the evidence is insufficient to support the verdicts, but relies for reversal upon alleged prejudicial error occurring at the trial.

Appellant's first assignment of error is predicated upon alleged prejudicial misconduct on the part of the district attorney during the examination of the prosecution witness Louis S. Kirby. After testifying that for seven years he had been a guard at the state prison road camp, he was asked:

"Q. Do you know the defendant, Don Dutton? A. I do.

"Q. How long have you known him? A. I am not positive of the year, but I think it was about 1932 when I met him, or 1933.

"Q. Where did you meet him? A. At the prison camp in Monterey.

"Mr. Higgins (Defendant's counsel): If your Honor please, may we approach the bench at this time?

"The Court: Yes, you may. (Following proceedings at the bench.)

"Mr. Higgins: At this time, I make a motion for a mistrial. It is quite apparent what the purpose of this testimony is.

"Mr. Arterberry (Deputy District Attorney): It is a part of the res gestae.

"The Court: I do not think there is anything thus far that would indicate anything that is prejudicial. The motion is denied. However, I would not go into that any further. (End of proceedings at the bench.) * * *"

[1] We find nothing in the foregoing which indicates that the witness testified to the effect that appellant had been convicted of a felony. For aught that appears, appellant might have been employed, as was the witness, in the capacity of a guard or in some other civilian capacity at the prison camp. But even though it be assumed that the questions were improper, still it cannot be said that the same were prejudicial, because when appellant voluntarily took the witness stand in his own defense the very first interrogatory put to the defendant by his own counsel was, "Mr. Dutton, have you ever been convicted of a felony?" to which appellant answered, "I have." Thus we see that the only positive evidence of appellant's previous felony conviction was supplied by himself. Such being the case, he cannot now be heard to complain of any prejudice occurring therefrom. Further, in view of appellant's decision to voluntarily become a witness, the prosecution would have been justified in eliciting from him on cross-examination, by way of impeachment, that he had suffered such prior felony conviction. People v. Rogers, 112 Cal.App. 615,

620, 297 P. 924; People v. Silva, 2 Cal. App.2d 616, 38 P.2d 481.

Appellant next urges that prejudicial error resulted from the admission of testimony by Albert Hunt and Robert H. Harrington concerning facts unconnected with the offenses for which he was on trial. The witness Hunt testified that he gave approximately $1,100 to appellant in 1938, and as security therefor received a bond of "Sierra County Power Company" for $1,000. The witness identified People's exhibit 25 as being a bond similar to the one he received from appellant. He further testified that he lived and worked on the leased property for six or seven months after September, 1938, and during this time received $500 or $600 from appellant, some of which the witness spent for supplies and equipment. Robert H. Harrington testified that in 1928 he went to work at a mine in Sierra City, California, being told by Mr. Dutton that he, the witness, had been made secretary of Sierra County Power Company, of which he understood Dutton was president; that he signed People's exhibit 25, as secretary, at the request of Mr. Dutton, whose purported signature appeared thereon as president; that he worked at the mine for a month and then returned to Los Angeles; that his job as secretary "went with the wind", and that he never heard of the Sierra County Power Company again. The witness further stated that he had occasionally grubstaked Mr. Dutton and had been told at some time or other he would be reimbursed with "a certain per cent"; but that he had never seen or been informed of the assignment to him by Mrs. Wilson referred to in count IX of the first information.

[2, 3] We are unable to perceive wherein this evidence was prejudicial or even remotely referred to the commission of other offenses by appellant. It is here contended that the evidence concerning the Sierra County Power Company bond tended to show that such company was not substantial; permitted the inference that it was fraudulently engaged in issuing bonds, and that by the conduct and actions of appellant both witnesses were misled to their detriment; that appellant had issued securities other than those involved in the charges against him. However, it is to be noted that nowhere in the challenged testimony was it made to appear that in issuing the bonds appellant did so without an appropriate permit so to do. But we think the evidence, even if it be conceded that it referred to other offenses, was nevertheless admissible to show the intent, motive, system or scheme by and through which appellant operated his enterprise to evade the Corporate Securities Act. People v. Murphy, 17 Cal.App.2d 575, 588, 62 P.2d 592; People v. Thorne, 10 Cal.2d 705, 76 P.2d 491. In cases of this kind one of the essential facts admissible is the defendant's plan or design to do the act with which he is charged. Such a plan may be evidenced by his conduct, and such conduct may consist of other similar acts.

Finally, it is contended that the trial court erred prejudicially to appellant when it gave to the jury an instruction reading as follows:

"You are instructed that People's Exhibits —" (sic) "are securities as defined in the Corporate Securities Act, and if you find from the evidence beyond a reasonable doubt that the acts of execution, sale, and delivery, or either or any of them, were the acts of this defendant, and if you further find that, at the time of the execution, sale or delivery of said instruments, the defendant had not applied for or received a permit from the commissioner of corporations authorizing and permitting the execution, sale and delivery of such instrument, then you will find the defendant guilty as charged in the indictment."

[4, 5] Appellant asserts that by informing the jury that as a matter of law the People's exhibits constituted securities, the court decided a question of fact and withdrew it from the consideration of the jury, and in so doing went far beyond its prerogatives under section 19, article VI of the Constitution. That by such instruction the court did withdraw from the jury the question as to whether certain documents introduced into evidence were securities, there can be no doubt. But in advising the jury that the documents in question as a matter of law were securities within the meaning of the act, the court committed no error. Section 19 of article VI of the Constitution of California provides that "The court may instruct the jury regarding the law applicable to the facts of the case * * *." Pursuant to the foregoing provision, the trial court was therefore authorized to determine as a matter of law and to instruct the jury regarding the legal effect of the terms of the chal-

lenged documents. In view of the definition of the term "security" as set forth in section 2 of the Corporate Securities Act, there can be no doubt that as a matter of law the People's exhibits in question constituted securities and the court was authorized to so advise the jury. The court clearly and properly instructed the jury that before they could find the defendant guilty they must find that he did certain acts with relation to these securities, and those acts were set forth in the instruction above quoted. The jury was therefore permitted to determine whether or not, in disposing of the securities, the defendant did so in violation of the Corporate Securities Act. Whether or not the documents in question constituted securities was not a question of fact, but one of law, upon which the court alone could pass. People v. McCalla, 63 Cal.App. 783, 220 P. 436; People v. Rubens, 11 Cal.App.2d 576, 587, 54 P.2d 98, 1107.

[6] Appellant complains that the court also instructed the jury that all of the People's exhibits were securities. We fail to see how any prejudice could result to appellant from this inadvertence, because under the instructions, before the jury could find the defendant guilty they were required to determine that he issued, sold and delivered a particular security to a particular person on or about a certain date, and that at such time he did not have a permit from the commissioner of corporations authorizing such execution, sale or delivery. There was but one document upon which each count was predicated, and but a single document introduced to establish the facts charged in each count. Manifestly, no prejudice could ensue to appellant from the instructions that all of the People's exhibits were securities, nor was the jury misled or confused thereby, when, as herein indicated, they were positively instructed that before they could convict the defendant they must be satisfied beyond a reasonable doubt that he acted in contravention of the Corporate Securities Act with reference to the specific document relied upon in each separate and specific count of the informations.

[7] Viewing this case in its entirety, including the stipulation entered into by appellant that he did not have a permit from the commissioner of corporations to execute or deliver the documents mentioned in the various counts of the informations, we would not be warranted in disturbing the judgments because of the provisions of section 4½ of article VI of our state Constitution.

The attempted appeal from the sentence is dismissed; and for the reasons herein stated, the judgment is affirmed.

We concur:

YORK, P. J.; DORAN, J.

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41 Cal.App.2d 846

BEKINS et al. v. HEIKEN, County Treasurer, et al.

Civ. 6424.

District Court of Appeal, Third District, California.

Dec. 7, 1940.

Rehearing Denied Jan. 6, 1941.

Hearing Denied Feb. 3, 1941.

1. Drains 🔑18
Levees and flood control 🔑34

The statutes indicate a method whereby trustees of a reclamation district may, if district is indebted, arrange with its creditors for a refunding of such indebtedness or for levying of an additional or supplemental assessment, and as long as the law affords a complete and adequate remedy, and in absence of any showing that such powers are inadequate to produce sufficient to meet district's obligations, Court of Appeal cannot under its equity jurisdiction direct a pro rata participation by the holder of unmatured bonds in funds earmarked for a special purpose. Pol.Code, §§ 3479, 3480.

2. Drains 🔑18
Levees and flood control 🔑34

Temporary financial embarrassment of a reclamation district does not justify a departure from ordinary method of retiring obligations, that is, in the order of their maturity.

3. Drains 🔑18
Levees and flood control 🔑34

Where reclamation district is insolvent and there are not sufficient funds with which to pay all obligations in full, and power to raise funds by taxation or otherwise has been exhausted, then equity may order the accessible money of district prorated among holders of all valid claims.

4. Drains ⚷18

Levees and flood control ⚷34

In event of present inability of reclamation district to pay matured bonds and coupons with a reasonable prospect of ultimate liquidation in full, the bond fund will be prorated among matured obligations only.

5. Mandamus ⚷110

Where treasurer of reclamation district did not have enough money on hand to pay in full all outstanding unpaid matured bonds and interest coupons, but did have enough money to pay all outstanding unpaid matured bonds and coupons which were obligations against the several allocations of funds under respective calls from July 1, 1932, to July 1, 1938, inclusive, except as to calls representing obligations maturing January 1, 1938, and July 1, 1938, and there was no finding that district was insolvent, bondholders were entitled to mandamus to compel payment in full of obligations maturing before January 1, 1938, and a pro rata payment of obligations maturing thereafter. Pol. Code, §§ 3479, 3480.

◆

Appeal from Superior Court, Sutter County; Warren Steel, Judge.

Mandamus proceeding by Reed J. Bekins and others against Fred H. Heiken, Treasurer of the County of Sutter, etc., and others, to compel payment of matured bonds and coupons of Reclamation District No. 1500. From a judgment for petitioners, the respondents appeal.

Affirmed.

Hearing denied; CARTER, J., dissenting.

W. Coburn Cook, of Turlock, for petitioners and respondents.

Hewitt & McBride, of Yuba City, and Huston, Huston & Huston, of Woodland, for respondents and appellants.

PULLEN, Presiding Justice.

At all the times herein mentioned petitioners were the owners and holders of matured bonds and coupons of Reclamation District No. 1500 in the sum of $12,260.

Immediately prior to the commencement of these proceedings these matured bonds and interest coupons were presented to the respondent treasurer for payment, which was refused, however, upon the ground that at the time there was not sufficient money in the bond fund of the district to pay all of the outstanding matured bonds and coupons of the district. It did appear, however, that there was at that time, and at the time of the hearing of this petition, enough money in the hands of the treasurer to pay in full all outstanding unpaid matured bonds and coupons, which were obligations against the several allocations of said funds under the respective calls from July 1, 1932, to July 1, 1938, inclusive, except as to calls representing obligations maturing January 1, 1938, and July 1, 1938. The bonds owned by petitioners matured January 1, 1936, and January 1, 1938, and interest coupons which had become due January 1, 1935, and each six months thereafter up to and including July 1, 1938.

On September 30, 1938 (the petition herein was filed October 20, 1938) there was outstanding $40,000 of the first issue of this district's bonds (which series was dated January 1, 1920), and by October 19, 1938, that issue had been reduced to $18,000. On January 1, 1930, the district put out refunding bonds in the sum of $2,930,000, all of which latter issue was outstanding but not due.

It is also a matter of record that out of approximately 65,000 acres, the district was, at the date of the hearing of this matter, the owner of approximately 4900 acres, which had vested under delinquent assessments of the first issue of bonds, and that some 6800 acres were delinquent under the same issue, but were still subject to redemption.

The trial court found that neither the district nor the funds of the district were insolvent, and entered judgment that petitioners were entitled to a peremptory writ of mandate directing the respondent treasurer to pay to petitioners the sum of $3,000, being the amount of the first issue bonds held by petitioners which matured January 1, 1936, with interest at the rate of six per cent per annum from January 1, 1936, to date of payment, and the coupons which matured January 1, 1935, to and including July 1, 1937, in the amount of $5,070, and also to pay to petitioners the bonds which matured January 1, 1938, in the sum of $2,000 and coupons appurtenant thereto, maturing in 1938, in the sum of $2,190, pro rata with other obligations against the same calls, and that there should be added to the amount appurtenant to said calls or funds for maturities of the year 1938, any unused portion of the bond fund resulting from the proceeds of assessments and prior calls after payment of all obligations against such prior calls. From that judgment this appeal is taken.

It was stipulated at the trial that on September 30, 1938, the district was in default in the sum of $119,620, interest coupons and bonds, and at that time its treasurer had in cash on hand $86,663.97.

From those figures appellants assert the district is insolvent, and contend that regardless of any other assets that might belong to the district, or any power to levy a supplementary assessment, the matured bonds and coupons are not entitled to payment in full, but only in proration with all other bonds, both matured and unmatured.

[1] With this we cannot agree. Sections 3479 and 3480 of the Political Code indicate a method whereby the trustees of a reclamation district may, if such district is indebted, arrange with its creditors for a refunding of such indebtedness or for the levying of an additional or supplemental assessment, and as long as the law affords a complete and adequate remedy, and in the absence of any showing that such powers are inadequate to produce sufficient to meet its obligations, this court cannot under its equity jurisdiction direct a pro rata participation by the holder of unmatured bonds in funds earmarked for a special purpose.

In Rohwer v. Gibson, 126 Cal.App. 707, 14 P.2d 1051, the fund was insufficient to pay in full both of two claimants each holding matured unpaid interest coupons. There were approximately $50,000 in the treasury against which there were outstanding obligations due and payable of some $65,000. The court held the claimants were not entitled to collect in full but that all holders of matured coupons should share ratably in the fund.

In Cooper v. Gibson, 133 Cal.App. 532, 24 P.2d 952, 956, involving certain interest payments, there was in the possession of the treasurer the sum of $126,000 in matured coupons, and something less than $30,000 from which to make the interest payments. About one-half of the money in the fund was earmarked to pay coupons due July 1, 1932, and a lesser amount to pay the coupons due January, 1933. The court had before it the question of the order of payment of past due coupons of different maturities, and there said: "We conclude, therefore, that the money received on account of each call is so far earmarked that, if ordered distributed, it should be ordered distributed so as to apply the money received on account of the call intended to make payment of the interest coupons falling due on July 1, 1932, to the payment of such interest coupons only, and that the moneys received on account of an installment call intended to raise money for the payment of interest coupons falling due on January 1, 1933, should be applied to the payment of such interest coupons only."

In Kimball et al. v. Hastings Tract, etc., 137 Cal.App. 687, 31 P.2d 417, 418, an appeal was taken from a mandate of the superior court ordering distribution to others than those for whom the funds were collected.

A call in the sum of $52,000 together with an additional 15 per cent to cover possible delinquencies, was issued to retire certain outstanding bonds and interest in the sum of $52,000. This call brought into the treasury approximately $49,000, leaving a delinquency of approximately $10,000. After application of some $45,000 to payment of the particular bonds and coupons as specified in the call, there still remained about $4,000 in the special bond fund. Holders of other bonds asked that the balance be applied to the payment of their obligations although a portion of the bonds and interest for which the assessment was originally levied still remained unpaid. The order there was: "It follows that the undistributed portion of the fund, amounting to the sum of $4,477.30, which remains in the hands of the treasurer for the designated purpose of applying it to future obligations, as directed by the trial court, should be prorated and applied towards the immediate payment of the specified matured bonds and the accrued interest thereon, in the proportion which said undistributed sum of $4,477.30 bears to the unpaid items of principal and interest which are contained therein as specified in the call for the assessment."

Thus in the foregoing cases the matured bonds and interest coupons were permitted to participate in the proration to the exclusion of the unmatured or undesignated bonds. The same principle was applied in the following cases:

In Bank of Hawaii v. Gibson, 15 Cal.App.2d 407, 59 P.2d 559, the funds of the district were insufficient to pay all matured interest coupons of the district, and the question was whether the matured interest coupons be paid pro rata until the available funds were exhausted, or in the order of presentation, and it was ordered, upon the authority of Rohwer v. Gibson, 126 Cal.App. 707, 14 P.2d 1051; Kimball v. Hastings, etc., District, 137 Cal.App. 687, 31 P.2d 417, and Cooper v. Gibson, 133 Cal.App. 532, 24 P.2d 952, that such payments were to be paid pro rata.

[2] In Morris v. Gibson, 30 Cal.App.2d 684, 87 P.2d 37, a bondholder asserted the district was insolvent and sought a pro rata distribution of certain funds in the possession of the district to bondholders regardless of maturity. The district was found to be solvent, although financially involved. It was there held that a temporary embarrassment did not justify a departure from the ordinary and usual method of retiring obligations, that is, in the order of their maturity, and cited the case of State v. Duncan, 334 Mo. 733, 68 S.W.2d 679, 684, which had previously been cited with approval in Bank of Hawaii v. Gibson, 15 Cal.App.2d 407, 59 P.2d 559. What is there held is particularly appropriate to the present situation: "The rule announced in many cases is that when a trust fund raised by special assessment is insufficient to pay all having equal claims upon it, payment should be made ratably. If a drainage district be insolvent, as held in Sturdivant Bank Case, supra [State ex rel. Sturdivant Bank v. Little River Drainage Dist., 334 Mo. 753], 68 S.W.(2d) 671, all outstanding bonds (those not due as well as those matured) must be taken into consideration in the apportionment of the fund. If the district is solvent there still must be an apportionment, but it is limited to matured bonds and coupons because in that situation the statute pledges the fund on hand from time to time to the payment of matured (and after that next maturing) principal and interest. We understand this view to be in accord with the following decisions which we cited in the Sturdivant Bank case, supra, and here refer to again: Rothschild v. Village of Calumet Park, 262 Ill.App. 96, 106; Thomas v. Patterson, 61 Colo. 547, 159 P. 34; Norris v. Montezuma Valley Irr. Dist. (D.C.) 240 F. 825; Norris v. Montezuma Valley Irr. Dist. [8 Cir.] 248 F. 369; Rohwer v. Gibson, 126 Cal.App. 707, 14 P.2d 1051."

[3] The latest case applicable here is Clough v. Baber, 38 Cal.App.2d 50, 100 P.2d 519. There an irrigation district was involved, and the district was admittedly insolvent. The rule is there laid down supported by a long line of well-recognized authorities that when the debtor is insolvent and there are not sufficient funds with which to pay all obligations in full, and the power to raise funds by taxation *or otherwise* has been exhausted, then equity may order the accessible money prorated among the holders of all valid claims. Such a situation, however, does not here exist. We have no showing of insolvency (and such a status cannot be assumed except upon clear proof), and the power to raise funds by taxation or otherwise has not been exhausted.

Another case helpful to a determination of the question here presented is that of Kerr Glass Mfg. Corp. v. City of San BuenaVentura, 7 Cal.2d 701, 62 P.2d 583, 584. There, petitioner, in mandamus, sought payment in full of $17,000 of overdue bonds from the city, which was the custodian of an improvement district assessment bond fund. The total obligations of that fund were in excess of $132,000. The payment of petitioner's matured obligations was refused "because there was not sufficient money in the bond redemption fund to pay all of the outstanding and matured bonds * * * although there was sufficient to pay the petitioner in full". The Supreme Court directed that the fund be distributed pro rata, and in doing so pointed out that this fund was limited without possibility of replenishment, and that in the case of general insolvency proration among matured and unmatured obligations was proper.

The declaration of insolvency of the fund by the city was justified, the court said, because of the large percentage of delinquencies, and the inability of the taxing power of the city to build up a surplus in the general fund, from assessments falling due on the property taken over by the city, with which to replenish the bond fund, either immediately or *in the reasonably near future.*

[4, 5] In the instant case we have no finding of insolvency, no large percentage of delinquencies nor is there any showing that in the reasonably near future the bond fund may not be replenished. As pointed out in the Duncan and Sturdivant cases, in the event of a present inability to

pay with a reasonable prospect of ultimate liquidation in full, the fund will be prorated among the matured obligations only.

We are therefore of the opinion the judgment of the trial court should be affirmed, and that a peremptory writ issue as prayed for except as to the allowance of interest upon a matured bond, which issue is still undetermined and pending before the Supreme Court of this state, and as to that issue the same is denied without prejudice. In all other respects the judgment is affirmed. It is so ordered. Petitioners and respondents to recover costs on appeal.

We concur: THOMPSON, J.; G. L. JONES, Justice pro tem.

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41 Cal.App.2d 884

TIDE WATER ASSOCIATED OIL CO. v. CURTIN et al.

Civ. 2495.

District Court of Appeal, Fourth District, California.

Dec. 10, 1940.

Hearing Denied Feb. 6, 1941.

1. Executors and administrators 🔑150

The heirs of an estate may ratify not only voidable but also void acts of the administrator including his leasing of land of decedent.

2. Appeal and error 🔑1008(3)

On appeal from judgment in action for declaratory relief respecting rights under oil and gas lease, question for District Court of Appeal was whether interpretation given lease by trial court was reasonable and according to agreement which parties made for themselves and in accordance with situation of the parties and the objects to be accomplished under the surrounding circumstances. Civ.Code, § 1641.

3. Executors and administrators 🔑150

Administratrix who executed oil and gas lease individually and as administratrix was bound individually as to her interest in the whole if lessee was given right to operate producing wells for life of lease, as much as though she had made a separate lease.

4. Appeal and error 🔑1008(3)

Where reviewing court could not say that oil and gas lease and ratification agreement, considered in the light of the facts, were not susceptible of interpretation placed upon them by trial court, reviewing court could not disturb trial court's decision.

5. Mines and minerals 🔑73

In suit for declaratory relief respecting rights under oil and gas lease, resolving doubtful language in lease in determining meaning and effect of subsequent ratification agreement was in trial court's province.

6. Appeal and error 🔑1008(3)

When the construction given an instrument by the trial court appears to be reasonable and consistent with the intent of the parties, appellate courts will not substitute another interpretation though it may seem equally tenable.

7. Executors and administrators 🔑150

Where oil and gas lease executed by administratrix empowered lessee to explore for oil, but provided that right to explore should expire at end of 20 years, and lease purported to be for a term longer than 20 years with respect to wells in production although administratrix was authorized by probate court to execute lease for only 20 years, and heirs executed ratification agreement after estate was distributed to them, determination that lessee was entitled to remain in possession and operate producing wells for as long as oil or gas was produced and marketed therefrom would not be disturbed.

8. Appeal and error 🔑782

Attempted appeal from order denying motion for new trial would be dismissed.

◆

Appeal from Superior Court, Orange County; G. R. Freeman, Judge.

Action by the Tide Water Associated Oil Company against Emma J. Curtin and others for declaratory relief respecting rights under an oil and gas lease. Judgment for plaintiff, and defendants appeal.

Affirmed; attempted appeal from order denying new trial dismissed.

Hearing denied; SHENK, HOUSER, and CARTER, JJ., dissenting.

W. Cloyd Snyder, of Los Angeles, and A. W. Rutan, of Santa Ana, for appellants.

Wm. F. Kiessig and Wm. I. Robinson, both of San Francisco, and Harrison Guio and Paul O. Broxon, both of Los Angeles, for respondent.

GRIFFIN, Justice.

This action for declaratory relief was brought by plaintiff and respondent to determine its rights as lessee under a certain oil and gas lease. The question presented to the trial court was whether all of lessee's rights under the lease terminated *at the end of twenty years,* or whether lessee was entitled to remain in possession of and to operate certain producing wells *for so long as oil or gas is produced and marketed from such wells.* The trial court gave judgment for respondent, declaring that the lessee had the right to operate producing wells under the terms of the lease so long as oil or gas is produced and marketed therefrom.

On May 17, 1919, Emma J. Curtin, one of the appellants herein, was the administratrix of the estate of Erwin Bayha, deceased, which estate owned an interest in the land covered by the oil lease here in question. The estate was in course of probate in the superior court of Orange county. A petition was filed in that court by the administratrix seeking authority to execute the lease.

The petition to lease said property provided in part as follows: "That the term of said proposed lease is twenty (20) years from and after the 10th day of May, A. D. 1919, * * *." The order granting said petition reads in part as follows: "It is ordered that said Emma J. Bayha, as administratrix of the estate of Erwin Bayha, deceased, be and she is hereby authorized, empowered and directed to lease that certain real property belonging to the estate of said Erwin Bayha, deceased, * * * for the term of twenty years, for the purpose of exploiting for minerals and mineral oils and petroleum, and extracting minerals therefrom * * *."

The oil lease was executed on May 17, 1919, by Emma J. Curtin individually as to her own personal interest and also by her as administratrix of the said estate. Later the estate was distributed and certain of the appellants were distributees. Oil wells were drilled on the demised premises and royalties paid thereon until May 17, 1939. Pertinent portions of the lease are as follows:

"* * * Lessors * * * demise unto the Lessee * * * all of the real property belonging to the said estate of Erwin Bayha, deceased, and said Emma J. Bayha, individually, * * * for the term of twenty years, commencing on the 17th day of May, 1919, and ending on the 17th day of May, 1939, for the purposes and with the sole and exclusive right to the Lessee of exploiting and drilling for, developing, producing * * * petroleum, oil, * * * upon and from said land * * *. *Provided* that at the expiration of twenty (20) years from May 17, 1919, that is to say on May 17—, 1939, the *said right to explore* and *drill for oil* and other hydro-carbon substances shall terminate * * *." (Then follows a description of the land.)

"The lessee agrees to pay the Lessors a royalty of one-sixth (1/6th) of the net amount of all petroleum, oil, * * * which may be produced * * *." (Then follows provisions and conditions for the drilling of successive wells on the property.) The lease further provides:

"The lessee agrees to operate each completed well on the premises to its full capacity so long as such well or wells shall produce oil in paying quantities *while this lease is in force*" and that

"The Lessee may at its election at any time after the completion of the first well or any subsequent well cease further drilling, and if the well or wells hereinabove provided for shall not have been drilled when the Lessee permanently ceases drilling, this lease shall thereupon terminate as to all of the demised premises, except such land covering and surrounding each producing well, or well being drilled, as may be necessary or convenient in the operation of the producing well or in the drilling of any well being drilled, not exceeding, however, five acres surrounding each producing well and five acres surrounding each well being drilled, *and the Lessee may hold each of said five acre tracts free of further drilling obligations so long as oil or gas is produced and marketed from the well thereon* * * *. Lessee shall have the right at any time prior to the expiration of Ninety days after the termination of this lease to remove from the demised premises all structures * * * including casing in nonproductive wells * * *.

"Upon the termination of *all* the Lessee's right under this lease the title to all unsevered petroleum, oil, natural gas and other hydrocarbon substances lying in and under the demised premises shall revert to the said Lessors, and the Lessee agrees thereupon and upon demand of the Lessors to execute and deliver to the Lessors an instrument quitclaiming to the said Lessors all interest of the Lessee in the demised premises, so as to effectually clear the title to said premises from any interest of the Lessee therein under this lease * * * no failure on the part of the Lessee to comply with any of the provisions of this lease as to any well or wells on any parcel of five acres surrounding same shall affect the right of the Lessee to continue its possession or operation of any other well or wells situated on any other five acre parcel or parcels. * * * Whenever *during the term of this* lease the Lessee shall determine that any portion of the demised premises is not, * * * oil producing territory" he "shall release to the Lessors all such portion * * *.

"This lease is entered into * * * pursuant to an order of the Superior Court * * * made on the 9th day of May, 1919, * * * authorizing such lease to be made by said Administratrix." (Italics ours.)

On August 20, 1926, a written agreement was signed respecting the leased premises. It reads in part as follows:

"Whereas, the parties hereto are the successors in interest of the parties to said lease and agreement of May 17, 1919, and

"Whereas, second party is willing to commence drilling operations forthwith on the demised premises for the purpose of exploring for and obtaining production from deeper oil sands, and the first parties desire to have such drilling and exploring done,

"Now, Therefore, in consideration of the premises and the covenants hereinafter contained, it is hereby agreed between the parties hereto as follows, to wit:

"1st. That all of the provisions of such lease and agreement of May 17, 1919, have been complied with to the date hereof.

"2nd: Said lease and agreement of May 17, 1919 and any and all amendments or modifications thereof heretofore entered into shall remain in full force and effect, except as herein provided * * *." (Signed by appellants herein, as parties of the first part, and respondent as party of the second part.)

On January 29, 1937, a portion of the demised premises was quitclaimed to certain of appellants by deed. After August 20, 1926, two wells were drilled deeper than previous wells. Upon being notified by appellants' counsel of the claimed expiration of the lease on May 17, 1939, the respondent refused to quitclaim or to deliver up possession, and thereupon filed this action for declaratory relief. A demurrer and answer were filed concurrently and upon the hearing of the demurrer it was agreed to submit the controversy upon the pleadings and stipulated facts, as above outlined. The court then overruled the demurrer and gave judgment for the respondent, declaring:

"That under the terms of said oil and gas lease dated May 17, 1919, * * * plaintiff is entitled to remain in possession of and to produce and operate wells numbers 2, 3 and 5 on the premises covered by said lease, * * * for so long as oil or gas is produced and marketed from each of said wells * * *. That by the terms of the agreement dated August 20, 1926," appellants "ratified said lease as to all of its terms and provisions and said parties are estopped to claim that said lease is void as to any period extending in excess of the twenty-year period provided in said lease."

Appellants first argue that the complaint does not state facts sufficient to constitute a cause of action for declaratory relief because the oil lease in question provides a definite twenty-year term which is nowhere in the instrument qualified or rendered uncertain or ambiguous as to the time of its termination, so as to provide the basis for any controversy or basis for declaratory relief. In support of this point it is argued that section 1579 of the Code of Civil Procedure then in effect (Stats. 1909, chap. 326, p. 540) provided "* * * the period of the lease, which must in no case be longer than for ten years * * * provided that, for the purpose of exploiting for minerals, or mineral oils or petroleum and extracting minerals therefrom, the period of the lease may be for twenty years", and that the lessee knew that on the date of the lease it could not have made a lease binding the estate of Bayha for more than twenty years. See, also, sec. 842, Prob. Code.

It is further argued that the language used in the lease to the effect that the lease commenced on May 17, 1919, and ended on May 17, 1939, was definite and unqualified, simple and understandable, and could not be qualified by inference or by any indirect or ambiguous clause appearing later in the instrument, citing Civil Code, sections 1641, 1642, 1643, 1644, 1645, 1648, 1649, 1650, 1652 and 1653. Appellants contend that the instrument, taken by its four corners, and considered as a whole, does not support the court's finding that the lease was not terminated "at the expiration of twenty years from the date thereof, as to the five-acre tracts surrounding each well" or "for so long as oil or gas is produced and marketed from such well". Appellants contend that the court misconstrued the "five-acre drilling clause"; that by the terms thereof the lessee was not authorized to operate the producing wells on the five acres in question after the expiration of the twenty-year period, and that by necessary implication there is added to that clause "but not extending beyond the operation date of the lease, namely, May 17, 1939", citing Scudder v. Perce, 159 Cal. 429, 114 P. 571; Brady v. Bartlett, 56 Cal. 350; Loyalton Electric L. Co. v. California Pine Box, etc., Co., 22 Cal.App. 75, 133 P. 323; that respondent's interpretation of the five-acre drilling clause would be a construction holding that the parties intended a violation of section 1579 of the Code of Civil Procedure, and that the trial court should not have favored such an interpretation; that the quoted portions of the lease show that all parties understood that there would be oil in paying quantities remaining in the ground after the lease had ceased its operation, that is, after the twenty-year period of the oil lease, and that the obligation of the lessee to produce oil in paying quantities only continued "while this lease is in force"; that the signing of the written agreement of August 20, 1926, by the distributees (heirs of the Bayha estate), did not extend the term of the lease beyond twenty years and was not a ratification thereof, and did not make lawful an otherwise unlawful term beyond twenty years, citing 52 Corpus Juris, page 1144, section 1. 25 Corpus Juris, page 1180, section 476, is also cited to the effect that as a general rule the facts or circumstances to be considered are those which are known to the parties when the lease is made, and the lease must receive its construction as of the date it becomes operative and not in the light of subsequent events; that it was the intent of all the parties at the time of the making of the lease that its term was for 20 years and no more and that a subsequent ratification of such lease could not extend the term thereof without some specific provision in reference thereto and that such specific provision of extension was not contained in the agreement of August 20, 1926; that the drilling of two oil wells after August 20, 1926, had no bearing on the term of the original lease to extend it or to otherwise qualify it; that the acceptance of benefits from such additional production thirteen years before the expiration of the lease did not operate as a benefit accruing to appellants after May 17, 1939, which could, in any manner, be construed as a ratification of the extension of the lease after its expiration date; that the fact alone that the so-called ratification agreement made no mention of any extension, should be convincing evidence that no such intention was manifested; that the lease, if it provided that it was to be *for a period of twenty years and so long thereafter as oil or gas was discovered in paying quantities on the leased property,* would have been void as to the estate. McPike v. Superior Court, 220 Cal. 254, 30 P.2d 17; Brosnan v. Kramer, 135 Cal. 36, 40, 66 P. 979; Smith v. Westerfield, 88 Cal. 374, 378, 26 P. 206; Texas Company v. Bank of America, etc., Ass'n., 5 Cal.2d 35, 53 P.2d 127; Welsh v. Cross, 146 Cal. 621, 81 P. 229, 106 Am.St.Rep. 63, 2 Ann.Cas. 796; Gally v. Wynne, 96 Cal.App. 145, 273 P. 825; Granger v. New Jersey Insurance Co., 108 Cal.App. 290, 291 P. 698.

Respondent in reply points out first, the rule stated in Adams v. Petroleum Midway Co., Ltd., 205 Cal. 221, 224, 270 P. 668, 669, that: "If it should be conceded that the provision of the lease is sufficiently uncertain to admit of the meaning which appellant gives it, it certainly cannot be said that the agreement, considered in the light of the facts stipulated to, is not susceptible of the interpretation placed upon it by the court. Hence we cannot disturb the decision. It was the province of the trial court to resolve doubtful language in the lease." In the cited case the court was concerned with the construction of an oil and gas lease and the case was tried on an agreed statement of facts. Similarly, the case at bar was tried upon the pleadings and certain stipulated facts. See, also, Whepley Oil Co. v. Associated Oil Co., 6 Cal.App.2d 94, 44 P.2d 670; Kautz v. Zurich Gen. Acc. & L. Ins. Co., 212 Cal. 576, 582, 300 P. 34; Evans v. Citizens Nat. Trust & Sav. Bank, 29 Cal.App.2d 133, 141, 84 P.2d 218; Culley v. Cochran. 17 Cal.App.2d 498, 503, 62 P.2d 168; Swerdfeger v. United Acceptance Corp., 9 Cal.App.2d 590, 593, 594, 50 P.2d

818. Respondent further argues that the judgment of the trial court in the instant case permits lessee to remain in possession of and to operate three wells on the leased premises for so long as oil or gas is produced and marketed from those wells, paying the one-sixth royalty provided under the lease, and otherwise operating in accordance with the provisions of the lease, and that the judgment is not only in accord with the expressed provisions of the lease but is fair and equitable; that it cannot be said that the judgment is so unreasonable as to permit this court to substitute its independent judgment therefor.

Respondent insists that by the terms of the lease, i. e., "the Lessee may hold each of said five acre tracts free of further drilling obligations so long as oil or gas is produced and marketed from the well thereon * * *", there is no limitation as to the time in that provision, and it unmistakably and clearly states that lessee may hold such five-acre tract "so long as oil or gas is produced and marketed from the well thereon"; that another paragraph gives the lessee the "right to do such acts and things as may be necessary to keep said wells in the highest productive state", which indicates that lessee may remain in possession of and produce such wells for so long as oil or gas is produced and marketed therefrom; that appellants are not authorized to read into the lease, by inference or otherwise, that it was intended thereby that after the words "so long as oil or gas is produced and marketed from the well thereon" there should be added by implication, as contended by appellants, "but not exceeding twenty years", citing Loyalton Electric L. Co. v. California Pine Box, etc., Co., supra. In other words, respondent construes the provisions of the lease to intend that even when lessee has drilled a well but has not complied with all of its drilling obligations, it is nevertheless permitted to remain in possession of five-acre tracts surrounding each producing well and may hold such five-acre tracts free of further drilling operations so long as oil or gas is produced and marketed thereon, and it may do such acts and things as may be necessary to keep such wells in the highest productive state; and that even should lessee breach its lease by not drilling all of the wells provided to be drilled thereunder, the lease might be terminated in part, but not as to producing wells or wells being drilled, and that even in case of a breach of the lease so that a partial forfeiture might result, still it was not contemplated that the lease should terminate as to producing wells, and as to such wells it is stated specifically that the lease shall remain in effect for so long as oil or gas is produced and marketed from such wells; that the granting clause of the lease demonstrates that this is correct; that the property by the terms thereof is leased "for the term of twenty years * * * for the purposes and with the sole and exclusive right to the Lessee of exploiting and drilling for, developing, producing, extracting, bringing to the surface, obtaining, taking, storing, removing and carrying away petroleum, * * *" and it is then stated: "Provided that at the expiration of twenty (20) years * * * the said right to *explore and drill for oil* and other hydrocarbon substances shall terminate"; that an oil and gas lease is given for three purposes, first, to explore for, second, to drill for, and third, to produce oil and gas; that in the demising clause all three of these rights are granted for a period of twenty years; that in the proviso only the *right to explore for* and the *right to drill for* oil and gas terminated at the end of twenty years; that therefore, while the *right to explore for* and the *right to drill for* oil and gas may terminate at the end of twenty years, the *right to produce* continues beyond that period and "so long as oil or gas is produced and marketed from" producing wells; that no other possible meaning may be given to the proviso, and that unless this construction is given to it the proviso is utterly meaningless; that the right of lessee to retain producing wells for the life of the wells is further evidenced by the provision that "upon the termination of all of the lessee's right under this lease the title * * * shall revert to the said lessors * * *"; that the use of the word "all" in this clause is highly significant and that it clearly expresses the intention that some rights under the lease shall terminate before the termination of other rights, that is, the right to drill for and the right to explore for oil and gas may terminate at the end of twenty years; that the right to produce continues so long as oil or gas is produced and marketed from producing wells; that in other provisions of the lease the use of the words "while this lease is in force" and "during the life of this lease" is also evidence that the right to produce shall continue so long as oil or gas is produced and marketed from producing wells; that the expressions "while the lease is in force" and "during the life of this lease" are significant; that nowhere in the lease will be found the limitation "during the twenty-year period provided for in this lease"; that the only reference in the lease to the twenty-year period is in the granting clause where, by the proviso, only the right to explore for and the right to drill for oil or gas are limited to twenty years.

[1] In answer to appellants' argument that section 1579 of the Code of Civil Procedure admittedly limited the duration of an oil and gas lease given by an executor and administrator to a period of twenty years, it is contended that the ratification of the lease by the agreement of August 20, 1926, executed by all of the persons having an interest in the lease, reaffirmed and validated those provisions in the lease granting to lessee the right to operate producing wells so long as oil or gas is produced and marketed therefrom. Appellants admit that the heirs of an estate may ratify not only voidable but also void acts of the administratrix of an estate. This principle has been applied specifically to the act of an administrator in leasing lands of a decedent. In 24 C.J., p. 191, sec. 689, it is stated: "The acquiescence of heirs or devisees, or their waiver of their rights, may operate to validate the acts of an executor or administrator in leasing the lands of decedent." See, also, Phillips v. Grubbs, 112 Ark. 562, 167 S.W. 101; Bessho v. General Petroleum Corp., 186 Cal. 133, 199 P. 22, and cases cited; Ions v. Harbison, 112 Cal. 260, 44 P. 572; McKeeby v. City of Los Angeles, 125 Cal. 639, 58 P. 263; and Texas Company v. Bank of America, etc., Ass'n, supra.

It therefore must follow that if the original lease extended the term as to the "five-acre tracts" beyond the twenty-year period and "for so long as oil or gas is produced and marketed from such well" appellants have fully ratified the terms of the original lease and the judgment of the trial court must be sustained. However, if the original lease, by its terms, intended that all rights of respondent therein terminated at the end of twenty years, there was nothing in the instrument dated August 20, 1926, that would or could extend the term thereof.

[2] The only question then presented to us is, between the two possible constructions to be placed thereon, whether the interpretation given the lease by the trial court was reasonable and according to the agreement which the parties made for themselves, and was in accordance with the situation of the parties and the objects to be accomplished under the surrounding circumstances. Sec. 1641, Civ. Code; 8 Cal.Jur.Supp., p. 672. The arguments presented by both appellants and respondent are not without merit. An oil and gas lease for a definite and fixed term and "so long thereafter as gas or oil * * * is produced therefrom" is one in common use. Dabney v. Edwards, 5 Cal. 2d 1, 53 P.2d 962, 963, 103 A.L.R. 822; Scheel v. Harr, 27 Cal.App.2d 345, 80 P.2d 1035.

[3] There can be no dispute as to certain facts. Originally there were two lessors to this lease, (1) Emma J. Curtin individually and (2) Emma J. Curtin as administratrix of the estate of Erwin Bayha, deceased. The lease was executed by the two lessors as cotenants. The lessor Emma J. Curtin individually was under no statutory disability and could make a lease of indefinite duration as to her interest. She was bound by the terms of the lease if the lessee was given the right to operate producing wells for the life of the lease just as much as though she had made a separate lease. A cotenant can individually lease property for oil and gas purposes, and she is bound as to her interest in the whole. Earp v. Mid-Continent Petroleum Corporation, 167 Okl. 86, 27 P.2d 855, 91 A.L.R. 188. If we are to speculate as to the intention of the parties, we can assume in support of the judgment that the lease was drawn so that by its terms it granted the right to the lessee to retain producing wells after the twenty-year period on the theory that Mrs. Curtin in her individual capacity would be bound by the lease in this respect, and that upon distribution of the estate, a ratification of the lease would be obtained by all of the parties then interested in the lease so as to bind their interest as well as Mrs. Curtin's individual interest.

[4, 5] Pursuant to the provisions of the agreement of 1926, lessee commenced and drilled two wells on the demised premises to deeper oil sands. Those wells were drilled approximately twelve years prior to the termination of the twenty-year period. The acceptance of the performance under the 1926 agreement and of the royalties from the wells drilled pursuant

to its provisions and the reliance of lessee upon the position of lessors is also significant as bearing on the intention of the parties. A circumstance in support of the judgment which appeals to us is the fact that the heirs signed the ratification agreement after the estate was distributed to them. Had the parties intended, originally, that the lease was to terminate for all purposes at the end of the twenty-year period, from the record before us, such a ratification would have been unnecessary. We must therefore presume that the ratification agreement was signed for some purpose. That purpose could only have been to ratify that portion of the lease, granting a term longer than 20 years with respect to wells in production, which was in excess of the powers of the administratrix at the time the original lease was executed. The agreement of August 20, 1926, provided that the original lease should remain in full force and effect. That agreement applied to all the terms of the original lease, and not merely to a part thereof. The lessors were then subject to no restriction limiting a lease to 20 years, and this later agreement clearly ratified and adopted the provision of the earlier lease relating to an extended term for holding portions of the land in connection with wells which continued to produce.

A further consideration is that in any event the provisions of the original lease are sufficiently uncertain to call for an interpretation thereof, the execution of the later agreement calls for an interpretation as to its meaning and effect as applied to and considered with the original lease, and it cannot be said that the two instruments, considered in the light of the facts, are not susceptible of the interpretation placed upon them by the court. Hence, we cannot disturb the decision. It was the province of the trial court to resolve doubtful language in the lease and to determine the meaning and effect of the subsequent agreement. Adams v. Petroleum Midway Co. Ltd., supra.

[6] When the construction given an instrument by the trial court appears to be reasonable and consistent with the intent of the parties making it, courts of appellate jurisdiction will not substitute another interpretation even though it seems equally tenable. Berdan v. Berdan, Cal. App., 103 P.2d 622.

[7, 8] For the reasons expressed the judgment is affirmed. The attempted appeal from the order denying the motion for new trial is dismissed. Chichester v. Seymour, 28 Cal.App.2d 696, 83 P.2d 301.

We concur: BARNARD, P. J.; MARKS, J.

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41 Cal.App.2d 792

BOELLAARD et al. v. CRABBE et al.

Civ. 11243.

District Court of Appeal, First District,
Division 1, California.
Dec. 4, 1940.

1. Railroads 🔑350(5, 7, 11, 13, 21)

In action for death of parents in railroad crossing accident, where there was some evidence that train at time of collision was traveling at 70 miles an hour in violation of ordinance, that no whistle warning was sounded, that flashing red lights did not operate, that wigwag signal installation violated order of Railroad Commission, and that all signals were inadequate, whether defendants were negligent was for the jury, unless contributory negligence was established as a matter of law.

2. Railroads 🔑350(13)

In action for death of parents in railroad crossing accident, where evidence was conflicting respecting whether father or mother was driving automobile, contributory negligence of driver, whichever it was, was for the jury.

3. Railroads 🔑346(5)

An automobile driver who with occupant was killed in railroad crossing accident was presumptively using due care, not only for himself, but likewise for other occupant.

4. Appeal and error 🔑110

An order denying motion for new trial is not an "appealable order".

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by Olga Boellaard and others, minors, by the guardian of their estate, against John L. Crabbe and others, to recover damages for wrongful death of plaintiffs' parents in a railroad crossing accident. From a judgment of nonsuit, plaintiffs appeal.

Reversed, and cause remanded.

Francis Gill and Mary Conway Kohler, both of San Francisco, for appellants.

Louis Oneal, Arthur G. Shoup, and Duncan Oneal, all of San Jose, for respondents.

WARD, Justice.

This is an appeal from a judgment of nonsuit, granted in an action by plaintiff minors, by the guardian of their estates, to recover damages for the wrongful death of the parents of the minors, killed when their automobile was struck at a street crossing in Redwood City by a train of the defendant Southern Pacific Company, which was being operated by Witte Hoogendyk and John L. Crabbe, as engineer and fireman, respectively. The driver of the automobile had slackened speed at the crossing to allow a northbound train to pass, and the decedents were killed when the car was driven across the track over which this train had just passed, and directly into the path of a southbound train.

The court granted the nonsuit upon the ground (1) that there was no evidence of negligence on the part of the defendants proximately causing the injury; (2) that if there was such negligence "I find that contributory negligence, as a matter of law, was imputed to the other party in the car for all the reasons advanced by counsel for the defendant." Plaintiffs appeal from the judgment and from the order denying their motion for a new trial.

In support of the theory of negligence on the part of respondents, appellants refer to an ordinance of the city of Redwood City which they claim prohibits the operation of the train involved herein at a speed exceeding forty-five miles an hour, and they contend that, regardless of the ordinance, the record shows respondents were guilty of negligence as a matter of law in operating the train at an excessive speed at the time and place of the accident.

[1] There is some evidence that at the time of the collision, the train was traveling at seventy miles an hour. There is also some evidence from which an inference might be drawn that no whistle warning was sounded by the southbound train on approaching the crossing; that the two-train flashing red light did not operate; that the wigwag signal installation was in violation of an order of the Railroad Commission, and that all of the signals were inadequate to notify those intending to cross the track of the approach of this particular train. The weight of such evidence is not for this court or the trial court to pass upon. It involved questions of fact which should have been presented to the jury unless contributory negligence as a matter of law was established.

[2] The trial court stated that if the respondents were negligent "contributory negligence, at a matter of law, was imputed to the other party in the car". To pass upon this question of imputed negligence necessitates considerable guessing as to facts not sufficiently established in the present record. Whether the father or mother was driving may be determined only by inferences drawn from certain testimony. The fireman on the train testified that the driver of the car wore a hat. After the accident, only a man's hat was found. One of the minor plaintiffs, ten years of age, testified that at the time of the accident she was eight years old and that she remembered that her father would go from home to the train "in a car with my mother". A friend of decedents testified that the wife had learned to drive and that she would take her husband to the station and then bring the car back home. An eye-witness testified that the woman was sitting on the right of the driver's seat. There was sufficient conflict in the evidence to have required the jury to pass upon the alleged contributory negligence of the driver of the car, whether it was the father or the mother.

The motion for nonsuit was granted, as above stated "for all the reasons advanced by counsel for the defendant". These reasons appear in respondents' brief. The following is their statement of the question involved: "May infant children recover for death of their mother where she was admittedly killed by the negligent operation of the automobile in which she was riding when the inferences from the evidence offered by plaintiffs are that the mother herself was operating said automobile?" In their argument in support of the motion for nonsuit, respondents state: "The evidence produced by the plaintiffs further proves as a matter of law, that the driver of the decedent's automobile was guilty of contributory negligence as a matter of law. * * * the plaintiff charges in paragraph four of the complaint that the father was the driver of the automobile. However, there is a very definite conflict in the evidence over that point, the inference from the evidence being that the mother was the driver. Of course, nobody knows. * * * There is a question as to who was the driver of this automobile. In any event, whoever was the driver was undoubtedly guilty of contributory negligence as a matter of law, the negligence which proximately caused the accident as a matter of law. I realize that the plaintiff would not be bound by any negligence of the person who was not driving the automobile—in other words, that if the father was driving, I think it is well established that the negligence of the father resulting in the death of the mother, would not be imputed to the children. * * * However, assuming that the mother was driving, this is a community of these two people, and the presumption is that the father, if he were not driving, he at any rate had some control over the operation of the automobile by his wife. * * * Now, here is a peculiar situation. We do not know who was the driver of that machine, but whoever it was that person was guilty of contributory negligence. Of course there is a presumption in law that these people were exercising due care for their own safety, but I submit that the physical testimony, and the testimony of Mrs. Fahey, displaces this presumption as to the driver of the automobile; the pleadings say it was John Boellaard, but the testimony does not show who it was."

[3] There was some testimony that the father was driving the car, and there is presumption that the driver, whoever it was, was using due care not only for himself but likewise for the other occupant of the car. Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590. It was for the jury to determine whether there was any proof of contributory negligence. If it found there was none, it was not necessary to consider the question of the imputed contributory negligence to the children.

There is a further question in this case; that of imputed negligence in the event of proof of contributory negligence. Respondents, in presenting the motion for nonsuit, conceded that "plaintiff would not be bound by any negligence of the person who was not driving the automobile". We refrain from expressing approval or disapproval of this statement for the reason that (1) it is not necessary to a disposition of the present question on appeal; (2) the point has not been briefed by either side. The above is a mere reference to the question by respondents. There was a statement by appellants to the effect that negligence of the driver could not be imputed for the death of the mother. The point is of such grave importance that it should not be decided on this appeal without direct or implied findings on the facts, and without mature consideration of the law by both sides and the court. For the reasons stated, further comment seems unnecessary.

No statement herein is intended as an expression of opinion as to the truth or falsity of, or the weight to be attached to, any part of the evidence.

[4] The appeal taken from the order denying the motion for a new trial, being a nonappealable order, is dismissed. The judgment is reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

We concur: PETERS, P. J.; KNIGHT, J.

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41 Cal.App.2d 862

LAW et al. v. CRIST et al.

Civ. 11559.

District Court of Appeal, First District, Division 2, California.

Dec. 10, 1940.

1. Corporations 🔑49

In action by persons acting under the name of the "United Lodge of Theosophists", to enjoin corporation organized by persons who had withdrawn from such lodge from using the name "United Lodge of Theosophists, Incorporated", complaint was sufficient as against general and special demurrers.

2. Appeal and error ⚷756

Attacks by appealing defendants which merely repeated allegations made in their demurrers to complaint and which, without citing any authority, merely objected that plaintiffs should have alleged particular probative facts, were insufficient to present objections to the complaint on appeal.

3. Associations ⚷20(1)

Members of association called the "United Lodge of Theosophists" had legal capacity to sue to enjoin use of name "United Lodge of Theosophists, Incorporated", by corporation organized by former members of the association.

4. Corporations ⚷49

In action to enjoin use of name "United Lodge of Theosophists, Incorporated", joining of corporation and the directors thereof was not a "misjoinder", since it was proper practice to make all persons parties who would be prejudiced if an injunction was improperly issued.

See Words and Phrases, Permanent Edition, for all other definitions of "Misjoinder".

5. Associations ⚷1

The usual meaning of the term "association" is an unincorporated organization composed of a body of men partaking in its general form and mode of procedure of the characteristics of a corporation, but the term is also often used as synonymous with "company" or "society".

See Words and Phrases, Permanent Edition, for all other definitions of "Association", "Company" and "Society".

6. Corporations ⚷49

Members of unincorporated association called the "United Lodge of Theosophists" were entitled to injunction against the use of the name "United Lodge of Theosophists, Incorporated", by corporation organized by former members of the association.

7. Trial ⚷392(4)

In action to enjoin use of corporate name, findings offered by defendants directly opposed to findings which had already been prepared were properly rejected where there was no conflict in the evidence and there was nothing on which the proposed new findings could rest.

◆

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by W. R. Law and others against General Grant Crist, M. D., and others, to enjoin defendants from using the name "United Lodge of Theosophists, Incorporated". From judgment for plaintiffs, defendants appeal.

Affirmed.

Charles D. Young, Chester J. Staley, and C. C. Caswell, all of Los Angeles, for appellants.

Derthick, Cusack & Ganahl, A. Weymann, W. R. Law, and Herbert Ganahl, all of Los Angeles, for respondents.

STURTEVANT, Justice.

In 1909 the plaintiffs and their associates, including the defendants Crist and Staley, were a group working together to advance and disseminate the teachings of theosophy as expounded by the writings of H. P. Blavatsky and William I. Judge. At or about the date last mentioned they acted under the name of United Lodge of Theosophists. Until the events hereinafter to be mentioned they so acted and maintained a meeting place in Los Angeles. Similar lodges were and are in existence in populous centers in America and elsewhere. All worked and cooperated to accomplish the same general purposes.

In 1937 several members, including the defendants Crist and Staley, withdrew from the lodge at Los Angeles and attempted to start an organization having the same general purposes. They formed a corporation under the name of United Lodge of Theosophists, Inc., and proceeded to act under that name. On July 21, 1937, the plaintiffs commenced this action to obtain a decree enjoining the corporation and the board of directors thereof from using said name. The defendants Crist, Staley and United Lodge of Theosophists, Inc., severally answered. The trial court made findings in favor of the plaintiffs and those defendants who answered appealed from the judgment.

[1, 2] Before answering, each of the defendants, Crist, Staley and United Lodge of Theosophists, Inc., severally filed demurrers. The demurrers were both general and special. Each made many attacks on the plaintiffs' complaint. However each demurrer was overruled. The defendants now claim the trial court erred in overruling said demurrers. We find no merit in that claim. The com-

plaint was drawn in conformity with the pleading that was under attack in Hooper v. Stone, 54 Cal.App. 668, 202 P. 485. On the authority of that case we have no hesitancy in saying that the complaint in the case before us is sufficient. As to many of the special attacks the defendants merely repeat the allegations made in the demurrer. In others, without citing any authority, they do no more than to assert that the plaintiffs should have alleged certain probative facts. Such attacks are insufficient presentations. 2 Cal. Jur. 726, "Appeal and Error", §§ 418–423.

[3, 4] It is asserted the plaintiffs did not have legal capacity to sue. It is settled law that they had. 7 C.J.S., Associations, § 35, p. 82; Wheelock v. First Presbyterian Church, 119 Cal. 477, 51 P. 841. Again it is asserted that there is a misjoinder of defendants because both the defendant corporation and the directors thereof were joined. But it was proper practice to make all persons parties who would be prejudiced if an injunction was improperly issued. 14 Cal.Jur. 237.

[5] The defendants quote from the record that the unincorporated association had no officers, no constitution and no by-laws. They then quote from Estate of Irwin, 196 Cal. 366, 372, 237 P. 1074, 1076, as follows: "The usual meaning of the term 'association' is an 'unincorporated organization, composed of a body of men partaking in its general form and mode of procedure of the characteristics of a corporation.'" They then contend that the findings are not sustained by the evidence. That is, they claim there was no evidence that there was an unincorporated association or that the plaintiffs were members thereof. But the defendants fail to note that the definition quoted above is, by its terms, not inclusive and exclusive. There are other well known associations. "The term 'association' is often used as synonymous with 'company' or 'society.'" 7 C.J.S., Associations, § 1, p. 19. The trial court in effect so held and its findings are abundantly sustained by the evidence.

[6] Restating the same facts, the defendants make the point that the trial court erred in granting an injunction. We think not. The record shows a flagrant violation by defendants of the rights of the plaintiffs. In Burrell v. Michaux, 273 S.W. 874, the court of civil appeals of Texas was called upon to determine a similar controversy. On page 880 of 273 S.W., Mr. Justice Graves, speaking for the court, said: "That such imitation furnished a causus belli, a just ground for injunctive relief, to such a benevolent association as the appellees constituted, even though neither incorporated nor engaged in business for material profit, has, we think, been definitely determined by the courts of this country, which have come to apply to real life with us, especially in its fraternal, benevolent, and humanitarian activities, at least the idea inhering in the doctrine of Iago to Othello: 'He who steals my purse steals trash, but he that filches from my good name leaves me poor indeed.'" He then cites numerous authorities to support his statement. In the same decision the writer says: "The right to injunction in such cases has furthermore been determined to be dependent neither upon the actual showing of specific injury nor the misleading of any particular person, the demands of the law in this respect being met when it is made to appear that there is a natural and probable tendency to mislead and confuse the public to the hurt and injury of the association having the prior right to the distinctive names and emblems." (Citing many authorities including those he had already cited.)

[7] After the findings had been prepared the defendants made a set directly opposed thereto. They made a motion that their set be adopted instead of the others. Their motion was, they claim, erroneously denied. Not so. There was no conflict in the evidence. There was nothing on which the proposed new findings could rest.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

HOSPELHORN v. NEWHOFF et al.*

Civ. 12137.

District Court of Appeal, Second District, Division 1, California.

Dec. 9, 1940.

Rehearing Granted Jan. 6, 1941.

1. **Appeal and error** ⚷863

Upon appeal from judgment entered after sustaining of demurrer, the only question before court is whether demurrer was properly sustained.

2. **Limitation of actions** ⚷180(2)

To raise the bar of limitations by demurrer successfully facts constituting the bar must affirmatively appear on face of complaint. Code Civ.Proc. § 359.

3. **Limitation of actions** ⚷2(1)

In determining when Maryland bank stockholders' liability to pay assessment was created under Maryland laws, as affecting the running of limitations, the law of Maryland must govern. Code Civ.Proc.Cal. § 359; Code Md.1939, art. 11, § 97.

4. **Limitation of actions** ⚷58(5)

Under Maryland law, the liability of bank stockholders for assessment is "created" so as to begin the running of limitations whenever it has been judicially determined that it is necessary to pay the debts of the corporation. Code Civ.Proc.Cal. § 359; Code Md.1939, art. 11, § 97.

See Words and Phrases, Permanent Edition, for all other definitions of "Created".

5. **Limitation of actions** ⚷180(3)

In action by receiver of Maryland bank to enforce stockholders' liability, bar of three-year statute of limitations was not properly raised by demurrer, in absence of allegations in complaint revealing judicial determination of the necessity of stockholders' liability to pay debts more than three years before bringing of action, notwithstanding allegations of appointment of receiver more than three years before. Code Civ.Proc.Cal. § 359; Code Md.1939, art. 11, § 97.

6. **Banks and banking** ⚷49(7)

A petition setting forth insolvency of Maryland bank, appointment of receiver, judicial determination of stockholders' liability and the necessity therefor, and necessary allegations concerning ownership of stock, amount of assessment, demand, and refusal, was sufficient in action to enforce stockholders' liability. Code Md.1939, art. 11, § 97.

7. **Banks and banking** ⚷49(7)

In action to enforce liability of stockholders of Maryland bank, uncertainty in allegation that assessment "was necessary to meet the statutory liability", whereas allegation that assessment was necessary to pay debts of bank was preferable, was not misleading and did not render the complaint demurrable. Code Md.1939, art. 11, § 97.

8. **Limitation of actions** ⚷182(3)
Pleading ⚷367(3)

In action to enforce liability of stockholders of Maryland bank, where allegations showed that action was founded upon particular court order, contention that time to commence action began to run from date of some other order or adjudication, as respects limitations, should be raised by affirmative defense, and plaintiff was not required to make his complaint more certain to reveal that his cause of action was barred. Code Civ.Proc.Cal. § 359; Code Md.1939, art. 11, § 97.

◆

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by John D. Hospelhorn, receiver of the Baltimore Trust Company, a banking corporation of the State of Maryland, against Morton L. Newhoff and others, to collect assessment levied upon stockholders. From a judgment for defendants, entered after demurrer to complaint had been sustained without leave to amend, plaintiff appeals.

Reversed, with directions to overrule the demurrer.

Catlin & Catlin and William E. Woodroof, all of Los Angeles, for appellant.

Kornblum & Austrian, of Los Angeles, for respondents.

DORAN, Justice.

This is an appeal from a judgment dismissing the action herein, as against respondents, after a demurrer to the complaint was sustained without leave to amend.

The action is one brought by the receiver of The Baltimore Trust Company, a banking corporation of the state of Maryland, to collect an assessment levied under the laws of that state imposing a liability upon stockholders of banks incorporated therein, and was instituted against respondents in California, in the county of Los Angeles, on May 10, 1938.

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* Subsequent opinion 111 P.2d 688.

The complaint alleges that the bank became insolvent on March 4, 1933; that a receiver was appointed January 5, 1935; that on November 13, 1935, said receiver was ordered by the Maryland court to collect the statutory liability of the stockholders of the bank, and that on said date the court also decreed the amount of the assessment and the necessity therefor to meet the stockholders' liability. Attached as an exhibit to the complaint is a copy of the order of the court fixing the amount of stockholders' liability and directing the collection thereof. Also alleged is the ownership of stock by respondents at and after the date of insolvency, the amount of the assessment thereon, demand therefor and the failure and refusal of respondents to pay the same or any part thereof.

To this complaint respondents demurred upon the following grounds: (1) That it did not state facts sufficient to constitute a cause of action; (2) that the cause of action was barred by section 359 of the Code of Civil Procedure of the state of California; (3) that said complaint was uncertain in that: (a) It could not be determined from the allegations whether the order made November 13, 1935, was the first adjudication of stockholders' liability, and whether said order created said liability or was merely to collect an assessment under a liability previously created; (b) it could not be ascertained from said allegations whether the order appointing the receiver of the bank purported to constitute an order directing said receiver to collect the said statutory liability; (c) it could not be ascertained from said allegations what order created said liability or the date when said act or order was performed or made. The court below did not state the grounds upon which the demurrer was sustained.

[1, 2] The sole question raised by appellant is stated to be whether the cause of action herein based on the Bank Stockholders' Liability Act of Maryland is barred by the provisions of section 359 of the Code of Civil Procedure of the state of California. It should be pointed out that upon an appeal from a judgment entered after the sustaining of a demurrer the only question before the court is whether the demurrer was properly sustained. Moreover, to successfully raise the bar of a limitation of action by demurrer the facts which constitute the bar must affirmatively appear on the face of the complaint. Therefore, as to such a bar in the instant case, this court is merely concerned with the question of whether it appears from the complaint that the cause of action as stated falls within the limitation provided by section 359 of the Code of Civil Procedure, which section provides that actions such as the instant one must be brought within three years after the liability was created.

It is only necessary therefore to decide whether the complaint here shows affirmatively that the stockholders' liability sought to be enforced was created more than three years before the commencement of the present action, as far as that particular ground of demurrer is concerned.

[3] The liability of the stockholders of the bank to pay an assessment in the instant case is created under the laws of the state of Maryland, and the law of that state must govern in a determination of when such a liability was created. So far as is here pertinent, section 97, article 11, of the Maryland Annotated Code reads: "Stockholders of every bank and trust company shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of every such corporation, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such stock. * * * *and the liability of such stockholders shall be an asset of the corporation for the benefit ratably of all the depositors and creditors of any such corporation, if necessary to pay the debts of such corporation, and shall be enforceable only by appropriate proceedings by a receiver, assignee or trustee of such corporation acting under the orders of a court of competent jurisdiction.*" (Italics added.)

[4] In a Maryland case, concerned with the identical insolvency proceedings which form the basis for the instant action, it has been clearly held that the liability of stockholders under the above-quoted provisions is conditional, contingent and unenforceable until it is needed to pay the debts of the corporation, and that the necessity for imposing and enforcing the liability is a jus-

ticiable fact to be ascertained by a court, and that the liability may be enforced "whenever it is judicially established that it is needed to pay the debts of the corporation". Robinson v. Hospelhorn, 169 Md. 117, 179 A. 515, 525, 184 A. 903, 103 A.L.R. 740. Therefore, it is reasonably plain under Maryland law that the liability of stockholders of a bank for an assessment is "created" whenever it has been judicially determined that it is necessary to pay the debts of the corporation.

[5] The complaint herein does not reveal any such judicial determination prior to November 13, 1935, unless it can be held that the appointment of a receiver, as alleged, constitutes such a determination. But it is clear from a reading of the decision in Robinson v. Hospelhorn, supra, that the mere appointment of a receiver cannot be construed as a judicial determination of the necessity of enforcing stockholders' liability. In comparing another statute, which did not contain the same qualifications, with the one quoted above, the court said, at page 522 of 179 A.: "There the contingency was insolvency; here it is that the liability is needed to pay debts." The Maryland court obviously draws a distinction between mere insolvency and a state of insolvency wherein it is necessary to enforce a statutory liability of stockholders in order to pay debts. Since the complaint in question does not allege any facts which reveal a judicial determination of the necessity of stockholders' liability to pay debts prior to November 13, 1935, it follows that the bar of the limitation under section 359, Code of Civil Procedure, was not properly raised by demurrer, the facts constituting such a bar not appearing on the face of the complaint.

Undisputed statements contained in the briefs indicate that the necessity of enforcing the stockholders' liability here in question was adjudicated prior to the date alleged in the complaint and more than three years before the commencement of the instant action. The precise question regarding the same liability sought here to be enforced against respondents was recently before the District Court of Appeal for the Fourth Appellate District in the case of Hospelhorn v. Wanda V. Van Dusen, Cal. App., 104 P.2d 888, 892, wherein it was held that the action was barred by the provisions of section 359, Code of Civil Procedure. However, in the Van Dusen case, supra, such a bar was raised as an affirmative defense and not by demurrer as here, and the question was properly before the court for decision.

There is nothing in the Van Dusen case in conflict with the reasoning herein. In the latter case the court, in considering the question as to when the statute of limitations, viz., section 359, Code of Civil Procedure, commenced to run, held it to be immaterial, under the facts presented, whether the liability arose on the date the bank was taken under custody or at the time the Maryland court made the order requiring the collection, because "under either interpretation more than three years" had expired prior to the filing of the action there considered.

[6] Appellant offers no argument as to the other grounds on which the demurrer was interposed and the same are not covered by the briefs. An examination of the complaint, however, reveals that it meets the test of the sufficiency of allegations in an action of this nature, setting forth as it does the insolvency of the bank, the appointment of a receiver and the judicial determination of the stockholders' liability and the necessity therefor, together with the necessary allegations as to ownership of stock, amount of assessment, demand and refusal. See, Bancroft's Code Pleading, sec. 997, and Ten-Year Sup. thereto.

[7, 8] While it is true that some uncertainty may exist in an allegation that an assessment "was necessary to meet the statutory liability", an allegation that the assessment was necessary to pay the debts of the bank being more exact, it cannot be said that any such uncertainty could mislead the defendants and render the complaint subject to demurrer on that ground. The other grounds of uncertainty virtually amount to an objection by defendants that they are unable to ascertain from the complaint whether the cause of action is barred by limitation of time. It is clear from the allegations of the complaint that plaintiff founds his action upon an order of a court made November 13, 1935.. If, as a matter of law, the time to commence the action began to run from the date of some other order or adjudication, that was a question to be raised by an affirmative defense. It was not incumbent upon plaintiff to reveal that his cause of action was barred, and he could not mislead defendants by the allegations he has made.

It follows, therefore, that the court erred in sustaining defendants' demurrer.

For the foregoing reasons the judgment is reversed and the court below is directed to overrule the demurrer.

We concur: YORK, P. J.; WHITE, J.

41 Cal.App.2d 874

JOHNSON v. FARMER et al.

Civ. 2496.

District Court of Appeal, Fourth District, California.

Dec. 10, 1940.

Rehearing Denied Jan. 7, 1941.

See 108 P.2d 945.

1. Trade-marks and trade-names and unfair competition 🔑93(1)

In action under the Unfair Trade Practice Act against photoengravers who allegedly sold cuts for less than cost of production for purpose of injuring plaintiff, the first requisite was that proof be made by plaintiff of the cost of production of the cuts. Gen. Laws 1937, Act 8781.

2. Trade-marks and trade-names and unfair competition 🔑93(3)

In action under the Unfair Trade Practice Act against photoengravers who allegedly sold cuts for less than cost of production for purpose of injuring plaintiff, scale, which was prepared by the American Photoengravers Association in 1932 from records obtained from that industry throughout the entire United States, should not have been admitted as a cost survey, and was not sufficient to prove the cost of production to defendants of the cuts sold by them, where the scale was obviously designed merely to furnish a guide in fixing prices, with suggestion that actual sales prices should be arrived at in individual cases by allowing discounts from the scale figures or by adding percentages thereto. Gen.Laws 1937, Act 8781.

3. Trade-marks and trade-names and unfair competition 🔑93(3)

In action under the Unfair Trade Practice Act against photoengravers who allegedly sold cuts for less than cost of production for purpose of injuring plaintiff, the crux of the entire case was whether photoengravers were selling below their cost of production, and no prima facie case could be made out until evidence was produced supporting that proposition. Gen.Laws 1937, Act 8781.

4. Trade-marks and trade-names and unfair competition 🔑93(1)

In action under the Unfair Trade Practice Act against photoengravers who allegedly sold cuts for less than cost of production for purpose of injuring plaintiff, the burden of proof was on the plaintiff. Gen.Laws 1937, Act 8781.

5. Trade-marks and trade-names and unfair competition 🔑68(2)

The Unfair Trade Practice Act is concerned only with the cost of production to those charged with violation of the act, and not with the carrying on of a business in any particular locality. Gen.Laws 1937, Act 8781.

6. Trade-marks and trade-names and unfair competition 🔑68(2)

In action under the Unfair Trade Practice Act against photoengravers who allegedly sold cuts for less than cost of production for purpose of injuring plaintiff, in arriving at exact cost of production of a cut made at plant where act was allegedly violated, it was necessary to consider certain items of overhead, such as cost of supervision, interest, taxes, and the like, which would be paid in connection with photoengravers' plant located at another place, where plant where the alleged violation of the act occurred served as a feeder for the other plant, and much of the work was sent to and produced at the other plant. Gen.Laws 1937, Act 8781.

7. Trade-marks and trade-names and unfair competition 🔑97

A judgment decreeing that defendants should be enjoined from violating the unfair practice act generally, was too broad to be valid. Gen.Laws 1937, Act 8781.

8. Trade-marks and trade-names and unfair competition 🔑97

Judgment decreeing that photoengravers, in action against them under the Unfair Trade Practice Act, should not sell at prices less than scale figures which were prepared by the American Photoengravers Association, and which were designated on certain exhibit, was void, where scale set forth in exhibit was designed merely to furnish a guide in fixing prices with suggestion that actual sales prices should be arrived at in individual cases by allowing discounts from the scale figures or by adding percentages thereto, and was not intended to be a cost survey. Gen.Laws 1937, Act 8781.

9. Trade-marks and trade-names and unfair competition ⚷98

In action under the Unfair Trade Practice Act against photoengravers who allegedly sold cuts for less than cost of production for purpose of injuring plaintiff, there was error in the measure for special damages whereby total amount of sales by photoengravers in their plant where alleged violation of act took place, was increased by the percentage which would represent the average or mean of the undercut prices as practiced by defendants against plaintiff, by taking that figure as the amount which the plaintiff would have received had he obtained all of such business, and by taking 15 per cent. of the amount, which plaintiff testified was the net profit on his business. Gen.Laws 1937, Act 8781.

10. Trade-marks and trade-names and unfair competition ⚷93(3)

In action under the Unfair Trade Practice Act against photoengravers who allegedly sold cuts for less than cost of production for purpose of injuring plaintiff, the actual cost of production by photoengravers should have been fairly and at least approximately determined on satisfactory evidence, which would necessarily call for the fair average cost of production over a reasonable time, rather than the cost of one item on a particular occasion. Gen.Laws 1937, Act 8781.

◆

Appeal from Superior Court, Orange County; Ben R. Ragain, Judge.

Action under the Unfair Practice Act by Milton E. Johnson, etc., against Harold A. Farmer and others for damages and to enjoin defendants from selling photoengravings below cost of production. From a judgment in favor of the plaintiff, defendants appeal.

Judgment reversed.

Schooling & Wayte, of Huntington Park, and West & Crookshank, of Santa Ana, for appellants.

Blodget, Kuchel & Tobias, of Santa Ana, and Harry R. Simon, of Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an action under the Unfair Practice Act, Deering's Gen.Laws, Act 8781; Stats.1937, ch. 860, p. 2395.

Prior to August 1, 1938, the plaintiff was the only photoengraver having a place of business in Orange county. For several years, however, the defendants, who operated a photoengraving plant in Vernon with branches in Santa Barbara and Glendale, had, through salesmen, solicited and obtained business in the various cities and towns of Orange county. On August 1, 1938, the defendants opened a branch plant at Santa Ana equipped to do certain rush work and for the purpose of securing and handling other work which was sent to the Vernon plant. Six months later the plaintiff brought this action seeking to enjoin the defendants from selling photoengraving cuts below their cost of production, and asking for damages.

Among other things, the court found that the defendants, for the purpose of injuring the plaintiff, had manufactured and sold certain cuts for less than their cost of production and that on numerous occasions the defendants had sold cuts and plates at prices below their cost to the defendants, "which cost is and was in accordance with the Standard Scale for Photo-Engravers Form H, dated August 1, 1932". A judgment was entered awarding the plaintiff $335.90 as special damages and $1,500 as general damages, and enjoining the defendants from selling, for the purpose of injuring the plaintiff, any cut for less than its cost of production, as defined in the Unfair Practice Act, and specifically enjoining the defendants from selling for the purpose of injuring the plaintiff any cut or product manufactured or produced in the photoengraving business "at a price or charge less than computed from and designated by the Standard Scale for Photo-Engravers Form H, dated August 1, 1932". This "Standard Scale" had been admitted into evidence as plaintiff's exhibit 1, and copies thereof were attached to and made a part of both the findings and judgment. From the judgment so entered the defendants have appealed.

[1] The first question to be considered is whether the evidence supports the court's findings to the effect that such cuts had been sold by the appellants for less than the cost of production. The first requisite, of course, was that proof be made of the cost of production of these cuts and this the re·

spondent failed to do. Section 5 of the Unfair Practice Act provides that where the particular trade or industry in question has an established cost survey for the locality in which the offense is claimed to have been committed, this cost survey shall be deemed competent evidence in proving the costs of the person or firm complained against. The respondent's exhibit 1, the "Standard Scale" above referred to, was admitted into evidence as such a cost survey, over the objection of the appellants. The importance and weight given to this scale is shown by the facts that the appellants were specifically found to have sold cuts for less than the cost of production, being the prices named in this schedule, and that they were enjoined from selling such cuts at prices or charges less than those designated therein.

It appears that this scale, exhibit 1, was prepared by the American Photo-Engravers Association in 1932 from records obtained from that industry throughout the entire United States. The respondent argues that, since Santa Ana is in the United States, this scale is the cost survey for that locality within the meaning of section 5 of the Unfair Practice Act; that it was used by both respondent and appellants "in pricing their products"; and that "since the trial court did adopt the scale and make it a part of its judgment, it must have found that such survey represented the costs of these defendants". Assuming that this was an average cost survey for all of the United States it may well be questioned whether it could be deemed competent evidence in proving costs of a particular firm in one particular community, under the provision of section 5 of the Unfair Practice Act. Be that as it may, the scale itself indicates that it was not prepared, intended or established as a cost survey.

This scale, exhibit 1, consists of a large sheet with thousands of figures in dollars and cents conveniently arranged for finding the ones applicable to cuts or plates of varying sizes and shapes. While it is stated thereon that it was "computed from cost records" it is not stated that the figures given are such cost records or average cost records. There are certain notes at the side of the figures which comprise the body of the scale. The first of these side notes gives directions how to use the scale in order to "Find the Scale value of a Plate". Nearly all of these notes describe and define special processes and operations in connection with various kinds of photo-engravings and indicate that extra charges should be made for such operations on a time basis. One of the early notes reads in part: "the following operations consist of hand work and differ in every instance, hence are not covered by scale figures and are sold at time rates for the time consumed". Subsequent notes state that the "figures on the scale are basic values", that "additional manipulations are charged extra as per the notes pertaining to such operations", and the notes then provide for innumerable extra charges with provisions that where two or more duplicates of the same thing are ordered they are to be "estimated" at a certain percentage off the scale. These side notes make no pretense of giving the cost of the various operations covered thereby and a headnote states that these side notes "indicate their average relation in cost to the figures in the body of the scale. These serve as a guide in estimating and pricing but do not fix the price of any photo-engraving. The actual sales price is made by the photo engraver in every case by the allowance of discount from both the figures shown in the body of the scale and from items referred to in these notes, or by the addition of an amount or percentage thereto." Another headnote reads:

"Photo-Engravings are always made to order. As no two are exactly alike, the cost of production, which involves chiefly skilled labor, fluctuates greatly in the same establishment and in every establishment. Since the cost of any photo-engraving cannot be determined beforehand and is known only after its completion, the necessity of a scale of some sort to aid in *estimating the approximate value of photo-engravings* before and after they are made is apparent. It enables the public to *estimate approximate prices* in advance and check invoices after production, subject to discounts or additions as aforesaid." (Italics ours.)

It clearly appears that this scale is not and was not intended to be a cost survey, average or otherwise. While average costs may have been used in its computation, it was obviously designed for the purpose of furnishing a guide in fixing prices, with the suggestion that actual sales prices should be arrived at in individual cases by allowing discounts from the scale figures or by adding percentages thereto. That this scale was intended merely as a guide in fixing prices is further shown by the fact that it had been so used by both the respondent and the appellants. The respondent testified that he had been selling many cuts at prices far below the prices named in this standard scale, and that in fixing prices of cuts he used a system of balancing his costs as shown by his own cost records against the prices shown in the scale. He further testified that he sold cuts to commercial printers at prices 25 per cent less than those named in this standard scale; that he sold cuts to newspapers at 50 per cent off the scale price; that he would charge an ordinary customer the price named in the standard scale; and that these prices left him a profit.

[2] It is obvious that this scale, exhibit 1, should not have been admitted as a cost survey and that, in itself, it is not sufficient to prove the cost of production to the appellants of the cuts sold by them.

The respondent argues that it is immaterial in this case whether or not this scale, exhibit 1, is actually a cost survey since other evidence which was introduced shows that this scale "represents the cost to these defendants". After a diligent search we are unable to find any such evidence in the record. Not only does it clearly appear that this scale has nothing to do with the appellants' cost of production, but we can find no evidence in the record showing what these costs were, and there is no finding as to what they were except the unsupported finding that the scale, exhibit 1, designated such costs.

While it appears that the court completely relied upon that scale as showing appellants' cost of production and that the respondent mainly relies thereon, he argues that certain other portions of the evidence indicate that the appellants were selling cuts below the cost of production. For example, it is argued that one of the appellants admitted that they were selling below cost since he testified in general that to sell cuts at 75 per cent below the scale price would be to give them away, since at another time he testified that they were selling 1 inch by 1½-inch cuts for 75 cents, and since 75 per cent off the scale price for these cuts would be 82 cents. His testimony was that to sell all cuts at 75 per cent off the scale would be to give them away. However, he testified that while they would lose money if they sold all sizes of cuts at a 75 per cent discount from the scale they could make more money on small cuts at 75 per cent off the scale than they could by selling large cuts at only 50 per cent from the scale. He testified that they made a profit at selling small cuts at 75 cents and that they did not plan to lose money on any cut. Again, it is argued that the appellants' auditor testified that the labor cost of making a 1 inch by 1½-inch cut, making one cut by itself, was $2.64 and that such cuts were being sold for 75 cents. However, this same witness testified that such cuts were produced on flats measuring 18 inches by 22 inches, and that the labor cost of producing a full flat of cuts at the same time was only $1.53 more than the labor cost of a cut produced singly. Since there is room on an 18-inch by 22-inch flat to produce 264 of these small cuts at the same time it readily appears that the labor cost per cut, under such circumstances, is reduced to a few cents. We can find no evidence showing the actual cost of production to the appellants of any cut which was sold by them, under the circumstances under which it was produced.

[3-6] The respondent argues that he made out a prima facie case against the appellants and that it was then incumbent upon them to prove their actual cost of production. The crux of the entire case is whether or not the appellants were selling below their cost of production and no prima facie case could be made out until evidence was produced supporting that proposition. Not only was the burden of proof upon the respondent, but he succeeded, through objections made, in preventing the appellants from showing their actual cost of production. In this connection, appellants' books and records covering their entire operations in both the Santa Ana plant and the main plant at Vernon, were excluded. Without that evidence it would be impossible to arrive at the exact cost of production of the cuts in question. While the respondent argues that each of the appellants' plants must stand upon its own feet and that we are not here concerned with anything in connection with the Vernon plant, it must be remembered that the Unfair Practice Act, in so far as material here, is concerned only with the cost of production to the appellants and not with the carrying on of a business in any particular locality. The evidence is that the appellants had secured much business from the Santa Ana territory before they established a plant in that city, that one of the purposes in establishing the plant was that it served as a feeder for the plant in Vernon, and that much of the work taken in by the Santa Ana plant

was sent to Vernon and produced there. It seems clear that in arriving at the exact cost of production of a cut made in the Santa Ana plant it would be necessary to consider certain items of overhead, such as the cost of supervision, interest, taxes and the like, which would naturally be paid in connection with the Vernon plant. It would appear equally true that if the Santa Ana plant produced a large amount of business which was sent to the Vernon plant a part of the cost of the Santa Ana plant, as defined in section 3 of the Unfair Practice Act, would properly be chargeable to the general business in figuring the cost of production of such cuts as were produced in the Santa Ana plant. A determination of the actual cost of the cuts, alleged to have been sold by the appellants in violation of the act, would necessarily involve charging a fair proportion of some of the costs in the Santa Ana plant to the Vernon plant. The question involved was the cost to the appellants of producing the articles in question, and that issue could not be limited by purely local considerations or by factors outside the provision of the Unfair Practice Act. The respondent failed to prove appellants' cost of production for the items in question, and it cannot be held that the burden in this respect shifted to appellants, especially where, as here, they were prevented from showing their actual costs.

[7, 8] The appellants' next contention, that the judgment is void for uncertainty, must also be sustained. By its terms the judgment decrees that the appellants shall be enjoined from violating the Unfair Practice Act generally, with a further order that they shall not sell at prices less than the scale figures designated upon exhibit 1. The first provision, enjoining them from violating the act, is entirely too broad. As was said in Rust v. Griggs, 172 Tenn. 565, 113 S.W.2d 733, 738: "He should not, however, be enjoined in general terms from violating the act in the future in every particular, for that would, as pointed out by the Supreme Court, compel defendant to conduct all his business under the jeopardy of punishment for violating a general injunction and violative of elementary principles of justice." With respect to the other portion of the judgment, ordering the appellants not to sell at prices less than the scale figures, the evidence does not justify the adoption of that scale as the appellants' cost of production and, further, that scale provides for discounts from and addition to the figures therein designated, while the amount of such discounts or additions, respectively, are not indicated. No means are provided either in the scale or in the judgment for determining those factors. The result is that the appellants are ordered to follow a scale which is so indefinite and uncertain that it cannot be told what is expected of them, and the judgment is void under the familiar principle that it must be sufficiently clear and definite to enable a party to comply with its requirements. Shriver et al. v. Superior Court et al., 48 Cal.App. 576, 192 P. 124; Young v. Enfield et al., 217 Cal. 662, 20 P.2d 701.

[9] The last point raised is that the evidence does not sustain the judgment for damages. The court allowed the respondent $335.90 as special damages and general damages in the sum of $1,500. With respect to the special damages the respondent states that the court took the total amount of sales made by the appellants in the Santa Ana plant, increased this by the "percentage which would represent the average or mean of the undercut prices as practiced by defendants against plaintiff", by taking this figure as the amount which the respondent would have received had he obtained all of such business, and by taking 15 per cent of this amount, this being respondent's net profit on his business as testified to by him. Even if a case for damages had otherwise been made out, this was not the correct measure thereof. Moreover, there is no evidence that all of the business done by the appellants in their Santa Ana plant was secured by selling cuts below the cost of production. There is neither evidence supporting the amount of special damages allowed, nor evidence supporting the judgment for general damages to the good-will and reputation of the respondent.

[10] We are here concerned not with the public policy expressed in the Unfair Practice Act, but with the manner in which the provisions of that act are to be applied and enforced. The first essential is that the actual cost of production shall be fairly, and at least approximately, determined upon satisfactory evidence. This would seem necessarily to call for the fair average cost of production over a reasonable time, rather than the cost of one item on a particular occasion. While section 5 of the act makes proof of one or more acts

of selling "below cost or at discriminatory prices" presumptive evidence of an intent to violate the act, another part of the same section provides that a local cost survey for a particular trade or industry shall be competent evidence of costs therein within the meaning of the act, and section 11 provides that "proof of average overall cost * * * for any particular inventory period when added to the cost of production of each article" shall be presumptive evidence of the cost of the article. The act seems to contemplate and intend a fair average cost over a reasonable time as the standard below which sales must not be made. To otherwise construe the act would be to make it practically unworkable. Almost any business, no matter how ethically conducted, has particular days when the amount of overhead expense is out of all proportion to the business done. To strictly apply the act under such circumstances would defeat the purpose for which it was passed, and we think it was not intended to be so applied in determining the cost of production and distribution within the meaning of the act.

The judgment is reversed.

We concur: MARKS, J.; GRIFFIN, J.

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41 Cal.App.2d 833

In re KELLOGG.

Cr. 1746.

District Court of Appeal, Third District, California.

Dec. 6, 1940.

Hearing Denied Jan. 3, 1941.

1. Witnesses 🔑52(7)

Generally, neither a husband nor a wife is a competent witness against the other one in a criminal action. Pen.Code, § 1322.

2. Witnesses 🔑61(1)

Where petitioner was charged with grand theft, accomplished by means of drawing and cashing six checks upon alleged joint tenancy account of petitioner and husband and by appropriating money to her own use contrary to her trust, husband was competent to testify against petitioner, as exception to general rule, specifically provided for by Penal Code. Pen.Code §§ 487, 1322; Code Civ.Proc. § 1881, subd. 1.

3. Statutes 🔑231

The provision of Code of Civil Procedure which authorizes one spouse to testify against the other in a criminal action for a crime committed by one against the other, and the provision of Penal Code authorizing a spouse to testify against the other in a criminal action involving a crime against either the person or the property of the witness, may be read together without doing violence to either, and, if there is any inconsistency between the two provisions, the provision of the Penal Code should prevail, since provision of Penal Code relates exclusively to criminal cases. Pen.Code, §§ 1102, 1322; Code Civ.Proc. § 1881, subd. 1.

4. Statutes 🔑231

In criminal cases the provisions of the Penal Code prevail over the Code of Civil Procedure where Code of Civil Procedure enacts a contrary rule of evidence on a particular subject. Pen.Code, § 1102.

5. Trusts 🔑34(1)

In California, a joint tenancy in a bank account may create a trust, dependent upon the intention of the parties, which may be established by extrinsic evidence rebutting mere presumption of an absolute transfer of title by means of a written instrument like a deed.

6. Evidence 🔑385, 390(1)

In absence of fraud, lack of consideration or other infirmity which vitiates entire document, extrinsic evidence is not admissible to vary terms of a written deed or other instrument.

7. Evidence 🔑434(2)

Where a deed or written contract is procured by an agreement dehors instrument which creates a trust independent of the document, parol evidence is admissible on theory that a violation of the agreement amounts to constructive fraud, which may be established by extrinsic evidence, as explanatory of the transaction out of which an equitable trust arises, and it does not necessarily contradict the terms of the deed.

8. Trusts 🔑17(1)

Trusts in money and other forms of personal property may be created by parol agreement.

9. Evidence ⟹432, 434(8), 436, 441(1), 444 (2), 596(3)

A written agreement creating a joint tenancy in bank account may not be varied or defeated by evidence of an accompanying oral agreement establishing a trust in conflict with the unambiguous language of the contract, except upon a clear showing of fraud, undue influence, lack of consideration or circumstances indicating that the instrument was not intended to become effective.

10. Criminal law ⟹447

Where petitioner was charged with grand theft accomplished by means of drawing and cashing six checks upon alleged joint tenancy account of petitioner and her husband and by appropriating money to her own use contrary to her trust, evidence of an oral agreement between petitioner and husband that petitioner was not authorized to draw upon funds for her own benefit until after death of her husband was competent on theory that it tended to show that written agreement of joint tenancy was procured by constructive fraud. Pen.Code, § 487; Gen.Laws 1937, Act 652, § 15a.

Proceeding by Mrs. Leola M. Kellogg for a writ of habeas corpus to secure release of petitioner from custody after having been held by a magistrate in a preliminary examination to answer to a charge of grand theft.

Writ denied.

Hearing denied upon the ground of want of jurisdiction to entertain action.

Busick & Busick, of Sacramento, for petitioner.

Otis D. Babcock, Dist. Atty., and Elvin F. Sheehy, Deputy Dist. Atty., both of Sacramento, for respondent.

THOMPSON, Justice.

By means of habeas corpus the petitioner seeks to secure her release from custody after having been held by a magistrate in a preliminary examination to answer to a charge of grand theft as provided by section 487 of the Penal Code.

The petitioner, who is the wife of William V. Kellogg, was charged with grand theft accomplished by means of drawing and cashing six checks upon the alleged joint tenancy account of herself and her husband in the Bank of America in Sacramento and by appropriating the money to her own use contrary to her trust. After a preliminary examination of the charge before a magistrate she was held to answer before the superior court for the crime of grand theft. An information was thereafter filed charging her with grand theft.

The proceedings at the preliminary examination show that William V. Kellogg owned the sum of $7,462.58, derived from the sale of his property, which was deposited in the Bank of America. He became seriously ill and went to the Veterans' Hospital at Yountville for treatment. Before leaving for the hospital both Mr. and Mrs. Kellogg signed a printed bank signature card of joint tenancy in the bank account in the following language:

"The undersigned depositors agree as follows with Bank of America National Trust & Savings Association:

"(1) That this account is to be carried by said bank as a savings account and all funds which the undersigned depositors have or may have on deposit therein with said bank shall be governed by its By-Laws, all future amendments thereof, and all regulations passed or hereafter to be passed by its Board of Directors pursuant to said By-Laws relating thereto including interest, service charges, etc.

"(2) That all funds now to the credit of or which may hereafter be placed to the credit of this account are and shall be the property of the undersigned as joint tenants to be withdrawn as follows:

"Upon the signatures of either of us or our survivors.

"(3) That in the event of the death of either of us the survivors will notify the bank at once.

"(4) You are also hereby authorized to accept the endorsement of either of us for the other of us on checks payable to both of us or to the other of us for deposit to this account.

"(Signed) Mr. William V. Kellogg
Mrs. Leola M. Kellogg.

"Date Jan 2 '40."

Subsequently the petitioner drew her checks upon the account for an aggregate sum amounting to several hundred dollars and appropriated the money to her own use. Mr. Kellogg recovered and upon returning from the hospital he demanded a refunding of the money which was refused. At the preliminary hearing, Mr. Kellogg was permitted to testify to an oral conversation between the spouses, over the objection of the defendant, that:

"The amount was not to be drawn on until I died. * * * I placed it in a joint tenancy with her, with the understanding that it should be drawn on when I passed away. * * * My conversation was that Leola says to me that she wished—this money would never be touched until I passed away, and that she would use it for litigation, in case I died, possibly in handling the estate."

[1, 2] The petitioner contends that the testimony of Mr. Kellogg against his wife in the criminal proceeding is incompetent and in violation of section 1881, subdivision 1 of the Code of Civil Procedure, and of section 1322 of the Penal Code, and that there is no evidence of the alleged theft of money, since the creation of the joint tenancy in the bank account passed the title to her absolutely and that the unambiguous language of the written instrument may not be varied or changed by parol evidence.

The petitioner asserts her husband was precluded by section 1881, subdivision 1, of the Code of Civil Procedure and by section 1322 of the Penal Code, from testifying against her in the criminal proceeding. We think not. The circumstances of this case bring it directly within the exception to the general rule that neither a husband nor a wife is a competent witness against the other one in a criminal action. Section 1322 of the Penal Code was amended in 1911 to add the exception with relation to the property of the spouse. It now reads:

> "Neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties, except with the consent of both, or in case of criminal actions or proceedings for a crime committed by one against the person or property of the other, whether before or after marriage or in cases of criminal violence upon one by the other, or upon the child or children of one by the other or in cases of criminal actions or proceedings for bigamy, or adultery, or in cases of criminal actions or proceedings brought under the provisions of sections 270 and 270a of this code or under any provisions of the 'Juvenile Court Law.'"

[3] In its exception to the general rule, subdivision 1, of section 1881 of the Code of Civil Procedure does not exclude the evidence of one spouse in a criminal proceeding against the other when the charge affects the property of the witness. It merely provides that "this exception does not apply * * * to a criminal action or proceeding for a crime committed by one against the other". Evidently the amendment to section 1322 of the Penal Code was adopted in 1911 to expressly authorize a spouse to testify against the other one in a criminal action involving a crime against either the person or the property of the witness. The provisions of the two codes are not conflicting in that regard, except upon the doctrine that having expressed certain exceptions to the general rule in section 1881 of the Code of Civil Procedure it is implied that other exceptions are therefore excluded. But that doctrine does not apply when the legislature deliberately adopts a section of another code specifically including another exception, as it did in section 1322 of the Penal Code. Both sections may be read together without doing violence to either. The last-mentioned section relates exclusively to criminal cases and, if there is any inconsistency between the two sections, the provision of the Penal Code should prevail in that class of cases. Section 1102 of the Penal Code provides that: "The rules of evidence in civil actions are applicable also to criminal cases, except as otherwise provided in this code."

[4] The legislature has thus declared that the provisions of the Penal Code shall prevail over the Code of Civil Procedure, where the first-mentioned code specifically enacts a contrary rule of evidence on a particular subject. People v. Langtree, 64 Cal. 256, 259, 30 P. 813.

The testimony of Mr. Kellogg was not incompetent merely because he is the husband of the defendant in the criminal proceeding. The accusation upon which the defendant was being tried involved the charge that she had stolen his property.

The cases relied upon by the petitioner in support of her contention that the testimony of her husband was incompetent may be reasonably reconciled with what we have previously said regarding that subject. McIntosh v. Hunt, 29 Cal.App. 779, 157 P. 839, 842, and Ayres v. Wright, 103 Cal.App. 610, 284 P. 1077, were both civil suits. Neither of them involved a crime against the person or property of a spouse. The case of People v. Godines, 17 Cal.App.2d 721, 62 P.2d 787, 790, assumed that the defendant did not commit a crime against either the "person or property of the other" spouse. It was a criminal proceeding against the wife on a charge of perjury alleged to have been committed by filing a verified complaint in a former suit against her husband for annulment of the marriage, falsely averring that he was a Filipino with whom she could not legally contract marriage and that the marriage had been procured by fraud. The marriage occurred in Mexico where the Oriental disqualification for marriage does not exist and the marriage was therefore not void on that account. But it was also contended the marriage was procured by means of fraud and that it should be dissolved on that account. It appears that before the criminal case was tried the marriage had been annulled, for the court says: "At the time of the trial, however, the Filipino was no longer the husband of the defendant." Since the alleged perjury for which the defendant was being tried was not a "communication made by one [spouse] to the other", upon the authority of People v. Loper, 159 Cal. 6, 112 P. 720, Ann.Cas.1912B, 1193, the court held that section 1322 of the Penal Code was not applicable.

However, it was held that a letter from the defendant to her husband, which was sent before the marriage was dissolved, and which was admitted in evidence over the objection of the defendant, constituted reversible error. We assume that the last-mentioned ruling was based on the assumption that the alleged perjury of the wife, in the suit for dissolution of marriage, did not constitute "a crime committed by one against the person or property of the other" and for that reason that it did not come within the amended section 1322 of the Penal Code. Clearly the Godines annulment proceeding was not a suit against the property of her husband, for it does not appear that any property was involved in that suit. If perjury committed against a husband in a suit for dissolution of marriage is not in effect a crime against his person, then the court properly held in the Godines case that the letter from the defendant to her husband did not come within the exception to either section 1322 of the Penal Code or section 1881, subdivision 1, of the Code of Civil Procedure, and its admission in evidence constituted reversible error. Reputable authorities hold that such conduct of a spouse does constitute a crime against the person of the other spouse. It certainly affected his marital status and therefore injured him personally. That is a question which we are not required to determine in this proceeding. If it be assumed that the perjury of Mrs. Godines was a crime against the person of her husband, then that case is in direct conflict with the provisions of both section 1322 of the Penal Code as amended in 1911, and section 1881 of the Code of Civil Procedure, and we would then withhold our approval of it.

The case of State v. Kephart, 56 Wash. 561, 106 P. 165, 26 L.R.A.,N.S., 1123, upon which the petitioner relies, is based upon facts similar to those of the present case, but it applied to a statute of the state of Washington which is radically different from the California statute as it now exists. The husband was charged with burning the property of his wife. That Washington statute merely provided that neither a husband nor a wife could testify against the other without consent, except in a criminal proceeding involving "a crime committed by one against the other". That statute did not contain the important exception found in section 1322 of our Penal Code with relation to crimes committed against the property of the other spouse. If it had contained that provision we have no doubt the testimony of the wife would have been held to be competent, and the judgment would not then have been reversed.

There is no doubt that a different rule prevails in that regard in the trial of civil cases. Marple v. Jackson, 184 Cal. 411, 193 P. 940.

A more serious question is presented as to whether evidence of an oral agreement is admissible to show that an unambiguous written document between a husband and wife creating a joint tenancy in a bank account pursuant to section 15a of the Bank Act is not what it purports to be, but on the contrary that it merely passed conditional title to the money involved to the wife in the event only that she survives her husband.

[5-7] In California it has been held that a joint tenancy in a bank account may create a trust, dependent upon the intention of the parties, which may be established by extrinsic evidence rebutting the mere presumption of an absolute transfer of title by means of a written instrument like a deed. Waters v. Nevis, 31 Cal.App. 511, 160 P. 1081; Williams v. Savings Bank, 33 Cal.App. 655, 166 P. 366; Halsted v.

Central Savings Bank, 36 Cal.App. 500, 172 P. 613; Halsted v. Oakland Bank of Savings, 36 Cal.App. 816, 172 P. 614; Conneally v. San Francisco Sav. & Loan Soc., 70 Cal.App. 180, 232 P. 755. It is true that, in the absence of fraud, lack of consideration or other infirmity which vitiates the entire document, extrinsic evidence is not admissible to vary the terms of a written deed or other instrument. 3 Jones Comm. on Evidence, p. 2757, sec. 1511. Where a deed or a written contract is procured by an agreement dehors the instrument, which creates a trust independent of the document, parol evidence is admissible on the theory that a violation of the agreement amounts to constructive fraud, which may be established by extrinsic evidence as explanatory of the transaction out of which an equitable trust arises, and it does not necessarily contradict the terms of the deed. Brison v. Brison, 75 Cal. 525, 533, 17 P. 689, 693, 7 Am.St.Rep. 189. In the case last cited, the plaintiff executed a deed to his wife, absolute in form, with the oral understanding that it was made to save the expense of probating his estate in case of his death, and that she would reconvey the property to him at his request. Upon demand she refused to reconvey the property. In effect, the court held that she procured the property by means of constructive fraud and that she held the title in trust for him. Evidence of the oral agreement to reconvey the property and of the circumstances of the transaction were recited in the complaint. A demurrer to the complaint was upheld. On appeal, the order sustaining the demurrer was reversed, and the court was directed to overrule the demurrer. The court quoted with approval from the case of Hall v. Livingston, 3 Del.Ch. 348, 373, and said with respect to the competency of such oral evidence:

"'There is a well-recognized distinction between contradicting a deed or impairing its legal operation, and raising out of the transaction an equity dehors the deed, binding the grantee's conscience to hold the land for the real purposes of the conveyance, and not according to its legal operation, when the latter use of it would, under the circumstances, work fraud. Such an equity is held to be independent of the deed, and not excluded by it as a mere conveyance of the legal estate, unless there be in it some terms or implication to that effect. To support such an equity parol evidence is admissible, not as contradicting the deed, but as explanatory of the transactions out of which the equity arises.'

"Perhaps the most comprehensive and philosophical expression of the rule is that parol evidence is admissible to raise a trust in cases of actual or constructive fraud. But, whatever may be thought of the terms in which it is expressed, the rule itself is well settled."

[8] Trusts in money and in other forms of personal property may be created by parol agreement. In Lefrooth v. Prentice, 202 Cal. 215, 227, 259 P. 947, 952, it is said: "It is a cardinal rule that trusts in personalty may be created, declared, or admitted verbally and may be proved by parol evidence, but the authorities are uniform to the effect that such evidence must at all times be clear and unequivocal."

To the same effect is the text in 65 Corpus Juris, page 254, section 37, which is supported by a multitude of authorities including several from the jurisdiction of California.

[9] We desire to make it clear that a written agreement creating a joint tenancy in a bank account may not be varied or defeated by evidence of an accompanying oral agreement establishing a trust in conflict with the unambiguous language of the contract except upon a clear showing of fraud, undue influence, lack of consideration or circumstances indicating that the instrument was not intended to become effective.

In response to the preceding language quoted from the Brison case to the effect that evidence of an oral agreement accompanying the execution of a deed may be competent to show the creation of a trust and that it is not excluded "unless there be in it some terms or implication to that effect" it may be suggested that in the present case the printed card which created the joint tenancy account does provide that the funds may be withdrawn "upon the signature of either of us or our survivors". That language would seem to refute the evidence of the oral agreement testified to by Mr. Kellogg that his wife was not to draw upon the account until after his death.

There are several California cases which hold that parol evidence is incompetent to vary the terms of a written agreement creating a joint tenancy in a bank account.

But all of those cases involve efforts to vary the terms of the written agreement by oral evidence in suits which were instituted after the death of one of the joint owners of the fund. None of those cases arose during the lives of either of the parties to the contract. Apparently there is a distinction between cases arising during the lives of the contracting parties, and suits by or in behalf of third parties after the death of one of the contracting parties.

Many California cases have held that evidence of an oral agreement is incompetent to vary or change the unambiguous terms of a written instrument creating a joint tenancy between a husband and wife in a bank account. That principle is concisely stated in the case of Conneally v. San Francisco Savings & Loan Society, 70 Cal.App. 180, 232 P. 755, 756, as follows:

> "When a written instrument is executed by a husband and wife on opening an account with a bank, agreeing that the deposit when made and all accumulations thereof should be held by them as joint tenants, with the right of survivorship, each is seized of the whole estate from the creation of the tenancy and the whole vests in the survivor without regard to the prior ownership or title to the property. * * *
>
> "In the absence of fraud or mistake, parol evidence is inadmissible to change the terms of the legal effect of such a written instrument, where it is in no respect uncertain or ambiguous."

The preceding statement of the rule excluding parol evidence under such circumstances is reinforced by the language of section 15a of the Bank Act (Stats. 1921, p. 1367; 1 Deering's Gen.Laws of 1937, p. 222, Act 652), which provided in part:

> "The making of the deposit in such form shall, in the absence of fraud or undue influence, be conclusive evidence, in any action or proceeding to which either such bank or the surviving depositor or depositors may be a party, of the intention of such depositors to vest title to such deposit and the additions thereto in such survivor or survivors."

In support of the declaration of that rule excluding evidence of an oral agreement varying the terms of the written instrument, the Conneally case cites half a dozen authorities, to which may be added many more, including Hill v. Badeljy, 107 Cal.App. 598, 290 P. 637, and Henry v. Bank of America, 8 Cal.App.2d 353, 47 P. 2d 1068. It is true that in each of those cases the suit involved a joint tenancy bank account maintained by or against a survivor of one of the parties to such a joint tenancy, or by or against the bank involved therein. In none of those cases was the action instituted during the lifetime of both parties to the transaction. It is claimed by the respondent in this proceeding that a different rule prevails while both parties to the transaction are alive. In support of that contention the language of the Bank Act previously quoted is referred to as indicating that the intention of the parties to create the joint tenancy is "conclusively presumed" only in cases wherein the bank or a surviving depositor is a party. It is argued that since the act so provides, the presumption that the parties intended to create a joint tenancy is otherwise rebuttable, and that therefore oral evidence is admissible in suits while the surviving depositors are alive.

The companion cases of Wallace v. Riley, reported in 23 Cal.App.2d at pages 654 and 669, 74 P.2d 800, and 807, in both of which cases rehearings were denied by the Supreme Court, determine the contention of the petitioner in this case adversely to her. Those actions were suits between codepositors in alleged joint tenancy bank accounts created by written instruments under section 15a of the Bank Act under circumstances almost identical with those of the present proceeding. The Wallace cases distinguish between suits by or against a surviving depositor after one of the parties to such a transaction has died, and actions which are instituted during the lifetime of the codepositors. It is definitely held that, under circumstances similar to those of the present proceeding, evidence of an oral agreement contrary to the presumption of the written instrument may be shown while both parties are alive, to establish the intent of the parties to create a trust, on the theory that it is evidence that the written instrument was procured by means of constructive fraud. After stating that, pursuant to the language of section 15a of the Bank Act, the written agreement to create a joint tenancy in a bank account, after the death of one of the depositors, is conclusive evidence of that relationship, that presumption, with respect to the codepositors, is rebuttable during their lifetime. The court says at page 663 of 23 Cal.App.2d, 74 P.2d 812, in that regard:

> "While such conclusiveness prevails in aid of the survivor, that same rule does not obtain in a controversy involving the rights of the depositors during their joint lives. Though their interests and shares are presumed to be equal, nevertheless, if there is proof of some special agreement between them at variance with the legal presumption of equality their rights and interests will then be fixed in accordance with their own agreement.
>
> "In recognition of this exception as between the joint tenants themselves, the court in Hill v. Badeljy, 107 Cal.App. 598, 604, 290 P. 637, 639, said: 'During the lifetime of both of the depositors either one would have the right to establish the real fact, whatever it might be, with reference to the account, and would have the right to bring an action in respect thereto.' This passage is quoted with approval, and the principle so announced was applied in Spear v. Farwell, 5 Cal.App.2d 111, 113, 114, 42 P.2d 391."

After stating that the Hill case did contain language to the effect that parol evidence is not admissible to vary the terms of a written agreement for a joint tenancy in a suit between the depositors in their lifetime, the Wallace opinion refutes that statement in the following language:

> "No controversy between living depositors being before the court in that case, the expression was obiter dictum, and is not deemed pertinent in the case in hand. Furthermore in Spear v. Farwell, supra, where a joint tenancy account had been opened by Mr. and Mrs. Farwell with funds belonging to the wife, parol evidence was held to have been properly admitted to show Mrs. Farwell's superior claim upon the fund as against a levy by the plaintiff as a judgment creditor of Mr. Farwell."

The court concludes its opinion in the Wallace case by saying:

> "During the lifetime of both of the designated depositors, however, the door is open to proof that the tenancy created was in truth something different from the character of the tenancy defined by the legal presumption. The relative rights of the parties are then dependent on the realities of the ownership."

[10] It follows that evidence of the oral agreement between the spouses that the wife was not authorized to draw upon or use the funds for her own benefit until after the death of Mr. Kellogg, was competent on the theory that it tended to show that the written agreement of joint tenancy was procured by constructive fraud. It constituted an exception to the general rule that a written instrument may not be varied by extrinsic evidence.

The writ of habeas corpus is denied.

I concur: PULLEN, P. J.

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41 Cal.App.2d 852

ARIGHI et al. v. RULE & SONS, Inc., et al.

Civ. 6460.

District Court of Appeal, Third District, California.

Dec. 9, 1940.

Rehearing Denied Jan. 8, 1941.

Hearing Denied Feb. 6, 1941.

1. Homestead 🔑82

A homestead may be acquired in property in which the claimant has a life estate.

2. Homestead 🔑81

Generally, a fee simple in the land is not necessary for establishment of a "homestead," since the "homestead right" is not an "estate in land," but a mere "privilege" of exemption from execution of such estate as the holder occupies. Civ.Code, §§ 765, 766.

See Words and Phrases, Permanent Edition, for all other definitions of "Homestead", "Homestead Right", "Estate in Land" and "Privilege".

3. Homestead 🔑5

The homestead statute is to be construed strongly to protect the homestead, and right of a creditor to take homestead on forced sale will be strictly limited to the instances specified therein. Civ.Code, § 1245.

4. Homestead 🔑167

A deed of homestead property given by husband and wife to their children with reservation of a life estate in grantors during life of wife did not constitute a "grant" or an "abandonment" of the homestead within statute, so as to make life interest preserved by grantors subject to execution under judgment against husband. Civ.Code, § 1243.

See Words and Phrases, Permanent Edition, for all other definitions of "Abandonment" and "Grant".

5. Life estates ⚷24, 25

The rights to lease and mortgage interest in property are attributes of a "life estate."

See Words and Phrases, Permanent Edition, for all other definitions of "Life Estate".

6. Homestead ⚷200

Failure of judgment creditor to perfect its levy of execution by filing of petition for appointment of appraisers of debtor's homestead property within 60 days after the levy had effect of extinguishing the lien of execution, and precluded any subsequent levy of execution against the homestead property based upon same judgment by an assignee thereof. Civ.Code, §§ 1245, 1253, 1254.

7. Fraudulent conveyances ⚷52(1)

A conveyance of homestead property by husband and wife to their children with reservation of life estate in grantors during life of wife, even if deed had been executed prior to obtaining of judgment against husband, would not have been in fraud of creditors, and only right of such judgment creditor was to reach excess over amount of the $5,000 exemption by appropriate procedure. Civ.Code, §§ 1245, 1253, 1254.

◆

Appeal from the Superior Court, Napa County; Percy S. King, Judge.

Action by Josephine Arighi and others against Rule & Sons, Inc., the Merchants Finance Corporation, and others to quiet title to realty. From a judgment for plaintiffs, the defendant Merchants Finance Corporation appeals.

Affirmed.

Eugene K. Sturgis, of Oakland, for appellant.

Clarence N. Riggins, of Napa, for respondents.

TUTTLE, Justice.

This is an appeal from a judgment quieting title in respondents. Appellant Merchants Finance Corporation filed an answer to the complaint setting up a judgment procured against the deceased husband of Josephine Arighi, and claiming that such judgment constituted a lien against the real property described in the complaint. Judgment by default was entered against the other defendants who have not appealed.

Title to the property involved in this action vested in Theodore Arighi and Josephine Arighi, husband and wife, and was community in character. On March 5, 1923, a declaration of homestead was filed thereon by Josephine Arighi as the wife of Theodore. A deed was executed on May 23, 1933, by said Theodore and Josephine Arighi, conveying the property to their children. The deed reserved a life estate in the grantors during the life of Josephine Arighi. A right to revoke the deed in whole or in part was also reserved by both grantors and to Josephine Arighi alone, if she survived her husband.

Appellant obtained a renewal judgment against Theodore Arighi on November 28, 1934, a prior judgment against him having been obtained by Rule & Sons, Inc., its assignor. A certified copy of appellant's judgment was recorded on December 5, 1934, and on July 30, 1937, the property was levied upon under the judgment. A petition for appointment of appraisers for the purpose of subjecting the property to execution under section 1245 of the Civil Code, relating to execution against homesteads, was filed by appellant on August 3, 1937. On August 23, 1937, a second petition was filed by appellant praying that the court adjudge that the conveyance of the property by deed in 1933 operated as an abandonment of the homestead, and that the interest of Theodore Arighi in said property be subjected to the execution levied. Both petitions were denied.

The present action, to quiet title, was commenced on September 30, 1938. The judgment quieted title in respondents, and decreed that appellant had no right, title, claim, lien, nor interest of any kind in the real property.

It is contended by appellant that its judgment of 1934 became a lien upon the life estate of Theodore Arighi, and that the title should be quieted, subject to the lien of said judgment. It is also urged that the deed of conveyance of 1933 was void as to appellant, in so far as the property conveyed was in excess of the $5,000 homestead exemption, and that the court erred in denying its motion for the appointment of appraisers under section 1245 of the Civil Code.

Respondents made a motion for permission to introduce additional evidence at the time of oral argument before this court. The motion is hereby granted, as we believe such additional evidence, which consists of certified copies of certain records, is material to the proper disposition of this appeal. The records consist of a certified copy of the judgment roll and register of actions in the case of Rule & Sons, Inc., plaintiff, v. Theodore Arighi, defendant, and a certified copy of the record of a levy of execution on the property involved in this action under a writ of execution issued in the former action. Said record shows that no petition for the appointment of appraisers under section 1245 of the Civil Code was filed by Rule & Sons, Inc., the original judgment creditors.

Appellant's first contention is that the deed of conveyance to the children constituted an abandonment of the homestead. It may be assumed that if such conveyance constituted an abandonment of homestead the life interest reserved by Theodore and Josephine Arighi would be subject to execution under appellant's judgment. Section 1243 of the Civil Code provides as follows:

"A homestead can be abandoned only by a declaration of abandonment, or a grant thereof, executed and acknowledged:

"1. By the husband and wife, if the claimant is married;

"2. By the claimant, if unmarried."

[1, 2] The question arises from the fact that while we have here a "grant" of the homestead property, the grantors reserve a life estate therein. Does this constitute an "abandonment" under the foregoing section, or will the homestead still attach to the life estate? So far as we can ascertain, the question has never been squarely decided in this state or elsewhere. "Estates of inheritance and for life are called estates of freehold." Civ.Code, sec. 765. "An estate during the life of a third person, whether limited to heirs or otherwise, is a freehold." Civ.Code, sec. 766. The right to acquire a homestead in property in which the claimant has a life estate is settled law at this time. 89 A.L.R. 521, note 111. Furthermore, as a general rule, a fee simple in the land is not necessary for the establishment of a homestead, as the homestead right is not an estate in the land, but a mere privilege of exemption from execution of such estate as the holder occupies. Spencer v. Geissman, 37 Cal. 96, 99 Am.Dec. 248; Alexander v. Jackson, 92 Cal. 514, 28 P. 593, 27 Am.St.Rep. 158.

[3-5] Once the homestead has been created, the objects of the law require that, as a matter of social policy, it be protected to the fullest extent. "Although homestead rights are purely creatures of statute, it has been frequently stated that the homestead statute should be given a liberal construction in favor of the exemption, because it is a remedial and beneficient law, and has an object of humane character. A more exact statement of the rule is that the statute is to be construed strongly to protect the homestead, and the right of a creditor to take the homestead on forced sale will be strictly limited to the instances specified therein." 13 Cal.Jur., p. 426, sec. 10. As we view it, the grantors here retained an estate in the land sufficient to support the existing homestead, and we do not deem that the conveyance of the fee to the children of the grantors, with a reservation of a life estate, constituted a "grant" of the homestead within the meaning of the provisions of section 1243 of the Civil Code. An examination of the cases in which it has been concluded that the grant effected an abandonment of the homestead, discloses (with the exception of those cases where the conveyance created a joint tenancy or tenancy in common), that the grantor or grantors have divested themselves of all property interests to which the homestead was attached. The circumstances in Kellersberger v. Kopp, 6 Cal. 563, and in the case of Carroll v. Ellis, 63 Cal. 440, cited by appellant, disclose an attempt by a husband and wife to preserve the homestead in land which they held in joint tenancy or as tenants in common with others. The grant by the husband and wife in both cases was held to have destroyed the homestead. In the case of First Trust & Savings Bank v. Warden, 18 Cal.App.2d 131, 63 P.2d 329, wherein was cited the last two mentioned cases, the deed of conveyance therein consisted of an absolute grant of all interest held by the grantors. There was nothing contained in the deed which might indicate the grantors intended the reservation of any interest in the property to which the homestead was attached. The appellant relies upon the case of The Bank of Suisun v. Stark, 106 Cal. 202, 39 P. 531, 532. There the grantors "reserve[d] to themselves the right to live in and occupy the residence now occupied by them, and situated upon the premises above de-

scribed". Such reservation is not one of a life estate, but a mere personal privilege. It did not leave a freehold interest in the grantors. Under it they could not lease the property or mortgage their interest in the same. The latter rights are attributes of a life estate. 21 C.J. p. 960, sec. 96, and p. 963, sec. 100. The court properly held that the grantors parted with all interest in the title, and that such conveyance was therefore a "grant" within the purview of the homestead law, and constituted an abandonment of the homestead.

[6] The other contention of appellant is that, although the homestead was not extinguished, it had the right to have the property sold under the execution. Section 1245 of the Civil Code reads as follows: "When an execution for the enforcement of a judgment obtained in a case not within the classes enumerated in section 1241 is levied upon the homestead, the judgment creditor may at any time within sixty days thereafter apply to the superior court of the county in which the homestead is situated for the appointment of persons to appraise the value thereof, and if such application shall not be made within sixty days after the levy of such execution, the lien of the execution shall cease at the expiration of said period, and no execution based upon the same judgment shall thereafter be levied upon the homestead."

If it exceeds in value the homestead exemption of $5,000, the court may order it partitioned or sold under the execution. Civ.Code, secs. 1253, 1254. The record shows that the original judgment creditor did not comply with the section quoted. It is not contended that he did. However, appellant, his assignee, did file such a petition, and it was denied. The ruling was proper. The failure on the part of Rule & Sons, Inc., to perfect their levy of execution by a filing of petition for appointment of appraisers within sixty days after the levy, had the effect of extinguishing the lien of the execution, and precluding any subsequent levy of execution against the homestead property based upon that same judgment. Palen v. Palen, 28 Cal.App.2d 602, 83 P.2d 36; Magneson v. Pacific Mfg. Co., 26 Cal.App. 52, 146 P. 69.

[7] There is no merit in the contention of appellant that the conveyance of 1933 was in fraud of creditors, or was void as to the excess of the homestead exemption. As fully pointed out, the right to execute upon this homestead property, by following the necessary proceedings on execution against homesteads, was a right held by Rule & Sons, Inc., which they relinquished by their failure to file the necessary petition. Even though the deed of conveyance had been executed prior to the obtaining of the judgment by Rule & Sons, Inc., in 1924, such conveyance would not have been in fraud of creditors. The only right of such judgment creditor was to reach the excess over the amount of the $5,000 exemption, by appropriate procedure.

Other points raised by appellant lack sufficient merit to warrant further discussion.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

ANCHORS v. ANCHORS.

Civ. 12530.

District Court of Appeal, Second District, Division Two, California.

Dec. 10, 1940.

Hearing Granted Feb. 6, 1941.

1. Judgment ⚿185

For the purpose of motion of plaintiff for summary judgment, allegations of defendant's affidavits were required to be accepted as true, and, if the allegations presented matters which if true would constitute a defense, the plaintiff's motion for summary judgment should have been denied. Code Civ.Proc. § 437c.

2. Evidence ⚿162(2)

In action to recover judgment for installments of maintenance and support money alleged to have accrued under the provisions of Missouri divorce decree, the records of the Missouri court were the "best evidence", and plaintiff could not "competently testify thereto" within statute relating to sufficiency of affidavits on motion for summary judgment. Code Civ.Proc. § 437c.

See Words and Phrases, Permanent Edition, for all other definitions of "Best Evidence".

3. Evidence ⚿383(5)

The effect of a judicial record of the state of Missouri is the same in California as in Missouri. Code Civ.Proc. § 1913.

4. Courts ⚿95(2)

In determining the effect of the judgment of a Missouri court, the court was required to look to the laws of Missouri, and, in doing so, was required to be guided by the interpretation placed on the laws of Missouri by the highest tribunal of that state. Code Civ.Proc. § 1875, subd. 3.

5. Judgment ⚿934(1)

Where the only notation entered on record of Missouri divorce decree providing for maintenance and support money, within 10 years before action in California to recover accrued installments, was a credit on a sheriff's sale on execution, there was no voluntary "payment" which would, under Missouri law, toll the 10-year Missouri statute providing that every judgment shall be presumed to be paid and satisfied after the expiration of 10 years from the date of the last "payment" duly entered on the record of the judgment. Mo.St.Ann. § 886, p. 1168.

See Words and Phrases, Permanent Edition, for all other definitions of "Payment".

◆

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Lillian Anchors against Don L. Anchors, to recover a judgment for installments of maintenance and support money alleged to have accrued under the provisions of a Missouri decree of divorce. From summary judgment in favor of the plaintiff, the defendant appeals.

Judgment reversed.

W. I. Gilbert, Jr., of Los Angeles, for appellant.

Joseph Lewis, of Los Angeles, for respondent.

WOOD, Justice.

Plaintiff commenced this action on July 5, 1939, for the purpose of recovering a judgment for instalments of maintenance and support money alleged to have accrued under the provisions of a decree of divorce previously obtained in the state of Missouri. Defendant filed an answer and thereafter plaintiff filed a motion for a summary judgment, supported by her affidavits. Defendant filed counter affidavits and thereafter a summary judgment was entered in favor of plaintiff for the sum of $10,280 with interest at 8 per cent per annum from July 5, 1934. Defendant appeals from the summary judgment.

Plaintiff alleged in her complaint that in a divorce action pending in the circuit court of Jackson county, Missouri, the court on June 15, 1926, rendered a judgment that "Lillian Anchors do have and recover of and from Don L. Anchors the sum of $40 per week for the support and maintenance" of the three minor children of plaintiff and defendant; that the said children of the parties have been in the care and custody of plaintiff since June 15, 1926; that said judgment remains wholly unsatisfied except for the sum of $1,500; that defendant came to the state of California on or about January 1, 1935. Plaintiff asked for judgment in the sum of $24,540 and interest. In his answer defendant denied the allegation that the Missouri judgment was unsatisfied except for the sum of $1.500. He also made a general denial of the allegations concerning the rendition of the judgment in Missouri.

A motion for a summary judgment in the sum of $25,540, which was supported by plaintiff's affidavit, was denied without prejudice and another motion was made for a summary judgment in the sum of $10,280 for the period of five years, less three weeks, supported by an additional affidavit. To her affidavits plaintiff attached a certified copy of the decree of the Missouri court. Immediately after the copy of the decree the following appears over the certificate of the judge and the clerk of the court: "A Credit given this entry, which appears on the margin of the record, is in words and figures as follows, to-wit: 'March 11, 1930, This Judgment given a credit for $90.50 under sheriff's sale on execution.'" In her first affidavit plaintiff stated that defendant had failed to pay any sum pursuant to the decree of divorce except the sum of $1,500; that she had had the custody of the children of the parties from January 15, 1926, to the date of the affidavit; that defendant had filed the action for divorce in Missouri but that his complaint had been dismissed and that the court had ordered defendant to pay the sum of $40 per week for the support of the minor children; that she could testify competently to all of these things. In her second affidavit plaintiff stated, among other things, that on January 28, 1927, defendant "filed suit" in Missouri to have the "decree of alimony reduced and signed said petition in his own handwriting before filing same"; that defendant did not prosecute "said suit" and that "nothing appears on record in said Kansas City court other than the said petition, which asked for a modification of the said court order made on the 15th day of June, 1926, in said action numbered 242133 requiring him to pay your affiant the sum of $40.00 per week for the support and maintenance of the parties hereto"; that plaintiff if sworn as a witness could testify competently to these facts.

Defendant also presented two affidavits. In these he stated that he does not owe to plaintiff any sum whatever whether or not he be given credit for $1,500; that the three children of the parties had all become of legal age before the commencement of the present action, their ages now being 28, 24 and 21 respectively; that he resided continuously in Missouri until the summer of 1930, at which time he moved to Los Angeles; that he had paid for the support of the children during the three years following June 15, 1926, a sum approximating $5,000; he denied on information and belief that the order referred to in plaintiff's affidavit was made by the Missouri court, denied that if any decree of divorce was rendered it has remained unmodified, and denied that plaintiff could competently testify of her own personal knowledge to the matters set forth in her own affidavits. With the exception of certain statements concerning the execution sale hereinafter referred to, the other matters set forth in the affidavits of the parties are of no importance in the present discussion.

[1, 2] The question for determination is whether the affidavits make a showing sufficient to present a triable issue of fact. Sec. 437c Code Civ.Proc. For the purpose of the motion the allegations of defendant's affidavits must be accepted as true, and if these allegations present matters which if true would constitute a defense the motion of plaintiff for a summary judgment should have been denied. 6 Cal.Jur., 10-Year Supp., p. 790, and cases there cited. Both the pleadings and the affidavits of the parties present a sharp conflict in the matter of the allegations concerning the amount of the payments which defendant had made. Plaintiff asserts that she could testify competently to the record of the Missouri court and that the judgment had not been modified. This assertion is denied by defendant. Clearly the Missouri records would be the best evidence and plaintiff could not "competently testify thereto". Section 437c, Code of Civil Procedure, provides in part: "The affidavit or affidavits in support of the motion must contain facts sufficient to entitle plaintiff [or defendant] to a judgment in the action, and the facts stated therein shall be within the personal knowledge of the affiant, and shall be set forth with particularity, and each affidavit shall show affirmatively that the affiant, if sworn as a witness, can testify competently thereto. * * *"

[3, 4] Defendant contends that under the laws of the state of Missouri there can be no recovery in this action on the judgment which forms the basis of the complaint. The effect of a judicial record of the state of Missouri is the same in California as in Missouri (sec. 1913, Code Civ. Proc.) and we must look to the laws of Missouri in determining the effect of the judgment a copy of which accompanies plaintiff's affidavit. In doing so we must be guided by the interpretation placed upon its laws by the highest tribunal of Missouri. Sec. 1875, subd. 3, Code Civ.Proc.

The Missouri statute bearing upon the question before us is section 886, Revised Statutes 1929, Mo.St.Ann. § 886, p. 1168, It is there provided: "Every judgment, order or decree of any court of record of the United States, or of this or any other state, territory or country, shall be presumed to be paid and satisfied after the expiration of ten years from the date of the original rendition thereof, or if the same has been revived upon personal service duly had upon the defendant or defendants therein, then after ten years from and after such revival, or in case a payment has been made on such judgment, order or decree, and duly entered upon the record thereof, after the expiration of ten years from the last payment so made, and after the expiration of ten years from the date of the original rendition or revival upon personal service, or from the date of the last payment, such judgment shall be conclusively presumed to be paid, and no execution, order or process shall issue thereon, nor shall any suit be brought, had or maintained thereon for any purpose whatever."

From the certified copy of the decree of the Missouri court it appears that the judgment was rendered on June 15, 1926, more than 10 years before the commencement of the present action. The only notation "duly entered upon the record" of the judgment was the credit of $90.50, which was a credit under a "sheriff's sale on execution". Manifestly this was not a voluntary payment.

It appears from the decision in Mayes v. Mayes, 342 Mo. 401, 116 S.W.2d 1, that the highest tribunal of the state of Missouri has decided the points which are presented touching the Missouri judgment. In that case the plaintiff was given a judgment of divorce on May 7, 1920, and was given the custody of the children of the parties and an allowance of $25 per month for the support of the children. Although there was some question as to whether the allowance was for alimony or child support the court held that if the judgment be treated as being for "child support" the decision would be the same. Immediately after the entry of the decree the defendant left Missouri and went to California. In December, 1935, the defendant received an inheritance of property in Missouri and the plaintiff obtained a writ of execution to enforce the judgment of May 7, 1920. A motion to quash the execution was made on the ground that more than 10 years had elapsed since the rendition of the judgment and there had been no revival of the judgment. In affirming the order of the trial court granting the motion to quash the execution the Supreme Court pointed out that the Missouri statute which has been above quoted must be considered together with other statutes which provide that at any time within 10 years action to revive the judgment could be taken. The court said: "It has several times been held in this state that a judgment for alimony, whether in gross or payable in periodical instalments, is subject to the same incidents as other judgments in actions at law and becomes dormant ten years after rendition unless kept alive by payments within such period or by revival." It was brought out in the evidence that while the defendant Mayes was in Los Angeles he "was prosecuted under some (apparently penal) statute of California, was convicted and sentenced to penal servitude, and was paroled on condition that he make certain contributions toward the support of his child, which, acting under such compulsion, he for a time made". The court considered the effect of the payment so made and held that they would not toll the statute. Concerning the provision that if a payment be made the 10-year period within which execution may issue runs from the date of the last payment, the court held that "this means that such payment, in order to extend the time, must have been made voluntarily or under and pursuant to the judgment or decree in the divorce case".

A decision by the Kansas City court of appeals, Eubank v. Eubank, Mo.App., 29 S.W.2d 212, sustains the contention of defendant. In that case the plaintiff on December 22, 1915, obtained a decree of divorce and judgment for alimony in the sum of $15 per month. At the time the decree was entered the plaintiff and the defendant were tenants in common of a life estate in certain real property and on December 28, 1915, the defendant conveyed his record title to the property to a third party. Notwithstanding this transfer the plaintiff through her agents collected rents from the property from time to time up to and including February, 1929. No credits were entered upon the judgment until October 7, 1929, when the plaintiff's counsel made this entry upon the record: "Payment of $15 per month made from January 1–16 up to and including the month of December, 1922; signed Mary Eubank by Garrett & Ruark, her attorneys." The defendant at no time authorized any person to collect the rents or to pay any of the benefits to the plaintiff. An execution was issued on the original judgment on October 7, 1929, and the defendant thereupon filed a motion to quash the execution. The trial court denied the motion to quash but the reviewing court reversed the order, basing its judgment upon the statute herein discussed, and held: "It is not the indorsement of the credit, but the payment, which operates as a renewal of a promise and removes the bar of the statute; that the party relying on a payment to stop the running of the statute must not only establish that it was made, but that it was made by authority of the defendant, is the rule. Regan v. Williams, 185 Mo. 620, 84 S.W. 959, 105 Am.St.Rep. 600. The record discloses no proof showing, or tending to show, that defendant ever voluntarily made or authorized any payment to be made on the judgment which plaintiff is endeavoring to enforce."

[5] It appears from the affidavits and from an order of the Missouri court which is before us that on May 26, 1929, defendant established a trust for the benefit of two of his minor children and his second wife. This was done by the endorsement and transfer of a secured promissory note to a trustee with directions to turn over part of the payments to be received on the note to plaintiff for the benefit of the two named minor children and part to his second wife, Margaret Anchors. The total payments for the benefit of the two minor children were to be in the sum of $12.50 per week. Thereafter plaintiff applied for and received from the Missouri court an order declaring the transfer of the note to the trustee to be in fraud of plaintiff's rights and ordering that the note be subject to seizure on execution. Apparently the "credit" notation on the judgment resulted from the sale of this property. It cannot in any sense be considered a "payment" by defendant. In view of the decisions of the Missouri court above referred to, it is not reasonable to argue that a forced sale of a litigant's property under execution would constitute such a "payment" as would toll the statute. Indeed, it was not so considered when the notation of the credit was made "upon the record". Since no payment was made thereon it must be held that under the terms of the statute in question the judgment is "conclusively presumed to be paid" and that no suit can be "maintained thereon for any purpose whatever".

The judgment is reversed.

We concur: MOORE, P. J.; McCOMB, J.

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16 Cal.2d 696

KATENKAMP v. SUPERIOR COURT IN AND FOR SANTA BARBARA COUNTY.

S. F. 16449.

Supreme Court of California.

Dec. 16, 1940.

1. Mandamus 🔑31

If a court is mistaken in its assumption that it does not possess requisite jurisdiction, mandamus will issue to compel it to assume jurisdiction, and such writ does not purport to interfere with court's discretion in deciding case.

2. Injunction 🔑218

Where trial court's judgment in injunction suit against corporation provided that a mandatory injunction should issue commanding corporation to remove specified groins from its property near plaintiff's beach property, and judgment was one in which both mandatory and prohibitory injunctions were issued, respondent, an individual to whom corporation transferred its property after commencement of suit, could not escape liability for "contempt" by failing to remove groins on ground that there was only an order for a mandatory injunction, and that there could be no contempt until after plaintiff procured issuance of mandatory injunction by trial court.

See Words and Phrases, Permanent Edition, for all other definitions of "Contempt".

3. Injunction 🔑218

Where judgment in injunction suit against corporation provided that a mandatory injunction should issue commanding corporation to remove groins from its property near plaintiff's beach property, and judgment was one in which both mandatory and prohibitory injunctions were issued, that trial court might dissolve or amend injunction if conditions warranted, and should consider any changed conditions before enforcing an injunction, did not prevent judgment from constituting an existing enforceable mandatory injunction.

4. Corporations 🔑617(5)

Where injunction suit was brought against corporation, the corporation's disposition of its property and its dissolution prior to issuance of judgment in suit did not affect validity of judgment. Civ.Code, § 399.

5. Injunction 🔑212

Where injunction suit was brought against corporation which thereafter transferred its property to its sole stockholder and filed a certificate of dissolution with Secretary of State upon service of injunction on stockholder, stockholder was bound by its terms, and contempt proceedings could be brought against stockholder for failure to obey injunction, since a corporation, as an artificial entity, cannot of itself perform or refrain from performing an act, and only its officers and agents may do so. Civ.Code, § 399.

6. Injunction 🔑212, 228

An injunction against a corporation binds not only the so-called corporate entity, but also all persons who act for corporation in transaction of its business and who have knowledge of decree, and disobedience of decree by such persons may subject them to punishment for contempt, and fact that injunction is issued against corporation alone rather than against its officers, agents, and employees does not change application of rule, since an injunction issued against a corporation is in effect an injunction against its officers, agents, and employees.

7. Corporations 🔑1

While a corporation is usually regarded as an entity separate and distinct from its stockholders, both law and equity will, whenever necessary to circumvent fraud, or protect rights of third persons, disregard the distinct existence and treat them as identical.

Proceeding by J. F. Katenkamp against the Superior Court of the State of California in and for the County of Santa Barbara for a writ of mandate to require the Superior Court to proceed with contempt proceedings against William J. Knapp for failure to comply with a judgment ordering the removal of two groins from property of which he was owner, said property having been deeded to him by a corporation in which he owned all the stock after an injunction suit had been instituted against the corporation.

Petition granted, and peremptory writ of mandate issued.

Leland Crawford and J. F. Goux, both of Santa Barbara, for petitioner.

Heaney, Price, Postel & Parma, of Santa Barbara, for respondent.

TRAYNOR, Justice.

Petitioner and other persons, owners of beach property in Santa Barbara county, recovered a judgment in the Superior Court of that county on July 20, 1937, ordering the Union Realty Company to remove two groins upon its property which were causing the beach of the plaintiff's property to be washed away and accordingly found to be nuisances. The judgment also enjoined the corporation from erecting on its property any structure which would interfere with the normal flow of the tides. The judgment was affirmed by the District Court of Appeal for the Second District and this court denied a petition for a hearing, whereupon remittitur was filed.

Four months before the decision in the trial court the Union Realty Company executed a deed of all its property to William J. Knapp, then the owner of all the issued and outstanding shares of stock of the corporation, and thereafter filed a certificate of dissolution with the secretary of state and went out of existence. Following the return of the remittitur, the judgment in the injunction suit was served upon Knapp who failed to remove the groins as ordered. Plaintiffs then instituted contempt proceedings against him, serving on him an order to show cause why he should not be held in contempt for failing to comply with the injunction. This proceeding was before a different judge from the one who heard the original action. Knapp, appearing specially, maintained that the court had no jurisdiction on the grounds that it had never actually issued a mandatory injunction commanding Knapp or any other person to remove the groins and that Knapp was never a party to the action. The court thereupon quashed the order to show cause and dismissed the proceedings. One of the plaintiffs now petitions this court for a writ of mandate to the superior court of Santa Barbara county directing it to proceed with the contempt proceedings.

[1] If a court is mistaken in its assumption that it does not possess the requisite jurisdiction, mandamus will issue to compel it to assume jurisdiction. Golden Gate Tile Co. v. Superior Court, 159 Cal. 474, 114 P. 978; City of San Diego v. Andrews, 195 Cal. 111, 231 P. 726; Pacific States Corporation v. Superior Court, 72 Cal.App. 241, 236 P. 938. Such writ does not purport to interfere with the court's discretion in deciding the case. If, as plaintiff alleges, a valid mandatory injunction has been issued binding upon Knapp, the lower court's refusal to proceed with contempt proceedings leaves the plaintiff with no adequate or immediate remedy to enforce the judgment unless he petitions for a writ of mandate to compel the lower court to exercise jurisdiction.

The judgment of the trial court in the injunction suit provided: "Now, therefore, it is hereby ordered, adjudged, and decreed that a mandatory injunction issue out of this Court commanding defendant to forthwith permanently remove from, upon, and in front of the property hereinafter described, those two certain structures known as groins, * * *" Respondent contends that herein there was no mandatory injunction but only an order for a mandatory injunction, the terms of which were to be fixed by the court at the time of its issuance in the future. He maintains that there can be no contempt of court until the mandatory injunction actually issues and that the petitioner must therefore first proceed to procure a writ of injunction from the trial court before the alleged contemnor could be held in contempt of court.

[2] This contention is without merit. In advancing his argument respondent points to the different phraseology used by the court in the same judgment with regard to the prohibitory injunction: "It is further ordered, adjudged, and decreed that defendant, its officers, agents, employees, and/or servants, be and they and each of them are hereby perpetually enjoined from building upon or in front of the hereinabove de-

scribed real property any structure upon the shore, into the waters of Miramar Bay or the Pacific Ocean, which has the effect of changing the normal and natural condition of the tides, currents, and/or littoral drift of the waters fronting and/or upon the properties of plaintiffs, or any of them." A mere variance in language, however, does not signify that while the prohibitory injunction was intended to take effect immediately, the mandatory injunction was not to issue until a future time. The judgment seems plainly one in which both a mandatory and prohibitory injunction were issued on the same basis. Thus the trial court states its conclusions of law as follows: *"That plaintiffs are entitled to a mandatory injunction of this Court requiring said defendant to forthwith permanently remove said groins* and each of them, from, upon and in front of its said property *and are further entitled to a judgment of this Court perpetually enjoining said defendant from maintaining and using any structure upon its said property* in such a manner as to interfere with the natural and normal flow of the ocean currents, tides, and/or waters to and upon the properties of said plaintiffs, and each of them. Let Judgment Be Entered Accordingly." (Italics added.) Finding that plaintiffs were entitled to a mandatory and a prohibitory injunction, the trial court issued both in its judgment.

While the present litigation began in October, 1936, it was not until March, 1940, that the case was finally disposed of on appeal enabling the plaintiffs to secure their injunctive relief. The entire proceedings in the trial court were concerned with the propriety of issuing such an injunction. The two appeals taken from such proceedings (Katenkamp v. Union Realty Co., 36 Cal. App.2d 602, 98 P.2d 239; Katenkamp v. Union Realty Co., 6 Cal.2d 765, 59 P.2d 473), involved the propriety of issuing a judgment embodying a mandatory injunction. The trial court obviously intended its judgment to be not a mere declaration of plaintiffs' right to relief upon application in the future, but a final disposition of the case granting to the plaintiffs the relief for which they prayed.

Respondent contends that he is entitled to know the precise command of the court before he can be held for contempt. The injunction issued by the trial court in this case, however, embodies no ambiguity. It plainly orders the removal by the defendant of two specified groins.

[3] Respondent notes that a trial court can dissolve or amend an injunction where conditions warrant it and should consider any changed conditions before enforcing an injunction. This observation affords no basis for arguing that the judgment of the trial court in the present case did not constitute an existing enforceable mandatory injunction.

[4] The corporation's disposition of its property and its dissolution prior to the issuance of judgment did not affect the validity of the judgment. Section 399 of the Civil Code provides that "No action or proceeding to which a corporation is a party shall abate by the dissolution of such corporation."

[5, 6] William J. Knapp was bound by the injunction issued even though the named defendant in the action was the Union Realty Company. A corporation, as an artificial entity, cannot of itself perform or refrain from performing an act; only its officers and agents can. An injunction against a corporation binds not only the so-called "corporate entity" but also all persons who act for the corporation in the transaction of its business and have knowledge of the decree. Disobedience by such persons may subject them to punishment for contempt. Morton v. Superior Court, 65 Cal. 496, 4 P. 489; Golden Gate Consolidated H. Mining Co. v. Superior Court, 65 Cal. 187, 3 P. 628; Drew v. Superior Court, 180 Cal. 711, 182 P. 417; McFarland v. Superior Court, 194 Cal. 407, 228 P. 1033; High, Injunctions, 4th Ed., § 1443. The fact that the injunction is issued against the corporation alone rather than against it, its officers, agents and employees, cannot change the application of this rule. An injunction issued against a corporation is in effect an injunction against the officers, agents, and employees. William J. Knapp as sole shareholder in the corporation during its existence, and successor in interest to its property on dissolution, was in control of the corporate affairs. Upon service of the injunction on him he was bound by its provisions.

[7] Furthermore, while a corporation is usually regarded as an entity separate and distinct from its stockholders, both law and equity will, whenever necessary to circumvent fraud or protect the rights of third

persons, disregard this distinct existence and treat them as identical. Wenban Estate v. Hewlett, 193 Cal. 675, 227 P. 723; Wood Estate Co. v. Chanslor, 209 Cal. 241, 246 P. 1001; Clark v. Millsap, 197 Cal. 765, 242 P. 918; Hotaling v. Hotaling, 193 Cal. 368, 224 P. 455, 56 A.L.R. 734; Minifie v. Rowley, 187 Cal. 481, 202 P. 673; Erkenbrecher v. Grant, 187 Cal. 7, 200 P. 641; Stanford Hotel Co. v. M. Schwind Co., 180 Cal. 348, 181 P. 780; 6a Cal.Jur. 75. In the present case the injunction against the Union Realty Company is in effect against William J. Knapp, its sole shareholder, and contempt proceedings may properly be brought against him.

Let the peremptory writ of mandate issue.

We concur: GIBSON, C. J.; EDMONDS, J.; SHENK, J.; CARTER, J.; HOUSER, J.; SPENCE, Justice pro tem.

16 Cal.2d 714

PEOPLE v. SILVER.

Cr. 4312.

Supreme Court of California.

Dec. 18, 1940.

1. Homicide 🔑289

In prosecution of watchman for murder of one who entered open pit silica mining property to steal gasoline, defended on ground that watchman was resisting commission of felony, in view of statute defining entry of mine or any underground portion thereof with intent to commit larceny as burglary, instruction defining "mine" as a subterranean cavity or passage, especially a pit or excavation in the earth, from which metallic ores or other mineral substances are taken by digging, was too restricted. Pen.Code, § 195; § 197, subd. 2; § 459; St.1939, pp. 1072, 1108, §§ 2200, 2601.

See Words and Phrases, Permanent Edition, for all other definitions of "Mine".

2. Homicide 🔑289

In prosecution of watchman for murder of one who entered open pit silica mining property to steal gasoline, defended on ground that watchman was resisting commission of felony, in view of statute defining entry of mine or any underground portion thereof with intent to commit larceny as burglary, defendant was entitled to instruction defining "mine" as including all mineral-bearing properties of whatever kind or character, whether underground, quarry, pit, well, spring, or other source, and defining "mineral" as including all mineral products, and stating that properties used in working or developing mine are to be deemed affixed to mine. Pen.Code, § 195; § 197, subd. 2; § 459; St.1939, pp. 1072, 1108, §§ 2200, 2601.

See Words and Phrases, Permanent Edition, for all other definitions of "Mineral".

3. Burglary 🔑9(2)

Silica is a "mineral", and the place where it is discovered and removed from the earth is a "mine" within terms of statute defining entry of mine or any underground portion thereof with intent to commit larceny or felony as burglary, regardless of the method of its extraction, whether through open cuts in the surface or subterranean tunnels. Pen.Code, § 459.

See Words and Phrases, Permanent Edition, for all other definitions of "Mine or Any Underground Portion Thereof".

4. Statutes 🔑194

The doctrine of "ejusdem generis" is but a rule of construction to aid in ascertaining the meaning of the legislature, and may be used to carry out, but not to defeat, the legislative intent.

See Words and Phrases, Permanent Edition, for all other definitions of "Ejusdem Generis".

5. Statutes 🔑205, 206

A statute will be given its full effect, as far as possible, and will be so construed that the whole may stand and that each part thereof may have the meaning and effect which, from the act as a whole, appears to have been intended.

6. Burglary 🔑9(2)

Under statute defining entry of "mine or any underground portion thereof" with intent to commit larceny as burglary, addition of the quoted words manifested intent to include entering the surface of mining property with intent to commit larceny or felony. Pen.Code, § 459.

7. Homicide ⚿**300(9), 340(2)**

In murder prosecution, defended on ground of justifiable homicide in resisting attempt to commit felony, but not on ground of self-defense, instructions on self-defense were erroneous and prejudicial to defendant.

8. Criminal law ⚿**814(3)**

Where charge to jury, though a correct statement of legal principles, is extended so as to cover an assumed issue which finds no support in the evidence, it constitutes error.

9. Criminal law ⚿**1172(1)**

Where proof of defendant's guilt is clear and no extenuating circumstances appear, errors in instructions may not be prejudicial; but, where the case is close and erroneous instructions concern matters vital to the defense and may have resulted in miscarriage of justice, such errors must be regarded as prejudicial and should result in new trial.

10. Homicide ⚿**156(1), 185**

In prosecution of watchman for murder of one who entered mining property to steal gasoline, evidence of watchman's conversation with deputy sheriff about 15 hours before the killing, wherein watchman received advice concerning his rights and duties, was admissible as bearing on questions of intent and of negligence.

Appeal from Superior Court, San Bernardino County; Charles Allison, Judge.

Gail Bradford Silver was convicted of manslaughter, and he appeals.

Reversed and remanded.

For prior opinion, see 102 P.2d 763.

Henry Brouillette, of Los Angeles, and Raymond E. Hodge, of San Bernardino, for appellant.

Earl Warren, Atty. Gen., Bayard Rhone, Deputy Atty. Gen., and Jerome B. Kavanaugh, Dist. Atty., of San Bernardino, for respondent.

CARTER, Justice.

Defendant herein was charged by information with the crime of murder. After a plea of not guilty, he was tried before a jury which returned a verdict of guilty of manslaughter. This appeal is prosecuted from the judgment of conviction, from an order denying a motion for new trial, and from an order denying a hearing on defendant's application for probation.

There is little controversy as to the facts. They may be summarized briefly as follows: Defendant, aged 22, was a son-in-law of a Mrs. Shook, who was the owner of a mining claim operated under the name of Temescal Clay Company; said claim being located near Victorville, San Bernardino county. The mine consisted of two open cuts in the side of a mountain from which silica was taken. Above the open cuts and adjacent thereto and upon the Temescal Clay Company property was situated, among other things, a gasoline storage tank of 640 gallons capacity, with an unenclosed gasoline pump located out in the open near a road, a short distance from an enclosed blacksmith shop and oil house. The gasoline stored therein was for use in and about the operation of the claim. Prior to the night of November 24, 1939, gasoline had been stolen from the tank. On the 24th and 25th days of November, 1939, defendant was employed and stationed as a watchman on that property. On the night of November 25, 1939, at about 6 p. m. defendant placed himself at a point near the top of a hill at an approximate elevation of 84 feet above the point where the gasoline pump was located and a distance of approximately 288 feet in a direct line from the pump. Shortly after dark, in the moonlight, he observed an automobile being driven to and about the property without lights. He picked up a 30-30 Winchester rifle and then saw the outline of the car backed up to the gasoline pump. He testified that after waiting a short time he called out "What do you want?"; that after receiving no answer he called "If you don't get out I will shoot"; that he fired a shot to scare away the thieves who were stealing gasoline out of the tank; that he waited a few moments and called again and then he fired two more shots; that after firing the second shot he heard what he thought sounded like a rock falling, as though someone was coming up the hill toward him, and that he then fired another shot and ran back over the hill approximately a mile and quarter to a trailer house and endeavored unsuccessfully to have a man go back and assist him at the scene where the men were stealing the gasoline; that he then got in his car, went to Victorville, called the office of the deputy sheriff at Barstow, and went to the home of Joseph Simonic, after which a doctor administered him morphine to quiet his nerves. After midnight he was taken to the scene of the shooting by the deputy sheriff and others and he claimed that it was then that he first learned that Lee Hartman, the deceased, had been shot and that he, together with his two younger brothers, Walter and Ernest, were the ones who had driven to the mining property for the purpose of stealing gasoline. The evidence indicates that the three brothers had been there on other occasions for the same purpose.

Their testimony, in substance, shows that on the night in question, they arrived on the property in their automobile, turned out the lights, and backed up the hill to the gasoline pump. All three boys got out of the car. Although the pump was locked, by some manipulation they were able to fill the tank of the car. While Lee and Ernest were draining the hose a shot was fired from the hill. Lee was struck by a bullet through the chest, fell backward and apparently died immediately. The same shot entered the leg of the youngest boy. The boys all claimed that prior to the first shot no words of warning were given by defendant. Ernest then started up the hill toward defendant and shouted "Stop shooting, mister." He claims that he then heard a voice that said "Get the Hell out of there or I will shoot you" or "If you don't get out I will fill you all full of lead." A second shot followed, while Ernest was trying to put Lee in the back seat of the car. He testified that he again called to defendant and said "Don't shoot any more * * * one of my brothers is shot." He claimed defendant said, "I told you guys to get out." After the second shot he discovered that his other brother, Walter, had been shot through the leg. Before they left for their home a third shot was fired over the car. Lee was taken to the mortuary and Walter received medical aid at the hospital. The charge of murder followed.

On this appeal defendant claims (1) that the verdict is contrary to the law and the evidence; (2) that the court misdirected the jury in matters of law and erred in decisions of law arising during the course of the trial; (3) that the court erred in denying defendant's motion for a new trial; and (4) that the court erred in denying a hearing on an application of defendant for probation.

As his sole ground of defense defendant contended that the homicide of which he was admittedly guilty was justifiable. The portions of section 197 of the Penal Code relied upon are: "Homicide is * * * justifiable * * * 1. When resisting any attempt * * * to commit a felony * * * or, 2. When committed in defense of habitation, *property,* or person, against one who manifestly intends or endeavors, by violence or *surprise,* to *commit a felony.* * * *" It is defendant's position that the Hartmans, who, according to their own testimony entered upon the property which defendant was guarding, with intent to and from which they did steal gasoline, were guilty of the felony of burglary. In this connection reference is made to the code definition of burglary (Pen.Code, sec. 459), namely, "Every person who enters any * * * *mine, or any underground portion thereof,* with intent to commit grand or petit larceny or any felony is guilty of burglary."

Defendant maintains that the jury were improperly instructed with respect to this defense. Certain instructions offered by him were refused. They are as follows:

"You are instructed that every person who enters any mine, or any underground portion thereof, with intent to commit grand or petit larceny, or any felony, is guilty of burglary, a felony;" and

"You are instructed that the California legal definition of a mine includes all mineral-bearing properties of whatever kind or character, whether underground, quarry, pit, well, spring or other source from which any mineral substance may be obtained;

"And you are further instructed that the California legal definition of 'mineral' includes all mineral products both metallic and non-metallic, solid, liquid or gaseous, and mineral waters of whatever kind or character." Sec. 2200, Public Resources Code, St.1939, p. 1072; Webster's Dictionary; Smith v. Cooley, 65 Cal. 46 [2 P. 880]. And

"You are instructed that sluice-boxes, flumes, hose, pipe, railway tracks, cars, blacksmith-shops, mills, and all other machinery or tools used in working or developing a mine are to be deemed affixed to the mine." Citing Civ.Code, sec. 661 (now sec. 2601, Public Resources Code).

Certain instructions given by the trial court were objected to by the defendant. The trial court read section 197 of the Penal Code on the question of justifiable homicide, and section 195 of said code on excusable homicide, and instructed the jury in the language of section 459 of said code defining burglary, as follows: "You are instructed that every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, mine, or any underground portion thereof, with intent to commit grand or petit larceny or any felony, is guilty of burglary;" and then added, "In this connection you are instructed that the word 'mine' in a specific sense means 'a subterranean cavity or passage, especially a pit or excavation in the earth, from which metallic ores or other mineral substances are taken by digging'."

This was followed by a further instruction: "* * * that one charged with homicide cannot avail himself of the defense that the homicide he stands charged with was justifiable because it was committed in defense of property in his charge or care unless it be shown that before the fatal shot was fired by the defendant it must have appeared to him, as a reasonable person, that the deceased manifestly intended or endeavored by violence or surprise to commit a felony."

It is defendant's contention that the definition of the word "mine" given in the second paragraph of this instruction on burglary is entirely too restricted; that from the wording of section 459 of the Penal Code the legislature intended a mine to be not only the underground portion thereof, but also that portion of the mine above the ground and the equipment thereon used in the operation of the mining plant, and that in reading the given instruction as a whole, and particularly by joining the two distinct instructions or definitions with the words "in this connection", there was but one conclusion that the jury could reach, and "that was that the court instructed them that a mine is a hole in the ground from which mineral is dug, and that a person entering a mine is guilty of burglary, but that it did not apply in the instant case because, from all of the testimony the decedent and his two brothers did not enter a hole in the ground with the intent to commit grand or petit larceny". Defendant claims that the legislature did not intend the use of the word "mine", in the definition of burglary, in a specific sense, and that the term "mine" included the whole claim or body of mining property, citing Tredinnick v. Red Cloud, etc., Mining Co., 72 Cal. 78, 81, 13 P. 152; 40 Cor.Jur., pp. 733-735, § 3; subd. 3; and Id., § 8, subd. 6.

The prosecution in reply maintains that the property in question was a quarry and not a mine, citing Marvel v. Merritt, 116 U.S. 11, 6 S.Ct. 207, 29 L.Ed. 550; J. M. Guffey Petroleum Co. v. Murrel, 127 La. 466, 53 So. 705; Hoysradt v. Delaware, L. & W. R. Co., C.C., 151 F. 321, 331; Board of Com'rs of Greene Co. v. Lattas Creek Coal Co., 179 Ind. 212, 100 N.E. 561; and that even if it could be considered a mine within the meaning of the statute, there was no structure whatever on the premises that the Hartman brothers sought or attempted to break into or enter. It is pointed out that the gasoline pump itself was entirely out in the open and was not covered with any roof or sides.

The prosecution further points out that section 459 of the Penal Code defining burglary was amended in 1913 (Stats.1913, p. 228), by adding "mine, or any underground portion thereof" to the structures which were subject to burglary. It is contended that driving upon a naked claim (upon which no structures have been erected, although entitled to be called a mine) with intent to commit a theft, could not under any theory of the law be held to be a burglary; that the statute, as amended, really contemplates that a person must *enter* a "home * * * mine, or any underground portion thereof" before he could be guilty of burglary.

[1-3] We agree with the contention of the defendant that the definition of a mine given to the jury by the trial court was entirely too restricted, and that the instructions offered by defendant on this subject should have been given. Silica, the substance taken from the mine here in question, is a mineral, and the place where it is discovered and removed from the earth is a mine regardless of the method of its extraction—whether it is done through open cuts in the surface or subterranean tunnels.

[4, 5] The prosecution maintains that the doctrine of ejusdem generis should be applied in defining the use of the words "mine, or any underground portion thereof". In our opinion, if that were the case, the legislature might well have omitted the word "mine" as it is used standing alone, and added only the words "any underground portion of a mine", for the structure and other outbuildings of a mine would have

been included in the other portions of the statute. It is to be remembered that "the doctrine of ejusdem generis is but a rule of construction to aid in ascertaining the meaning of the legislature, and may be used to carry out, but not to defeat the legislative intent". 23 Cal.Jur. 756. A rule of construction which appears to be more consonant with the legislative intent in this case is that "a statute will be given its full effect, as far as possible, and will be so construed that the whole may stand, and that each part thereof may have the meaning and effect which, from the act as a whole, appears to have been intended". 23 Cal.Jur. 757.

[6] There are many reasons for believing that the legislature intended by the addition of the words "mine, or any underground portion thereof" to Penal Code section 459 to render the entering of the surface of mining property with the intent to commit grand or petit larceny or any felony thereon as burglary. One reason is undoubtedly the fact that much of the equipment used in the operation of a mine and mine plant of necessity must be left out of doors unenclosed by four walls and a roof. The greater portion of such equipment such as hose, pipes, flumes, compressors, railway tracks and other tools from the nature of its use and because of its bulk cannot be kept in enclosed buildings. Another reason is that mining property is most frequently located in areas of relative isolation somewhat apart from thick settlements of population and the security of police protection. These circumstances obviously render such property susceptible to appropriation by those who are inclined to steal or misappropriate the property of others where the likelihood of their apprehension is slight or the penalty for their conduct is mild. It is probable, therefore, that the legislature, by the addition of the word "mine" to the statute had in mind the imposing of this rather severe penalty to act as a deterrent to those who might be inclined to take advantage of the isolation of mining claims, especially in the absence of the owners thereof or of adequate police protection, to enter and appropriate property which may lay there in the open necessarily unenclosed.

Defendant also objects to instructions given on the subject of self-defense. One of the instructions so complained of reads: "The court further instructs the jury that to justify the killing of another in self-defense, it must appear to the defendant as a reasonable person that the danger was so urgent and pressing that in order to save his own life, or to prevent receiving a great bodily harm, the killing of the other was absolutely necessary." Defendant's objection to this instruction lies in the fact that at no time did he raise as a defense to this action the argument of self-defense. It is his position that the interposition of the instruction confused or misled the jury in rendering its verdict.

[7, 8] We are of the opinion that the instructions were erroneously given. When the charge to the jury, though a correct statement of legal principles, is extended beyond such limitations so as to cover an assumed issue which finds no support in the evidence it constitutes error. People v. Savinovich, 59 Cal.App. 240, 244, 210 P. 526.

The defendant contends that the instructions on self-defense concerned a vital feature of his defense, and placed upon him a greater burden of proof than that exacted by the law; that said instructions, coupled with the confusion which must have been created in the minds of the jurors as to what his real defense was, operated to prevent the jury from adequately comprehending and correctly considering the only defense interposed by him—that of justifiable homicide.

This contention of the defendant finds support in the case of People v. Roe, 189 Cal. 548, at page 559, 209 P. 560, 565, wherein the court said: "That the several instructions upon the law of self-defense, given to the jury at the request of the people, were calculated to confuse the jury, and must have prejudiced the defendant's case, is affirmatively shown, we think, by the fact that they charged the jury that—'in order to justify a killing upon the ground of self-defense, it must have appeared to the slayer, as a reasonable person, that the danger, if any, was so urgent and pressing that in order to save his own life or to prevent his receiving great bodily harm the killing was absolutely necessary; * * * that the killing was done under a well-founded belief that it was necessary for the defendant to kill the deceased at the time to save himself from death or great bodily harm; * * * that the slayer had really and in good faith endeavored to decline further trouble before the fatal shot was fired.' * * * and if the jury applied, as doubtless they did, the requirements of said instructions to the situation of 'the slayer' at the time of the killing, they could not fail to find, in the face of the undisputed fact that she was not being assailed by the deceased at the time of the killing, that it was not necessary for her to kill the deceased in order to save herself from death or great bodily harm, and, therefore, in keeping with the charge of the court, the jury had no alternative but to find the defendant guilty upon the fictitious issue of self-defense, which was, by the instructions complained of, created and injected into the case in conflict with and to the confusion of the defense of the person of another, which was the only defense interposed and relied upon by the defendant, and which, under the evidence bearing upon the situation of the defendant at the time of the killing, was the only defense available to her."

[9] Where errors in instructions occur, the question always arises as to whether or not they are prejudicial. Here it may be said that where the proof of a defendant's guilt is clear, and no extenuating circumstances appear, such errors may not be prejudicial. But where a case, such as the one at bar, is what may be termed a "close" case, and where the erroneous instructions concern matters vital to the defense of the defendant, and may have resulted in a miscarriage of justice, we are of the opinion that such errors must be regarded as prejudicial and should result in a new trial for the defendant.

Upon a new trial the question will again arise as to whether certain testimony offered by the defendant should have been rejected. On the night before the date of the homicide, after defendant had spent most of the night on the hill as watchman, he went to the Union oil station at Victorville to get warm. While there he met a deputy sheriff of San Bernardino county and had a conversation with him in which he sought and received the advice of said deputy sheriff with regard to his rights and duties as a watchman. The court refused to permit the defendant to relate the conversation had with the deputy sheriff immediately prior to the homicide, on the ground that it was immaterial and self-serving. Defendant contends that the conversation was a part of the res gestae, and that he was entitled to introduce said conversation because it would bear not only on the intent of the defendant, but also on the question of his negligence.

In the case of People v. Fong Sing, 38 Cal.App. 253, 258, 175 P. 911, 913, the District Court of Appeal gave consideration to the instances in which evidence of this character might be received on behalf of a defendant in a criminal case.

It is true that in said case the evidence offered was held inadmissible for the reason that there was no utterance by the defendant himself. Defendant had offered to show that one Gong Sue had requested another, Charlie Suey, to go to a lumberyard, as evidence that, he, the defendant, accompanied Charlie Suey to said lumberyard. The court correctly ruled such evidence inadmissible, saying: "The rule contemplates some utterance by the party to the action himself, and not that of a third party, for the very obvious reason that the declaration is admissible only because it is supposed to be expressive of what is in the declarant's own mind with respect to the intention as to his destination, which, manifestly, could not be determined from what some other person might have said, unconnected with any declaration in that particular by the party himself. * * *"

[10] In the instant case, however, defendant offered to relate a conversation in which he sought to ascertain his rights and duties as a watchman. The fact that he conscientiously attempted to learn and act within his rights could be construed as negativing the existence of an intent on the part of defendant to negligently and recklessly shoot at anyone unlawfully on the property which he was guarding. Then again the defendant might have been warned by said deputy sheriff that certain dangerous criminals were at large in the vicinity who might be stealing gasoline and that he should be exceedingly careful for his own safety. Of course, such knowledge would not give defendant the right wilfully or recklessly to shoot at anyone unlawfully on the premises. Nevertheless, the defendant was justified in acting on appearances, and if the information which he received from the deputy sheriff was such as to create in the defendant a state of mind which would cause him as a reasonable man to believe that it was advisable for him to shoot when he ascertained that a burglary or robbery was being perpetrated, the jury were entitled to take this evidence into consideration in determining whether or not the defendant fired the fatal shot without exercising the caution or

circumspection which a reasonably prudent person would have exercised under the circumstances.

That such evidence is admissible was determined in the case of People v. Fong Sing, supra, wherein, at page 258 of 38 Cal. App., 175 P. at page 913, the court said: "There are many cases which have sanctioned testimony of extrajudicial declarations, where a defendant in a criminal case or a party to a civil action has made some statement as to some matter arising in connection with a transaction constituting the principal fact in dispute. Declarations in such cases, however, have generally been admitted, not altogether under the rule of res gestae, or because they were deemed as strictly a part of the principal transaction in dispute, but because they were regarded as indicative of the frame of mind of the declarant as to some act growing out of the principal transaction, and exhibited under such circumstances or conditions as to make it reasonably certain that it was not the result of a premeditated design to prepare, pro re nata, a statement of the fact; and it is generally upon this latter theory, rather than upon the theory that it is a part of the transaction in dispute, that the declaration of a person as to his destination on leaving his home or some other place is receivable as evidence of his intention or purpose where such declaration has a material bearing upon his connection or want of connection with the principal question in issue."

If the conversation did bear on the defendant's intent or negligence we are of the opinion the trial court should have permitted it to be related. The purported conversation was not too remote, it having occurred at 3 o'clock on the morning of November 25, 1939, on which date, at 6 p. m. the homicide occurred. Of course, we are here passing on the offer of proof only, and if upon presentation of the evidence, it does not in fact have some bearing upon defendant's intention or negligence at the time of the occurrence of the homicide, the power of the trial court may be invoked to strike the same from the record.

The judgment and order denying defendant's motion for a new trial are and each of them is hereby reversed, and the cause is remanded for a new trial in accordance with the views expressed herein.

We concur: HOUSER, J.; CURTIS, J.; SHENK, J.; TRAYNOR, J.

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16 Cal.2d 701

Ex parte CONNOR.

Cr. 4257.

Supreme Court of California.

Dec. 17, 1940.

1. Habeas corpus 🔑25(1)

Where the contention that the trial court failed to inform defendant of his right to counsel was not urged in proceedings to vacate judgment of conviction either in the trial court or on appeal, and no appeal was taken from judgment, the contention could not be made the basis of a successful "collateral attack" by habeas corpus on the validity of judgment, since a defendant may not try out his contentions piecemeal by successive proceedings attacking the validity of the judgment against him. Pen.Code, § 987; U.S.C.A.Const. Amend. 6; Const.Cal. art. 1, § 13.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack".

2. Habeas corpus 🔑1, 4

The function of the writ of "habeas corpus" is to determine the legality of one's detention by an inquiry into the question of jurisdiction and the validity of the process on its face and whether any thing has transpired since it was issued to render it invalid, and the writ is not designed to retry issues of fact or to answer the purpose of an appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Habeas Corpus".

3. Criminal law 🔑641(1)

The right of an accused to counsel will be protected, but it is a right which may be waived. Pen.Code, § 987; U.S.C.A.Const. Amend. 6; Const.Cal. art. 1, § 13.

4. Habeas corpus 🔑85(1)

Where the alleged denial of the right of an accused to counsel was not asserted on appeal from a judgment of conviction or on appeal from an order denying a motion to set aside the conviction, it will be presumed, under the presumption of validity and regularity which attends every final judgment, that the requirements concerning counsel were met. Pen.Code, § 987; U.S.C.A.Const. Amend. 6; Const.Cal. art. 1, § 13.

5. Habeas corpus 🔑85(1)

A judgment cannot be lightly set aside by collateral attack even on habeas corpus, since when collaterally attacked, the judgment of a court carries with it a presumption of regularity.

6. Habeas corpus 🔑85(1)

Where a defendant without counsel acquiesces in a trial resulting in his conviction, and later seeks relief by the extraordinary remedy of habeas corpus, he has the burden of establishing that he did not competently and intelligently waive his constitutional right to counsel. Pen.Code, § 987; U.S.C.A. Const. Amend. 6; Const.Cal. art. 1, § 13.

7. Habeas corpus 🔑85(1)

A docket entry recording proceedings in the municipal court at time of defendant's preliminary arraignment stating that the court informed defendant of the charge against him and of his right to the aid of counsel in every stage of the proceedings imported absolute verity and was required to be accepted as speaking the truth on collateral attack of the judgment of conviction by habeas corpus, since the presumption is that in preparing the record, official duty was regularly performed. Code Civ.Proc. § 1963, subd. 15; Pen.Code, § 987; U.S.C.A.Const. Amend. 6; Const.Cal. art. 1, § 13.

8. Criminal law 🔑641(1)

The right to counsel guaranteed by constitutional and statutory provisions, like any other legal right, may be invoked only in the course of orderly procedure, and a defendant who with an intelligent conception of the consequences of his act declines the aid of counsel prior to or at the commencement of his trial, is not entitled thereafter to interrupt and delay the hearing at any stage he deems advantageous merely to interpose a demand for legal assistance. Pen.Code, § 987; U.S.C.A.Const. Amend. 6; Const.Cal. art. 1, § 13.

9. Criminal law 🔑641(1)

Where defendant stated at the time of his arraignment that he did not need an attorney, the court was justified in taking him at his word, and his attitude at that time and his standing mute at the commencement of the trial when asked who was representing him were equivalent to a final declination of counsel and precluded defendant from again raising the question of his right to counsel when the trial was well under way. Pen.Code, § 987; U.S.C.A.Const. Amend. 6; Const.Cal. art. 1, § 13.

10. Criminal law 🔑641(1)

Whether a defendant has intelligently and competently waived his right to counsel depends on the particular facts and circumstances in each case including the background, experience, and conduct of the defendant. Pen.Code, § 987; U.S.C.A.Const. Amend. 6; Const.Cal. art. 1, § 13.

11. Criminal law 🔑641(1)

A defendant's prior encounters with the law and the consequent knowledge gained thereby place a greater burden on him when he asserts that he was not conversant with his constitutional right to counsel. Pen. Code, § 987; U.S.C.A.Const. Amend. 6; Const.Cal. art. 1, § 13.

12. Habeas corpus 🔑85(1)

Evidence showed that defendant intelligently and competently waived his right to counsel with full understanding of the consequences of his act, and hence he was not entitled to release on petition for a writ of habeas corpus on the ground that that right was denied him. Pen.Code, § 987; U.S.C.A. Const. Amend. 6; Const.Cal. art. 1, § 13.

13. Habeas corpus 🔑92(1)

In a habeas corpus proceeding the court considers only those grounds of illegality attacking the judgment alleged in the petition for the issuance of the writ, and the case is heard and determined on the issues framed by the pleadings. Pen.Code, § 1474.

14. Habeas corpus 🔑92(1)

The scope of inquiry on habeas corpus may under exceptional circumstances extend over the entire course of proceedings in the lower courts and may embrace additional evidence received by the Supreme Court, either directly or under an order of reference, but in considering the purport of the record on prior proceedings, erroneous opinions and conclusions are irrelevant, and immaterial matters are disregarded. Pen.Code, § 1474.

15. Habeas corpus 🔑85(1)

Where a defendant seeking release on habeas corpus contends that the trial court imposed on him and took advantage of his ignorance, any evidence touching on his intelligence, education, ability to comprehend his situation, and familiarity with court procedure is relevant and material. Pen. Code, § 1474.

16. Habeas corpus 🔑85(1)

On application for habeas corpus attacking validity of conviction on ground that defendant was denied his right to counsel, the full record of proceedings had up to the time defendant filed his original application was admissible as bearing directly on the issue of whether his waiver of counsel was intelligently and competently made or whether he was imposed on by the trial court, and the same was true of correspondence conducted by him with public officials including particularly his letter to the district attorney which was plainly indicative of his experience, education, and familiarity with court procedure at or about the time of proceedings wherein he stood mute. Pen.Code, § 987; U.S.C.A.Const. Amend. 6; Const.Cal. art. 1, § 13.

17. Evidence ⚿**179(3)**

On application for habeas corpus attacking validity of conviction on ground that defendant was denied his right to counsel, the proffer of a photostatic copy of defendant's letter to the district attorney plainly indicating his experience, education, and familiarity with court procedure at or about the time of proceedings wherein he stood mute was proper where original letter was in the custody of the district attorney. Code Civ.Proc. § 1855, subd. 3; Pen.Code, § 987; U.S.C.A.Const. Amend. 6; Const.Cal. art. 1, § 13.

◆

Proceeding in the matter of the application of Frank S. Connor for a writ of habeas corpus.

Petitioner remanded to custody and proceeding dismissed.

Frank S. Connor in pro. per.

H. Thomas Austern, of Washington, D. C., and Wayne M. Collins, of San Francisco, for petitioner.

Earl Warren, Atty. Gen., E. W. Mattoon, Asst. Atty. Gen., and J. Q. Brown and Frank Richards, Deputy Attys. Gen., for respondent.

SHENK, Justice.

On September 11, 1939, this court, without written opinion, denied an application of the petitioner for a writ of habeas corpus to secure his release from the state penitentiary. On December 18, 1939, a writ of certiorari was granted by the United States Supreme Court. Connor v. California, 308 U.S. 547, 60 S.Ct. 299, 84 L.Ed. 460. As the record on which this court acted, other than petitioner's application, had not been formally presented, a motion for diminution was entertained for the purpose of securing an authentic transcript which could be certified for use in the certiorari proceeding. In re Connor, Cal.Sup., 99 P.2d 248. The granting of the motion for diminution, however, did not result in settling the record and on May 13, 1940, there was received the order of the United States Supreme Court remanding the cause to this court for further consideration of the application in habeas corpus. Connor v. California, 309 U.S. 631, 60 S.Ct. 708, 84 L.Ed. 989. A return to the writ was thereafter filed together with a traverse to the return, and exceptions to and motion to strike certain parts thereof. The matter has also been heard, argued orally, and fully briefed by both parties.

In 1926, petitioner was sentenced to serve a thirteen and a half year penitentiary term for the crime of robbery. In July, 1931, he was released on parole. While on parole, and on January 18, 1932, he was arrested for further crimes alleged to have been committed on that day. Following preliminary arraignment and examination in the municipal court, and on February 16, 1932, an information was filed in the superior court charging him with four counts of robbery and one of grand theft, each count alleging a prior conviction of a felony, and with a sixth count charging possession of a revolver after a prior conviction. On February 18th petitioner was arraigned in the superior court on these charges, pleas of not guilty were entered, and trial of the cause was set for March 17, 1932. The trial resulted in a judgment of conviction, with consecutive sentences to state's prison on counts 1, 2, 3 and 4, and concurrent sentences on counts 5 and 6. No appeal was taken by petitioner from the judgment, but on October 31, 1933, and again on May 31, 1934, he moved in the superior court that the judgment be vacated. Both motions were denied. No appeal was taken from the order denying the first motion. On appeal from the order denying the second motion, it was affirmed. People v. Connor, 3 Cal.App.2d 642, 40 P.2d 316, petition for hearing in this court denied, February 14, 1935.

[1, 2] On August 10, 1939, petitioner's term of imprisonment under the thirteen and a half year sentence imposed by the conviction of 1926, expired. On August 21, 1939, he filed in this court the present application for a writ of habeas corpus, alleging as the sole ground for his release that throughout the period of his arraign-

ment, trial and conviction, the court failed to inform him of his right to counsel, or to appoint counsel to defend him, or to allow him a sufficient opportunity to procure legal assistance, all in alleged violation of fundamental rights guaranteed to him by the federal and state Constitutions, Const. U.S. Amend. 6; Const.Cal. art. 1, § 13, and in violation of section 987 of the Penal Code.

Under the general rule well established in this state, but which admits of some modification under exceptional circumstances, this contention cannot at this late date be made the basis of a successful collateral attack by habeas corpus upon the validity of the judgment. The point could have been urged by petitioner on an appeal from the judgment, but none was taken. It could also have been urged in the proceedings to vacate the judgment instituted in 1933 and 1934, but it was not, either in the trial court or on appeal. In re Connor, supra. It is not a good ground for discharge in this proceeding. In this state a defendant is not permitted to try out his contentions piecemeal by successive proceedings attacking the validity of the judgment against him. In re Drew, 188 Cal. 717, 207 P. 249; In re Connor, supra. Neither may the writ of habeas corpus be employed to serve the purposes of an appeal. In re Leonardino, 9 Cal.App. 690, 100 P. 708. The function of the writ, as described in the case last cited, "is to determine the legality of one's detention by an inquiry into the question of jurisdiction and the validity of the process upon its face and whether anything has transpired since it was issued to render it invalid. It is not designed to retry issues of fact or to answer the purpose of an appeal".

Again, in Re Murphy, 79 Cal.App. 64, 248 P. 1044, 1045, it is said: "The law appears to be well settled that upon a petition for a writ of habeas corpus the scope of the inquiry is limited to questions affecting the jurisdiction of the court, the sufficiency in point of law of the proceedings, and the validity of the judgment or commitment under which the prisoner is restrained. This inquiry is limited to the face of the proceedings. In other words, the alleged invalidity must appear upon the face of the judgment attacked by this method. 12 R.C.L. 1185, § 8, p. 1240, § 59; 13 Cal.Jur. 217, § 4, and cases there cited. In Ex parte Long, 114 Cal. 159, 45 P. 1057, it is stated: 'The inquiry to be had thereunder (on habeas corpus proceedings) does not extend beyond the question of jurisdiction and the validity of the process on its face.' People ex rel. Doyle v. Atwell, 232 N.Y. 96, 133 N.E. 364, 25 A.L.R. [107] 111."

In Re Maldonado, 97 Cal.App. 288, 275 P. 495, 496, a habeas corpus proceeding, the petitioner claimed that he had not been informed of his legal rights at the time of his arraignment. Denying him relief, the court stated: "The writ of habeas corpus is not a substitute for an appeal. 13 Cal.Jur. 217, § 4. Errors in the trial and denial of statutory rights which could be waived are grounds of appeal, but are not grounds for discharge on habeas corpus. 13 Cal.Jur. 236, § 17."

[3, 4] A like conclusion was announced in Re Gutierrez, 1 Cal.App.2d 281, 36 P.2d 712, 714. Petitioner there applied for a writ of habeas corpus upon the ground, among others, that "he was denied counsel and was not represented by counsel". Refusing to grant relief, the court said: "The proper method of presenting this objection is by appeal from the judgment. Ex parte Ah Sam, 83 Cal. 620, 24 P. 276; In re Maldonado, 97 Cal.App. 288, 275 P. 495. * * * Each of the foregoing rights is one that he could have waived, and the alleged denial of any one or all of them might properly have been raised by appeal but it is not a ground for discharge in this proceeding." See, also, Ex parte Max, 44 Cal. 579; Ex parte Ah Sam, 83 Cal. 620, 24 P. 276; Ex parte Long, 114 Cal. 159, 45 P. 1057; Matter of Application of Smith, 161 Cal. 208, 118 P. 710; In re Northcott, 71 Cal.App. 281, 235 P. 458; In re Culver, 84 Cal.App. 295, 257 P. 876; In re Ryley, 108 Cal.App. 544, 291 P. 847; In re West, 9 Cal.App.2d 125, 48 P.2d 983; People v. Bagasol, 22 Cal.App.2d 327, 332, 70 P.2d 970. In other words, while the right of an accused to counsel will be protected, it is a right which may be waived. Therefore, where the alleged denial of the right was not asserted on an appeal from a judgment of conviction, or, as here, on an appeal from an order denying a motion to set aside the conviction, it will be presumed—under the presumption of validity and regularity which attends every final judgment—that the requirements as to counsel were met.

[5, 6] In the federal courts the rule may be said to permit a more extended inquiry in habeas corpus. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 1025, 82 L.Ed.

1461, and cases cited. But even under that inquiry, which may embrace a complete review of the proceedings in the lower courts, full recognition is given to the presumption of validity and regularity of the judgment and to the burden of proof placed upon the petitioner. As stated in Johnson v. Zerbst, supra, "It must be remembered, however, that a judgment cannot be lightly set aside by collateral attack, even on habeas corpus. When collaterally attacked, the judgment of a court carries with it a presumption of regularity. Where a defendant, without counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of habeas corpus, the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional right to assistance of Counsel." See, also, United States v. Hill, D.C., 29 F.Supp. 890; Buckner v. Hudspeth, 10 Cir., 105 F.2d 396; Sedorko v. Hudspeth, 10 Cir., 109 F.2d 475; Walker v. Johnston, 9 Cir., 109 F.2d 436; Harpin v. Johnston, 9 Cir., 109 F.2d 434; Kelly v. Johnston, 9 Cir., 111 F.2d 613; Avery v. State of Alabama, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377.

In the present case the application of the federal rule would not avail petitioner. Indeed, an extended consideration of his contention on the merits, including an examination of the record, shows that he was both informed of his right to counsel, and afforded ample opportunity to secure counsel, but that he did not choose to avail himself of the privilege at any time when he might properly have done so.

[7] The docket entry recording the proceedings in the municipal court at the time of petitioner's preliminary arraignment of January 27, 1932, and preliminary examination of February 1, 1932, states: "Court informs defendant of the charge against defendant and of defendant's right to the aid of counsel in every stage of the proceedings." This statement is part of the printing in a printed form of docket sheet, which was used to record the proceedings had on January 27th and February 1st. At that time, according to an affidavit of the clerk of the court, it was customary to prepare the docket from the clerk's rough minutes, and after comparison of the two to insure accuracy, to then destroy the rough minutes. The clerk's affidavit also contained the averment that the rough minutes pertaining to petitioner's arraignment of January 27th had been destroyed. There is nothing in these facts, or in the method shown to have been employed in preparing the record, or in any other matter brought out by petitioner, which would cast a doubt upon the verity and authenticity of the docket entry stating that petitioner was duly informed of his right to counsel. The presumption is that in preparing the record, official duty was regularly performed. Code Civ.Proc., sec. 1963, subd. 15. The record imports absolute verity, and in this collateral proceeding must be accepted as speaking the truth. Halpern v. Superior Court, 190 Cal. 384, 212 P. 916; People v. Figueroa, 134 Cal. 159, 66 P. 202; Govea v. Superior Court, 26 Cal.App.2d 27, 78 P.2d 433. It is therefore of itself sufficient to refute petitioner's claim that he was then denied his constitutional right with respect to the aid of counsel.

The record further shows that at the time of petitioner's arraignment in the superior court on February 18, 1932, before the Honorable Elliot Craig, he was asked: "Have you an attorney?" and he replied: "I don't need any." He was then asked: "You want to represent yourself; is that the idea?" and replied: "The only thing I like—It don't make any difference to me. Go ahead." Following this pronouncement, petitioner stood mute. He refused to plead to the charges against him, and the court was therefore forced, in each instance to direct the clerk to enter a plea of not guilty. When the cause was called for trial before Honorable William C. Doran, on March 17, 1932, he asked: "Who represents the defendant?" One of the attorneys for the prosecution answered, "He has no counsel." The court then addressed petitioner directly, saying, "Who is your attorney?" As petitioner failed to answer, the bailiff said, "The judge is talking to you.", and the court repeated, "Have you an attorney?" Petitioner still stood mute and the court therefore directed that the trial proceed. It was not until the conclusion of the direct examination of the first witness, when petitioner was invited to cross-examine, that he suddenly found his tongue, stating that he wanted a lawyer and understood that Judge Craig had appointed one for him. The court immediately ordered a recess and, in the absence of the jury, questioned petitioner and examined the record of the arraignment proceedings in order to determine whether petitioner had been denied any right with respect to securing the aid of counsel.

After satisfying himself that petitioner had been given sufficient opportunity to procure legal assistance, but had refused to have an attorney, the court recalled the jury and ordered the trial to proceed. Thereafter throughout the duration of the hearing the petitioner harassed the court with repeated demands for counsel, so that the proceedings were punctuated with prolonged colloquies on the subject. The court, however, maintained its position that petitioner had had ample opportunity to secure counsel, and, having failed to do so, should not be permitted to take advantage of that fact during the course of the trial to interrupt the proceedings and secure a continuance to which he would not otherwise be entitled.

[8, 9] These rulings of the court, refusing to accede to belated demands of petitioner obviously interposed to delay proceedings and sway the jury, were not erroneous. The right to the assistance of counsel guaranteed by the constitutional and statutory provisions, like any other legal right, may be invoked only in the course of orderly procedure. A defendant who, with an intelligent conception of the consequences of his act, declines the aid of counsel prior to or at the commencement of his trial, is not entitled thereafter to interrupt and delay the hearing at any stage he deems advantageous merely to interpose a demand for legal assistance. People v. Goldenson, 76 Cal. 328, 341, 19 P. 161; State v. Fulco, 138 La. 995, 71 So. 134; Watkins v. Commonwealth, 174 Va. 518, 6 S.E.2d 670; People v. Bimbo, 369 Ill. 618, 17 N.E.2d 573; Marovich v. State, 202 Ind. 274, 173 N.E. 326. When petitioner stated at the time of his arraignment that he did not need an attorney, the court was justified in taking him at his word. Dietz v. State, 149 Wis. 462, 136 N.W. 166, Ann.Cas.1913C, 732; In re Connor, supra. His attitude, both at that time and at the commencement of the trial, was equivalent to a final declination of counsel (People v. Cowan, 38 Cal.App.2d 144, 100 P.2d 1079), and precluded him from again raising the question when the trial was well under way.

[10-12] Not only is it a settled rule in this state, as in other jurisdictions, that the right to counsel may be waived (People v. Rocco, 209 Cal. 68, 285 P. 704; People v. Rose, 42 Cal.App. 540, 183 P. 874; People v. Cowan, supra; In re Gutierrez, supra; In re Connor, supra; 16 C.J., § 2077, p. 821, 23 C.J.S., Criminal Law § 979, and cases cited in note), but the burden rests upon a petitioner seeking release by the extraordinary remedy of habeas corpus, to establish that he did not in fact competently and intelligently waive it. Johnson v. Zerbst, and other federal cases, supra. Whether the waiver has been intelligently and competently made "depends upon the particular facts and circumstances in each case, including the background, experience, and conduct of the accused." Buckner v. Hudspeth, supra [105 F.2d 397]; Johnson v. Zerbst, supra. Here petitioner failed to sustain the burden of establishing that he did not waive his right. Indeed, the facts and circumstances, including a consideration of his background, experience and conduct, show beyond doubt that there was a waiver, and that it was both intelligently and competently made. While petitioner professes to have been unfamiliar with court procedure, and charges that the court took advantage of his ignorance, the evidence is to the contrary. Petitioner had formerly been a bank clerk. He was neither a dullard nor an uneducated man. The proceedings which resulted in his prior conviction of robbery and his penitentiary confinement had given him at least some knowledge of criminal court procedure. As stated in United States v. Hill, supra [29 F.Supp. 891], his "prior encounters with the law, and the consequent knowledge gained thereby, place a greater burden upon him when he asserts that he was not conversant with his constitutional right to counsel". See, also, Harpin v. Johnston, supra.

On preliminary examination in the municipal court, where petitioner appeared without an attorney on February 1, 1932, he intelligently declined to cross-examine witnesses or interpose a defense. His conduct on that occasion was so strikingly different from his conduct at the time of trial as to suggest that the latter was a pose assumed for the purpose of embarrassing the court in the presence of the jury. Shortly prior to his last conviction he wrote a letter from the county jail where he was confined, to the district attorney, setting forth in detail how it would be to his benefit to return to San Quentin as a parole violator, and requesting the transfer. This letter stated that the charges left him with no defense and showed that he was fully and completely aware of every phase of his situation and knew what course of action he wished to pursue.

Subsequent to conviction, he was represented by counsel in the preparation and presentation of the motion of 1934 to vacate the judgment, with a supporting brief. Thereafter, desiring to appeal from the order denying the motion, he filed an application to substitute himself as counsel in place of his attorneys of record on the ground that they had withdrawn from the further handling of his case, and that he had "no alternative but to prosecute his appeal in propria persona" and that he was "competent to defend himself in the pending appeal". After the substitution he competently, albeit unsuccessfully, prosecuted the appeal to final determination. People v. Connor, supra. In 1937 he corresponded with the county clerk relative to securing a transcript of prior proceedings, and in 1939 he initiated the present proceeding by filing, in propria persona, a well-prepared application for habeas corpus, with points and authorities in support thereof. This document, as well as the correspondence, exhibits a considerable knowledge of the law and of court procedure.

The record contains an abundance of data attesting petitioner's learning and ability and leads to the inescapable conclusion that he intelligently and competently waived his right to the assistance of counsel with full understanding of the consequences of his act, and therefore he is not entitled to release on the ground that such right was denied him.

[13] The briefs filed subsequent to oral argument by petitioner's present counsel raise several new points. The closing brief in particular attacks the validity of an amendment to the commitments under which petitioner is confined, and questions the propriety of the action of the prison board in deferring the running of the sentences under his present convictions until expiration of the sentence on his prior conviction. Petitioner did not mention these questions in his application. In a habeas corpus proceeding the court considers only those grounds of illegality alleged in the petition for the issuance of the writ. The case is heard and determined on the issues framed by the pleadings. Pen.Code, sec. 1474; Ex parte Walpole, 84 Cal. 584, 24 P. 308; Ex parte Rosenheim, 83 Cal. 388, 23 P. 372; 25 Am.Jur., p. 236, § 126, citing Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A.L.R. 1172; 13 Cal.Jur., § 39, p. 263, § 52, p. 274; 29 C.J., § 187, p. 163. But, notwithstanding this rule, our review of the record discloses that the contentions are without merit.

On oral argument exceptions interposed by petitioner's counsel to matters contained in the return to the writ, his motion to strike portions thereof, and his objections to evidence, were taken under submission.

The return to the writ contains a complete record of prior proceedings, that is, a copy of the docket record of the preliminary arraignment in the municipal court, a copy of transcript of proceedings on preliminary examination in that court, a copy of the transcript of proceedings on arraignment, trial, and sentence in the superior court, copies of amended commitments, certificates of clerks of the superior court and District Court of Appeal showing disposition of the motions to vacate the judgments, and copies of correspondence with petitioner relative thereto. In addition certain documents, including a photostatic copy of petitioner's letter to the district attorney, already referred to herein, were offered in evidence.

Petitioner objects to and seeks to strike all portions of the record which relate to matters occurring prior or subsequent to his arraignment and trial in the superior court on the ground that they are irrelevant and immaterial. Other portions of the record, he contends, are repetitious and have no bearing on the issues. Exception is taken to numerous remarks of the trial judge on the ground that they merely represent his personal opinions and conclusions. The phrase "in propria persona", inserted after petitioner's name in transcript headings, is declared to be a mere conclusion of the court reporter.

These numerous exceptions and objections merit no detailed discussion. Counsel have stipulated that except for the municipal court docket sheet, the exhibits printed in the return to the writ are true and correct copies of original documents. The printed copy of the docket sheet has been supplemented by introduction in evidence of a photostatic copy, showing what entries are a part of the printed form and what are written in by hand. Petitioner's attack upon this docket record has already been held to be groundless.

[14, 15] The scope of inquiry on habeas corpus in this state may, as above stated, under exceptional circumstances, extend over the entire course of proceedings in the lower courts (In re Lake, 65 Cal.App. 420, 224 P. 126; In re Friday, 138 Cal.App. 660, 32 P.2d 1117; In re Connolly, 16 Cal. App.2d 709, 61 P.2d 490, and cases cited), and may embrace additional evidence received by this court either directly or under an order of reference. In re Mooney, 10 Cal.2d 1, 73 P.2d 554. In considering the purport of the record of prior proceedings, erroneous opinions and conclusions are irrelevant and immaterial matters are disregarded. In defining the scope of inquiry in the federal courts it is stated in Frank v. Mangum, 237 U.S. 309, 331, 35 S.Ct. 582, 589, 59 L.Ed. 969, that upon an application for a writ of habeas corpus the court has the right "to look beyond forms and inquire into the very substance of the matter, to the extent of deciding whether the prisoner has been deprived of his liberty without due process of law, and for this purpose to inquire into jurisdictional facts, whether they appear upon the record or not; that an investigation into the case of a prisoner held in custody by a state on conviction of a criminal offense must take into consideration the entire course of proceedings in the courts of the state, and not merely a single step in those proceedings * * *." Thus where a petitioner contends that the trial court imposed upon him and took advantage of his ignorance, any evidence touching upon his intelligence, education, ability to comprehend his situation, and familiarity with court procedure is relevant and material. Johnson v. Zerbst, and other federal cases, supra; Logan v. Johnston, D.C., 28 F.Supp. 98.

[16, 17] In the present case the full record of proceedings had up to the time petitioner filed his original application herein bears directly upon the issue of whether his waiver of counsel was intelligently and competently made, or whether he was imposed upon by the trial court. The same is true of correspondence conducted by him with public officials, including particularly his letter to the district attorney, hereinbefore referred to, which is plainly indicative of his experience, education, and familiarity with court procedure at or about the time of the proceedings wherein he apparently feigned ignorance or stupidity by standing mute. A photostatic copy of this letter was offered in evidence by respondents on the hearing before this court. In addition to objecting to its introduction upon grounds already discussed, petitioner contended that no opportunity was afforded for its identification and that it constituted secondary evidence of an unsubstantial character. As the original letter was in the custody of the district attorney, a public officer, the proffer of a photostatic copy was not improper. Code Civ.Proc. sec. 1855, subd. 3. The authenticity of the writing, which petitioner did not deny, was attested by an affidavit of a deputy district attorney. A comparison of that writing and of petitioner's characteristic and individual signature, with the signature placed by him on his application for a writ of habeas corpus herein affords further and satisfactory evidence of identification. Code Civ.Proc. sec. 1944.

Petitioner's exceptions and objections to the evidence are overruled. His motion to strike is denied. The petitioner is remanded to custody and the proceeding is dismissed.

We concur: GIBSON, C. J.; CURTIS, J.; CARTER, J.; EDMONDS, J.; MOORE, J. pro tem.; MARKS, J. pro tem.

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42 Cal.App.2d 12

In re MADDALENA'S ESTATE.

MADDALENA et al. v. KELLER.

Civ. 12835.

District Court of Appeal, Second District, Division 2, California.

Dec. 16, 1940.

1. Executors and administrators 🔑151

Where administrator, who took possession of farm and continued farming operations, advised court, by his petition for authority to borrow money, of his purpose to plant a large acreage of alfalfa, and court authorized crop mortgage to obtain money for seed, labor and rental of equipment, without objection from heirs, payments for seed, oil, fuel and power, and tires and battery for automobile were properly approved.

2. Executors and administrators 🔑258

Payments by administrator out of insurance money received for movables of others lost in fire on decedent's estate were properly approved, in absence of showing of bad faith in settling claims therefor.

3. Executors and administrators 🔑216(1)

Payments by administrator to widow in excess of widow's allowance were properly approved, as partial payments to widow for services on farm belonging to estate.

4. Executors and administrators 🔑258

Where court authorized administrator to borrow money for purpose of purchasing a new pump and drilling a new well, but administrator was unable to obtain loan and proceeded to have the improvements made without borrowing the money, payments for new well, pump and pipes were properly approved. Probate Code, § 929.

5. Executors and administrators 🔑132

Payments by administrator for construction of new house with insurance money received when old house was destroyed by fire were properly approved. Probate Code, § 929.

6. Executors and administrators 🔑93(1)

An administrator is required by statute to obtain specific authority to carry on the business of a decedent, but if the administrator acts in good faith and as a cautious and prudent man would act under similar circumstances, he will not be held personally liable for expenses incurred by management undertaken without prior specific authority, though his operations prove to be a detriment to the estate. Probate Code, § 572.

7. Executors and administrators 🔑132

Payments by administrator, with implied authority of the court and without objection from heirs, for reseeding acreage theretofore planted in alfalfa, for repairing well and pump in order to irrigate neglected acreage and for rebuilding house which had been destroyed by fire were not improperly approved because administrator took possession of farm and proceeded to carry on farming operations without first obtaining a court order to do so, since court could ratify act which it had power to authorize in the first place. Probate Code, §§ 572, 581.

8. Executors and administrators 🔑76

The probate court has power to supervise the conduct of administrators and is the tribunal to approve or disapprove if they neglect to procure authorization to perform acts.

9. Executors and administrators 🔑510(10)

The fact that economic losses may result to the beneficiaries is not sole criterion by which to measure quality of an administrator's acts, and appellate court will not interfere with trial judge's approval of action taken without prior court approval, in absence of a showing of bad faith on part of administrator or of an abuse of discretion by trial court in approving his account. Probate Code, §§ 572, 581.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceeding in the matter of the estate of Antone Maddalena, wherein Angelena Maddalena and others filed objections to the account and report of William D. Keller, administrator. From an order approving the account and report, the objectors appeal.

Affirmed.

Ratzer & Bridge, of Los Angeles, for appellant Angelena Maddalena.

Henry E. Bianchi, of Los Angeles, for appellants Peter Maddalena, Rocco Maddalena and Lillie Maddalena Toni.

Bay, Sturges & Thompson, of Los Angeles, for respondent.

MOORE, Presiding Justice.

This appeal is taken by the heirs at law from an order of the court approving the account current and report of the administrator.

Antone Maddalena departed this life in August of 1937 leaving about 80 acres of land near the city of Lancaster, together with a small residence, miscellaneous farming equipment, livestock and personal property. William D. Keller, a stranger in blood to the decedent, qualified as administrator on or about October 7, 1937, and continued farming operations on the property until he filed his account. When he took charge he found 20 of said acres growing alfalfa. Thirty acres thereof had been formerly planted to the same crop but it had deteriorated to grazing land. His home was a small frame house, partly without floors. Nearby was a well with an old pump which supplied water at the time sufficient for the irrigation of the 20 acres.

In addition to the appellants, decedent left surviving him his wife Carmela who, about the month of December, 1937, was married to Noah Schism. The two continued to reside in the old home and in the new one which later replaced it.

When the administrator took possession of the estate, it was indebted in a sum not to exceed $750. Without first obtaining an order to do so he proceeded to carry on the farming operations, to make certain permanent improvements on the land and to enlarge the productive area. Also he caused the house and contents to be insured for $750. All this resulted in numerous expenditures, and appellants have objected to some 92 items of the expenses so incurred.

On February 12, 1938, the administrator applied to the court for authority to borrow $1,000 for the purpose of paying a power bill in the sum of $250, for repairing the water system, about $200, for the purchase of alfalfa seed in the sum of $250, for labor in the sum of $200 and for rental of equipment in the sum of approximately $225. Notice was served upon all the objectors except Angelena, who had not yet appeared. On or about March 4, 1938, without objection by any one, the court made its order granting said application. Subsequent thereto the administrator executed his note and a crop mortgage for the $1,000 in favor of the Bank of America. In the same month the water supply began to fail, the pump collapsed and the well ceased to produce.

The account was filed April 15, 1939. Upon hearing the objections to the account the court made a finding that the pump and well were both in need of repair; that it was impossible to obtain sufficient water to irrigate the land; that it became necessary to install a new pump and to drill a new well in order to obtain sufficient water supply for the farm.

In view of the failure of the well and pump, the administrator on June 30, 1938, petitioned the court for authority to borrow $2,000 for the purpose of purchasing a new pump and of drilling a new well, which petition contained a statement of facts showing the necessity for the money, the aridity of the land and the futility of attempting to sell the land without a water supply. Notice of said petition was served upon the parties interested, including appellants, and the order was entered. The bank refused to loan the $2,000 and efforts to sell the farm failed. Thereupon the administrator, conceiving that the authority to borrow money for the purpose was authority to make the improvements, acted accordingly. The well was re-drilled and the new pump was installed at a cost of $2,780.

During his operations the administrator paid the old bills left by decedent due to the Southern California Edison Company and thereafter incurred bills for power used upon the farm in the sum of $515.84; gas and oil, $84.96; seed, $536.75, and labor, $218.10; total, $2,145; while his gross receipts from the sale of alfalfa were $1,224.27, making the loss sustained by his farming operations $920.86.

The old house having been destroyed by fire in December of 1937, the administrator received the sum of $750 in insurance, out of which he paid the balance, $88.02, due upon a refrigerator, $121.52 for the clothing of Carmela and $25 for the tools of one Towne, all of which were destroyed in the fire. With the balance left, supplemented with about $70, he built a new house at a cost of $584.69.

While the court made an order for a widow's allowance of $25 per month for four months, the administrator paid the widow, besides the amount paid for the loss of her clothing, the sum of $152.44, supplied her with groceries in the sum of $218.10 and allowed her the use of the home from October of 1937 until April 28, 1939, the date of the filing of the account.

Of the items objected to, three are for alfalfa seed ($290), four are for permanent improvements ($197.50), five are for payments to the widow ($91.50), three are for oil and gas ($61.50), two are for electric power ($199.58), four are for losses of personal property belonging to others ($137.53), one is for tires and battery for the automobile, seventy-one are for labor ($1,245) and two are for wire and water ($20.75) used in baling the hay.

[1] As to the item for seed, the administrator advised the court by his petition for authority to borrow $1,000 in

February of 1938 of his purpose to plant a large acreage in alfalfa. Objectors knew of it, made no objection and the court authorized the crop mortgage to obtain money for seed, labor and the rental of equipment. The items for oil, fuel and power and for tires and battery fall in the same category or they were used to "carry on" the farming operations. If they were incurred in planting the extra 30 acres the objectors had notice that it was about to be done and the court authorized the purchases; if they were incurred in the course of farming the 20 acres they were properly chargeable as operation expense and will be disposed of on the same basis as items of "labor".

[2] The four items of payments for chattels destroyed in the fire were properly approved by the trial court. For an administrator to receive insurance money for movables of others lost in a fire on decedent's estate and to withhold it from those who suffered the losses would have been sheer dishonesty. In the absence of a showing of his bad faith in settling claims of this character, no good reason appears why the court should not have approved such payments.

[3] Nothing in the objections or in the bill of exceptions demonstrates the illegality or impropriety of the payments to the widow of $91.50. Since they are in excess of the widow's allowance they may have been deemed partial payments to the widow for her services in cooking for and serving meals to the laborers employed on the farm. Such expenditures come within the same category as items for labor.

[4, 5] As to the four items for improvements, they were payments either for the new well and the new pump and pipes, which the court had expressly or impliedly authorized, or for the construction of the new house, which was both a necessity and a permanent improvement of the realty and was substantially paid for out of the insurance money received for the old house. The payment of these claims as well as those for losses sustained by occupants of the house were correctly approved by the court, so long as it was convinced of the good faith of the administrator. If the debts of a decedent may in good faith be paid without verified claims (Prob.Code, sec. 929; Estate of Machado, 186 Cal. 246, 199 P. 505; In re Houston's Estate, 205 Cal. 276, 270 P. 939, 60 A.L.R. 730), no good reason appears why losses suffered by others by reason of a fire on decedent's lands and expenditures on account of necessary permanent improvements of the estate should not have been approved by the court.

[6-9] The seventy-one items of charges for labor and the two items for wire and water appear to have been incurred as farming and harvesting expenses. This brings us to the primary contention of the objectors, namely, that "in the absence of authority conferred by will of a deceased or by a probate court" an administrator has no right to make improvements not necessary to the preservation of the estate.

In support of their contention appellants invoke the doctrine announced in Estate of Rose, 80 Cal. 166, 22 P. 86; In re Estate of De Rome, 175 Cal. 399, 165 P. 919; and In re Estate of Ward, 127 Cal.App. 347, 15 P.2d 901. These cases hold that where he does not first obtain an order "to continue the operation of the decedent's business", Prob.Code, sec. 572, the administrator assumes the peril of the management of the business of the estate and he does not subject the estate to the liabilities growing out of his conduct of the enterprise. While the cited code section does require the administrator to obtain specific authority to carry on the business of a decedent, yet, even though his labors prove to be a detriment to the estate, the better-seasoned authority holds that if he acts in good faith and as a cautious and prudent man would act under similar circumstances, he will not be personally liable for the expenses incurred by his management. In re Estate of Houston, 205 Cal. 276, 283, 270 P. 939, 60 A.L.R. 730; In re Clos' Estate, 110 Cal. 494, 42 P. 971; In re Moore's Estate, 96 Cal. 522, 528, 31 P. 584. If the administrator in this case had undertaken to subdue an utterly untouched desert and to plant it for the first time, the rule of In re Estate of De Rome, supra, might with propriety be applied. But such is not the case. Twenty acres of alfalfa were flourishing, while 30 acres were in a state of neglect. He undertook to replant land which had theretofore produced crops, to make repairs to the well and pump which had long been in use, and he rebuilt the house, which was indispensable to the best interests of the estate. He was obliged to keep the pump and well in repair, Prob. Code, sec. 581, and he conceived it to be his duty to re-seed and irrigate the neglected 30 acres. He was impliedly authorized to do these things when he was granted an order to borrow the $1,000, and he was virtually authorized to re-drill the well and to replace the old pump by the authorization to borrow the $2,000.

As he proceeded to carry out his undertakings the objectors complacently observed the procession of events until they discovered that the price offered for the land was far below its appraised value. The estate having received full benefit of the expenditures, it was inequitable to deny reimbursement to the administrator. In re Estate of Houston, supra; In re Clos' Estate, supra. To procure an order to proceed before undertaking to make the repairs and to do the farming was not indispensable. If his acts and the expenditures are approved "there is no rule of law which will deprive the court of the power to reimburse him". In re Moore's Estate, 88 Cal. 1, 25 P. 915, 916. If the court has the power to authorize an administrator to perform an act, it has the power to ratify the act when done without a previous order. The probate court is vested with power to supervise the conduct of administrators. If they neglect to procure authorization to perform acts, that court is the tribunal to approve or disapprove. The fact that economic losses may result to the beneficiaries is not the sole criterion by which to measure the quality of the administrator's act. In the absence of a showing of bad faith upon his part or of an abuse of discretion by the trial court in approving the account, it would be inappropriate for the appellate court to interfere with the action of the trial judge. For these reasons the court's action in overruling the objections must be sustained.

The complaint that no proper inventory has been filed and that certain items of personal property have never been accounted for will come before the superior court when the new inventory has been filed as ordered at the hearing of the account.

The order is affirmed.

We concur: WOOD, J.; McCOMB, J.

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42 Cal.App.2d 64

GUMP v. GUMP.

Civ. 11557.

District Court of Appeal, First District, Division 2, California.

Dec. 18, 1940.

1. Divorce ⚷184(10)

In suit to set aside judgment of divorce, whether evidence was sufficient to support finding of reconciliation before entry of final decree could not be determined by the reviewing court as a pure question of law upon reading the printed record, but appellant was required affirmatively to show where trial court made error.

2. Divorce ⚷167

In proceeding to set aside judgment of divorce, whether subsequent to the entry of interlocutory decree the parties became reconciled and lived together or cohabited as man and wife was for the trial judge, since "reconciliation" like "condonation" is a state of mind to be determined from all the evidence including rational inferences.

See Words and Phrases, Permanent Edition, for all other definitions of "Condonation" and "Reconciliation".

3. Divorce ⚷167

Evidence authorized setting aside of final decree of divorce on ground that subsequent to entry of interlocutory decree parties became reconciled and lived together as man and wife.

4. Divorce ⚷167

Where complaint alleged that final decree of divorce was entered at the request of husband without wife's knowledge and after parties had become reconciled, and evidence supported allegations, final decree was properly set aside notwithstanding that fraud in procurement of decree was not pleaded, since concealment of true facts was against public interest and a "fraud" upon court and it would be presumed without special pleading or proof that if the court had been informed of the circumstances alleged, it would have refused to enter the decree.

See Words and Phrases, Permanent Edition, for all other definitions of "Fraud".

5. Judgment ⚷443(1)

Equity will relieve an injured party from the effect of a judgment procured by extrinsic fraud.

6. Divorce 🔑167

Where after entry of interlocutory decree, and after parties had been reconciled, final decree of divorce was entered at request of husband and without wife's knowledge, wife properly prosecuted suit in equity to vacate the judgment procured by the extrinsic fraud of the husband notwithstanding that there was available to her in the principal action a motion to vacate under statute. Code Civ.Proc. § 473.

7. Appeal and error 🔑1008(1)

Contention that in equitable actions by wife against husband for revision of a property settlement agreement and to set aside a final decree of divorce, wife was estopped by her conduct in that she was guilty of laches in failing to commence her action until six months after entry of the final decree, raised questions of fact within the province of the trial court to decide.

8. Divorce 🔑156

Reconciliation and cohabitation avoid any contract made for the parties by an interlocutory decree of divorce with respect to property rights.

9. Divorce 🔑167

Where after entry of interlocutory divorce decree moneys in the nature of alimony paid by husband's father for benefit of husband were used in part for joint living expenses of husband and wife, and whatever sums received by wife after the entry of the final decree were taken in contemplation of husband's assurances to her that reconciliation was complete and wife did not receive anything more than she was entitled to as a wife, wife was not "estopped" by her conduct from maintaining a suit to set aside final divorce decree entered after reconciliation.

See Words and Phrases, Permanent Edition, for all other definitions of "Estopped".

10. Divorce 🔑167

Where husband and wife became reconciled after entry of interlocutory decree and husband thereafter without consent or knowledge of the wife secured entry of final decree, wife in delaying some two years in bringing suit to set aside the final decree and for property settlement was not barred by "laches" where husband was not shown to have been injured by the delay since an essential element of the plea of "laches" is injury resulting from delay.

See Words and Phrases, Permanent Edition for all other definitions of "Laches".

11. Evidence 🔑91

When laches does not appear affirmatively on the face of the record, it is incumbent upon the party claiming it to prove his claim.

Appeal from Superior Court, Los Angeles County; Georgia P. Bullock, Judge.

Two actions by Hela Gump against Richard B. Gump for rescission of a property settlement agreement and to set aside a final decree of divorce. From a judgment of the Superior Court of Los Angeles County in favor of the plaintiff, defendant appeals.

Affirmed.

Clarence Hansen, of Los Angeles, for appellant.

Louis C. Runge and Kent Rogers, both of Los Angeles, for respondent.

NOURSE, Presiding Justice.

Two actions were filed against the defendant—one for the rescission of a property settlement agreement, and one to set aside a final decree of divorce. The actions were consolidated for trial and plaintiff had one judgment granting her the relief prayed for in each action.

The defendant herein commenced a suit for divorce against this plaintiff in February, 1936. His wife filed a cross-complaint. A property settlement was executed by the parties, and, on March 19, 1936, an interlocutory decree of divorce was entered on the cross-complaint. On March 31, 1937, a final decree of divorce was entered at the instance of the husband while the parties were living together openly as husband and wife. The payments in the nature of alimony called for by the property settlement were all made for the benefit of the husband by his father, and a full release was taken from this plaintiff of all claims arising under the agreement.

On this appeal the first two points raised by appellant are that the evidence does not support the finding that the parties were reconciled before the entry of the final decree. Upon his statement of the evidence the question would appear to be debatable. But, when this question is raised, we must look to the evidence supporting the finding as well as to that which is contradictory. With the exception of the denials of the appellant, which were generally in the nature of a failure of recollection, the witnesses testified that from about May 1, 1936, to about March 1, 1937, the parties were constantly in the company of each other and had marital intercourse on many occasions; that, from about March 1, 1937, to about May 1, 1937, the parties continuously lived together, part of the time in an apartment maintained by the wife, and later in an apartment maintained by the husband. They freely cohabited and conducted themselves as husband and wife. The parties were living in Hollywood where both were engaged in a mutual struggle to make a living—the appellant as a song writer, the respondent as an actress. Following the entry of the interlocutory decree the wife shared with the husband her food, her living quarters, and her alimony. The respondent testified that, from about the time of the entry of the interlocutory decree, the appellant frequently urged a reconciliation, and that she heeded these solicitations about February 3, 1937, and that later she moved into his apartment and lived with him until after the entry of the final decree of divorce. A Mr. Trebitsch occupied another room in the same apartment. He paid one-third of the rent of the apartment, and the appellant paid two-thirds. During this period the home of the husband was the only known residence of the wife, and the place to which her mail was addressed. It was in this manner that she received notice of the entry of the final decree, when she and the appellant were awakened at about 11:30 a. m. by the delivery of the morning mail. She testified: "Mr. Gump and I were still sleeping when Mr. Trebitsch came in and brought my mail and it was the final decree and in an open envelope and I did not pay any attention to it, I just discarded it and Mr. Gump didn't pay any attention to it either, he just glanced at it and said, 'Oh, that is nothing.'" She also testified that she continued to live with the appellant in this apartment for some weeks following the entry of the final decree, and that she was led to believe from his conduct that this decree was void and that they had become reconciled.

[1-3] The relations of the parties during the periods in which the trial court found there was marital cohabitation were testified to by other witnesses. It is true that some of the evidence of cohabitation related to a period after the entry of the final decree, but much of it tended to prove a reconciliation prior to that, and no other finding would have been supported by the evidence. The question whether these facts are sufficient to support the finding of reconciliation cannot be determined by the appellate court as a pure question of law upon reading the printed record. The appellant must affirmatively show where the trial court made error. The correct rule is stated in Ruggles v. Bailey, 15 Cal.App.2d 555, 556, 59 P.2d 837, as follows: "'Reconciliation, like condonation, is a state of mind to be determined from all the evidence including rational inferences.' Keller v. Keller, 122 Cal.App. 712, 715, 10 P.2d 541. 'The real question before the court was whether the circumstances as a whole showed a mutual intention to effect a reconciliation and unite in mending the break in the matrimonial yoke. This was a question of fact for the determination of the judge, who had the parties before him and patiently listened to each.' Keller v. Keller, supra." Here the respondent testified that the parties agreed to a reconciliation and resumed their marital relations. The appellant testified that they did not, but he was contradicted by other witnesses in material portions of his testimony. If for this reason the trial court rejected his testimony on the matter of reconciliation and believed the testimony of the respondent, the appellant may not say now that the finding is not supported by the evidence.

[4] The appellant argues that it was error to set aside the final decree because fraud in its procurement was neither pleaded nor proved. In this the appellant is in error. The complaint alleged that the final decree was entered at the request of appellant and without the respondent's knowledge or consent, and after the parties had become reconciled. The evidence proved these allegations. It will be presumed, without special pleading or proof that, if the court had been informed of these circumstances, it would have refused to enter the decree. A fraud upon the court was thus pleaded and proved, and the strict rules applying to the pleading of fraud generally are not controlling under these circumstances. The interest of the state in the preservation of the marital relation

makes it an interested party in divorce proceedings and any action of the principals which conceals the true facts and circumvents this interest is against the public policy and is a fraud upon the court. The rule is stated in McGuinness v. Superior Court, 196 Cal. 222, 230, 237 P. 42, 45, 40 A.L.R. 1110, as follows: "It was also extrinsic fraud in so far as the court itself granting such decree was concerned, since it was effected through concealment from the court in an ex parte proceeding of facts which the defendant in said action was bound to disclose, and which, if disclosed, would have rendered improper the granting and impossible the procurement of such final decree."

[5, 6] In the same connection the appellant argues that the relief granted was improper because, though the action purported to be in equity, it sounded in law and should have been treated as a motion made under section 473, Code of Civil Procedure, to set the decree aside. The same point was decided adversely in Baker v. Baker, 217 Cal. 216, 217, 18 P.2d 61, where the court said: "It is settled that equity will relieve an injured party from the effect of a judgment procured, as was the decree here vacated, by extrinsic fraud. Sohler v. Sohler, 135 Cal. 323, 67 P. 282, 87 Am.St.Rep. 98; Bacon v. Bacon, 150 Cal. 477, 481, 89 P. 317; Simonton v. Los Angeles T. & S. Bank, 192 Cal. 651, 656, 221 P. 368; Jeffords v. Young, 98 Cal.App. 400, 404, 277 P. 163. The fact that a party injured by a fraudulent judgment may move in the principal action to have the same set aside does not oust equity of its jurisdiction in this particular. The remedies are distinct and cumulative. The decisions are numerous to the effect that a suit in equity to vacate a judgment procured by extrinsic fraud may be prosecuted by the injured party, even though there be available to him in the principal action a motion to vacate under section 473 of the Code of Civil Procedure."

[7-9] Finally it is argued that the respondent is estopped by her conduct and that she is guilty of laches in failing to commence her action until six months after the entry of the final decree. Both of these questions are primarily questions of fact and hence within the province of the trial court to decide. As to the defense of estoppel, it was held in the early case of Wells v. Stout, 9 Cal. 479, 491, that the reconciliation coupled with cohabitation in pursuance thereof operates to avoid the agreement for separation. This doctrine was approved and extended in Peters v. Peters, 16 Cal.App.2d 383, 386, 387, 60 P.2d 313, 315. "The effect of the reconciliation is to avoid any contract made for the parties by an interlocutory decree with respect to property rights * * *." (Citing cases.) Evidence was offered to show that the moneys which respondent received from appellant's father in the nature of alimony were used in part for the joint living expenses of these parties during the period following the interlocutory decree, and that whatever portion was received by respondent after the entry of the final decree was taken in contemplation of appellant's assurances to her that the reconciliation was complete. There is no showing that she received under the agreement anything more than she was entitled to as the wife of appellant. This evidence fully supports the finding against appellant's claim of estoppel.

[10, 11] The question of laches may be decided upon this simple principle of settled law—that when laches does not appear affirmatively on the face of the record it is incumbent upon the party claiming it to prove his claim. One essential element of the plea of laches is injury resulting from the delay. 10 Cal. Jur. 530. The appellant has not met this burden of proof.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

42 Cal.App.2d 45

JONES v. WILTON.

Civ. 12131.

District Court of Appeal, Second District, Division 1, California.

Dec. 17, 1940.

Hearing Denied Feb. 13, 1941.

1. Appeal and error 🔑907(3)

Where an appeal is presented on the judgment roll alone, all intendments must be made in support of the judgment, and all proceedings necessary to its validity will be presumed to have been regularly taken.

2. Appeal and error 🔑907(3)

Where an appeal was taken on the judgment roll alone, the reviewing court was required to assume that evidence sufficient to support findings was presented at the trial.

3. Appeal and error 🔑1071(6)

In attorney's action on an agreement to recover for services rendered, finding that agreement was executed for a valuable consideration, read in conjunction with other findings favorable to attorney, negatived defendant's theory that he was induced by false and fraudulent representations to execute agreement, and overcame presumption of invalidity of agreement which was executed while relationship of attorney and client existed, and hence trial court's failure to find specifically on the issue of fraud did not constitute prejudicial error.

4. Appeal and error 🔑1071(6)

Where findings are made on issues which determine a cause, other issues become immaterial and a failure to find thereon does not constitute prejudicial error.

5. Attorney and client 🔑166(1), 167(4)

In attorney's action on an agreement to recover for services rendered, defendant had burden of proof with respect to allegations of fraud inducing the execution of the agreement set up in a separate defense, and the trial court having found each allegation of the amended complaint to be true must necessarily have found adversely to that defense, even though findings were made thereon.

6. Appeal and error 🔑1071(6)

Where a judgment is supported by the findings, it is not prejudicial error to fail to find on an issue, the burden of sustaining which rests on appellant, if a finding thereon must necessarily have been adverse to him.

Appeal from Superior Court, Los Angeles County; H. S. Schaffer, Judge.

Action by Mark F. Jones against Hugh Wilton to recover fees for professional services rendered defendant, according to an account stated and an agreement for payment. From a judgment for plaintiff, defendant appeals on the judgment roll alone.

Affirmed.

Calvin L. Helgoe, of Los Angeles, for appellant.

W. L. Engelhardt and A. G. Divet, both of Los Angeles, for respondent.

YORK, Presiding Justice.

This appeal from a judgment in favor of respondent, an attorney at law, is prosecuted upon the judgment roll alone.

The complaint alleges that prior to September 5, 1928, respondent had rendered professional services on behalf of appellant, and that on said date an account was stated between them and an agreement executed by the terms of which appellant acknowledged he was indebted to respondent in the sum of $20,000 for such services; and for the purpose of securing the payment thereof, he agreed to assign to respondent certain trust deeds until the total assignment aggregated $50,000, at the same time guaranteeing that respondent should receive therefrom the sum of $20,000 with interest within thirty-six months of the date of execution of said agreement. He also guaranteed the payment of such sum irrespective of whether or not respondent received anything from the trust deeds. It is also alleged that pursuant to the agreement appellant did assign or cause to be assigned one trust deed in the sum of $10,000 which was later rendered valueless by the foreclosure of a prior lien, and that no part of said sum of $20,000 was ever paid or satisfied in any manner. A copy of the agreement was attached to the complaint and marked Exhibit "A".

The answer denied the indebtedness and set up the following separate defenses to the action: (1) that there was no consideration for the agreement; (2) that a subsequent oral contract amounting to a rescission of the original agreement had been fully executed by the parties whereby certain real and personal property was conveyed to and accepted by respondent in full accord and satisfaction of any claims he might have had under the original agreement; (3) that payment had been made of all sums due under the agreement; (4) that said agreement provided that before it should become effective there should be assigned to respondent not less than $50,000 in first trust deeds and mortgages, and that no part of them had been assigned to respondent; (5) that the action is barred by section 337 of the Code of Civil Procedure.

At the time of trial, appellant by leave of court filed an amendment to his answer to the first amended complaint, and as a seventh separate and distinct defense alleged that false and fraudulent representations were theretofore made by respondent to the effect that "he would not enforce said agreement but would use it only to protect defendant in case defendant's creditors attempted to collect against defendant's properties or holdings and would act as trustee to collect any sums due the defendant and would hold such sums for the benefit of the defendant. That such representations were false and fraudulent * * * and were made by the plaintiff to induce the defendant to execute the said agreement. That plaintiff had no intention at said time to refrain from enforcing said agreement, but intended and at all times since, has intended to enforce said agreement. * * * That relying upon said false and fraudulent representations and believing said representations to be true, defendant did execute said agreement based upon his faith and trust in plaintiff as his attorney."

At the conclusion of the trial, the court gave judgment in favor of respondent attorney at law, and made findings of fact following practically verbatim the allegations of the complaint and the answer thereto, but he made no findings upon the allegations of the amendment to the answer setting up the seventh separate defense.

It is here contended by appellant that the failure of the trial court to find with respect to his separate defense alleging fraud on the part of respondent constitutes prejudicial error. He predicates his argument upon the fact that "the very existence of the relationship of attorney and client at the time the subject agreement was entered into in favor of plaintiff attorney raises a presumption of fraud and invalidity"; and that "it was necessary for the trial court to make a finding on this issue inasmuch as there was evidence in the form of the presumption referred to above, which in the absence of contrary evidence sufficient to overcome the presumption, would have required a judgment for defendant".

[1-3] As hereinbefore stated, this appeal is presented upon the judgment roll alone which shows that findings of fact were made upon every issue presented by the pleadings, including appellant's separate defenses, with the exception of the defense of fraud and undue influence. Since all intendments must be made in support of the judgment and all proceedings necessary to its validity will be presumed to have been regularly taken (2 Cal.Jur. 521), it must be assumed that evidence sufficient to support the findings was presented at the trial. It should be noted in this connection that the court found "that it is not true that there was no consideration to the defendant Hugh Wilton for his promises under the agreement marked Exhibit 'A' and attached to the amended complaint, but finds that said agreement was executed for a valuable consideration". This finding read in conjunction with the other findings made by the trial court negatives the theory advanced by appellant in his seventh separate defense that he was induced to execute the agreement relying upon false and fraudulent representations of respondent, and in addition overcomes the presumption of invalidity of the agreement which was executed while the relationship of attorney and client existed between the parties thereto. Consequently, the failure of the court to find specifically upon the issue presented by the seventh separate defense does not constitute prejudicial error.

[4] "It has been repeatedly held that if findings are made upon issues which determine a cause, other issues become immaterial and a failure to find thereon does not constitute prejudicial error." 24 Cal.Jur. 947, and authorities there cited.

In consonance with the above, it is stated in the case of Phillips v. Stark, 65 Cal.App. 136, 140, 223 P. 443, 445: "Where issues upon which findings are made are necessarily decisive of the case, it is unnecessary that the findings should dispose of any further issues as all other issues thereby become immaterial. Murphy v. Bennett, 68 Cal. 528, 9 P. 738; McCourtney v. Fortune, 57 Cal. 617; Porter v. Woodard, 57 Cal. 535; Shank v. Blackburn, 53 Cal.App. 620, 200 P. 762; Spaulding v. Dow, 118 Cal. 424, 50 P. 543."

[5] With respect to the allegations of fraud set up in his seventh separate defense, the burden of proof was upon appellant, accordingly, the court having found each and every allegation of the amended complaint to be true must necessarily have found adversely to said affirmative defense even though findings had been made thereon.

[6] "It has frequently been held that if a judgment is supported by the findings, it is not prejudicial error to fail to find upon an issue, the burden of sustaining which rests upon appellant, if a finding thereon must necessarily have been adverse to him." 24 Cal.Jur. 944; 10 Cal.Jur. Ten Year Supp. 740. See, also, Moore v. Hoar, 27 Cal.App.2d 269, 292, 81 P.2d 226.

For the foregoing reasons, the judgment appealed from is affirmed.

We concur: DORAN, J.; WHITE, J.

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42 Cal.App.2d 9

CARTER v. SHINSAKO et al.

Civ. 12745.

District Court of Appeal, Second District, Division 2, California.

Dec. 16, 1940.

Hearing Denied Feb. 13, 1941.

1. Appeal and error 🔑935(1)

On appeal from an order granting relief under statute authorizing court to correct an error resulting from inadvertence, it would be presumed that trial judge believed statement of facts as presented by party moving to vacate judgment entered pursuant to sustaining of demurrer without leave to amend, and, if doubt exists, it should be resolved in favor of the motion to end of securing a trial on the merits. Code Civ. Proc. § 473.

2. Judgment 🔑282

Where demurrer to first amended complaint was sustained without leave to amend on January 22, and on afternoon of January 25 judge verbally granted plaintiff permission to apply for modification of order of January 22 to permit filing of second amended complaint, but on afternoon of 25th a formal judgment sustaining demurrer without leave to amend was presented by clerk of court along with other orders to judge for his signature and was, through inadvertence, signed by him, plaintiff's counsel was justified in assuming that no judgment would be signed or filed by court until reasonable time had expired after verbal authorization to present application for modification of original order.

3. Judgment 🔑306, 360

Where demurrer to first amended complaint was sustained without leave to amend on January 22, and on afternoon of January 25 judge verbally granted plaintiff permission to apply for modification of order of January 22 to permit filing of second amended complaint, but on afternoon of 25th a formal judgment sustaining demurrer without leave to amend was presented by clerk of court along with other orders to judge for his signature and was, through inadvertence, signed by him, the court had power to correct mistakes in its own records and set aside judgment inadvertently made which was not actually the result of exercise of judgment.

4. Pleading 🔑225(2)

Where court had sustained demurrer to first amended complaint without leave to amend, having in mind the potentialities of the pleading which had suffered from adverse ruling and the likelihood of its being so framed that trial might with propriety be had, it was trial court's duty to hear application for filing of new pleading made seriously and in good faith.

5. Judgment 🔑360

Where court inadvertently signs a judgment after indicating a desire to reconsider a ruling which sustains a demurrer without leave to amend, it is duty of court to exercise sound discretion with a view to substantial justice and to set aside the judgment inadvertently signed.

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Action by Mrs. C. M. Carter against Frank Shinsako and others. From an order granting plaintiff's motion to vacate a judgment entered pursuant to sustaining a demurrer without leave to amend, defendant C. W. Soderstrom appeals.

Affirmed.

Lasher B. Gallagher, of Los Angeles, for appellant.

Harry A. Wishard and J. E. Simpson, both of Los Angeles, for respondent.

MOORE, Presiding Justice.

Defendant appeals from an order granting plaintiff's motion to vacate a judgment entered pursuant to sustaining a demurrer without leave to amend. The order complained of was made by the court March 20, 1940, following the presentation of a motion accompanied by an affidavit of merits. The affidavit established the following facts:

The demurrer to the first amended complaint was sustained without leave to amend and a minute order was entered January 22; while no formal notice of the court's ruling was served upon plaintiff or her counsel, a copy of the court's memorandum of decision was mailed to her counsel on the date of the order; on the afternoon of January 25th, pursuant to the request of plaintiff's counsel, the judge granted plaintiff permission to apply for a modification of the order of January 22nd in order to permit the filing of a second amended complaint and required counsel to serve a copy of the application on defendant's counsel and the judge stated that the application would be considered and determined by him; immediately and on the same day, plaintiff's counsel prepared the application and on the morning of the 26th directed his process server to serve and file the paper. However, on the afternoon of the 25th a formal judgment sustaining the demurrer without leave to amend was signed by the judge and entered on the following day; the form of judgment which had been prepared by defendant's counsel was presented by the clerk of the court along with other orders to the judge for his signature and was at that time, through inadvertence, signed by him. The averment then follows that the plaintiff has a good cause of action. No affidavit or other evidence was submitted in contradiction to the affidavit filed by plaintiff. The motion having been submitted upon briefs to be filed, the court on March 20th filed a decision and entered its order granting the motion to vacate the judgment and authorized plaintiff to file her second amended complaint.

The order of the court vacating the judgment of January 25th is in all respects a valid judgment for two reasons: (1) Because the court was authorized by the provisions of section 473 of the Code of Civil Procedure to correct an error resulting from his own inadvertence, and (2) the court had inherent power to strike from its records entries made through the inadvertence of the judge to the end that substantial justice might not be defeated.

[1-3] On appeal from an order granting relief under section 473, Code of Civil Procedure, it will be presumed that the trial judge believed the statement of facts as presented by the moving party (Ackerman v. Beach, 104 Cal.App. 299, 285 P. 895), and if any doubt exists it should be resolved in favor of the application to set aside the order to the end of securing a trial on the merits of the case. Savage v. Smith, 170 Cal. 472, 150 P. 353. Counsel was justified in assuming that no judgment would be signed or filed by the court until a reasonable time had expired after the verbal authorization to present the application. He moved with reasonable celerity and the motion was filed and presented within a reasonable time. However, notwithstanding all questions of excusable neglect on the part of plaintiff's counsel or of inadvertence on the part of the court, the court had the power to correct mistakes in its own records and to set aside orders and judgment inadvertently made which are not actually the result of the exercise of judicion. Stevens v. Superior Court, 7 Cal.2d 110, 59 P.2d 988.

[4, 5] The judgment which had been signed by the court was calculated to deprive plaintiff of the ultimate right to litigate the merits of her case. Having in mind the potentialities of the pleading which had suffered from an adverse ruling and the likelihood of its being framed so that a trial might with propriety be had, it was the duty of the court to hear the application for the filing of a new pleading made seriously and in good faith. Where the court inadvertently signs a judgment after indicating a desire to reconsider the ruling which sustained a demurrer without leave to amend, it was the duty of the court to exercise a sound discretion with a view to substantial justice.

Order affirmed.

We concur: WOOD, J.; McCOMB, J.

41 Cal.App.2d 925

MARTIN v. FOX WEST COAST THEATRES CORPORATION et al.

Civ. 12148.

District Court of Appeal, Second District, Division 1, California.

Dec. 13, 1940.

Hearing Denied Feb. 10, 1941.

1. Negligence 🔑32(1)

One may be an invitee upon a certain portion of premises of another for a proper purpose, and yet may become a mere licensee on other portions of the property, dependent upon the particular circumstances.

2. Theaters and shows 🔑6

Where action of theater patron, for injuries sustained when he fell into unguarded and unlighted emergency exit ramp and passageway at rear of theater while going to automobile parked on parking lot maintained by theater, was defended on ground that parking facilities ended at rear wall of theater and that invitation of theater management did not extend to that portion of premises to rear of theater, record, which was barren of evidence indicating presence of any fence, barrier, or notice that rear portion of premises was reserved to theater management, did not warrant conclusion that patron at time of accident was a "licensee" rather than an "invitee".

See Words and Phrases, Permanent Edition, for all other definitions of "Invitee" and "Licensee".

3. Theaters and shows 🔑6

Theater maintaining automobile parking lot for use of its patrons was bound to exercise reasonable care in providing safe place for protection of patron while he was on the parking lot as "invitee" of the theater.

4. Theaters and shows 🔑6

In action by theater patron for injuries sustained when he fell into unguarded and unlighted emergency exit ramp and passageway at rear of theater while going to automobile parked on parking lot maintained by theater, whether theater was negligent in failing to provide reasonable prudent means of warning patron against imminence of danger or of protecting him by guard rails or otherwise against falling into the ramp was for jury.

5. Negligence 🔑4

In determining the presence or absence of "negligence", the test is, not what others would have done in that regard, but, rather, what would a reasonably prudent person do under similar circumstances?

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence".

6. Appeal and error 🔑927(7)

On appeal from judgment based upon directed verdict for defendant unless court can say from review of evidence, disregarding conflict and giving full credit only to that portion of evidence, whether produced by plaintiff or defendant, which tends to support plaintiff's allegations, and indulging in every legitimate inference which may be drawn from that evidence, that there is no evidence of sufficient substantiality to support a verdict for plaintiff if verdict were given, court must reverse judgment.

7. Trial 🔑142

Where different conclusions may reasonably be drawn by different minds from same evidence, the decision must be left to the triers of fact.

8. Negligence 🔑136(26)

The question of contributory negligence is always one of fact for the jury to decide under proper instructions, except in those cases in which, judged in the light of common knowledge and experience, there is a standard of prudence to which all persons similarly situated must conform.

9. Negligence 🔑136(26)

It is only where, judged in the light of common knowledge and experience, there is a standard of prudence to which all persons similarly situated must conform, that failure to adhere to that common standard is as a matter of law "contributory negligence".

See Words and Phrases, Permanent Edition, for all other definitions of "Contributory Negligence".

10. Theaters and shows 🔑6

Where theater patron walking from theater to automobile on parking lot maintained by theater stepped into puddles of water, and because of darkness passed by the rear of his automobile to one parked adjacent thereto and, after realizing his mistake, attempted to pass in front of such automobile to reach his automobile in order to avoid puddles, and while doing so fell into unguarded and unlighted emergency exit ramp and passageway at rear of theater, whether patron was contributorily negligent was for the jury.

11. Appeal and error ⚷782

An attempted appeal from a verdict would be dismissed.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Personal injury action by Frank R. Martin against the Fox West Coast Theatres Corporation and others. From an adverse judgment, plaintiff appeals.

Judgment reversed and cause remanded for a new trial.

Attempted appeal from the verdict dismissed.

Nat. A. Rosenstein, of Los Angeles, for appellant.

Sidney A. Moss, of Los Angeles, for respondents.

WHITE, Justice.

Plaintiff commenced this action to recover damages for personal injuries allegedly sustained as a result of the negligence of defendants. Epitomizing the facts as disclosed by the record, it appears that defendants operated a theater on North Figueroa street in the city of Los Angeles and in connection therewith maintained a parking lot adjoining the north side of the theater for the convenience and use of the theater patrons. On the evening of December 26, 1937, at about 5:30 o'clock, plaintiff, accompanied by his wife, drove in an automobile to defendants' theater, and prior to entering as a patron parked his automobile in the aforesaid parking lot. The surface of the lot is covered with gravel and extends easterly about 150 feet farther from the street than do the north and south walls of the theater. In this connection it is contended by defendants that the portion of the lot extending easterly from the north and south walls of the theater building was not part of the parking facilities, but was reserved exclusively for the private use of the theater management. This contention hereinafter will be referred to and answered.

At the northeast corner of the theater building is an emergency exit and ramp extending easterly from the rear of the theater, the threshold of the emergency exit door being about four feet below the ground level at the rear of the theater as well as four feet below the level of the adjoining parking lot. This ramp is of cement construction, about 18 feet long and approximately six feet wide, with retaining walls on each side. On the northerly side of the ramp, adjoining the parking lot, the retaining wall rises above the ground about six inches. Such retaining walls of the ramp were not equipped with any guard rails or other safety devices for the protection of anyone who might venture near it. The parking lot was operated by defendants as a free auto park for the patrons of the theater, and the admission charge to the theater included parking privileges. The north and rear walls of the theater building contained five electric floodlamps with porcelain-lined reflectors, each reflector and lamp being mounted on an iron pipe standard with a goose-neck top, reflecting the light downward. Four of the lamps were on the north wall roof about 27 feet above the ground level of the parking lot and were spaced at intervals ranging from the front of the theater respectively 33 feet, 73 feet, 109 feet and 149 feet. The floodlamp on the rear wall was placed directly over the south retaining wall of the ramp.

When plaintiff drove into the auto park he stopped his automobile a short distance from the rear end of the north wall, with the front bumper near such wall, purchased tickets of admission for his wife, son and himself, and attended the performance at the theater. At the time he parked his automobile it was raining. At the conclusion of the performance, about 8:30 p. m., plaintiff left his wife standing in front of the marquee in front of the theater and proceeded to the parking lot to get his automobile. At that time only one of of the floodlights was lighted, the same being 33 feet from the front of the theater. While walking in the auto park to obtain his automobile, plaintiff stepped into puddles of water, and because of the darkness passed by the rear of his automobile to one parked adjacent thereto, which car was parked at a right angle to the north wall and straddling an imaginary line extending from the rear wall of the theater building close to the northerly side of the retaining wall of the ramp. After he had proceeded around and alongside of the left door of the last-mentioned automobile he discovered the door was locked, and then realized he had mistaken this automobile for his own. He then attempted to pass in front of this automobile to reach his car, which was parked next to it. While so doing he fell into the unguarded and unlighted exit ramp and passageway, descending to the floor of the ramp, thereby sustaining serious injuries.

Trial was had before the court sitting with a jury. At the conclusion of the testimony defendants moved the court for a directed verdict in their behalf on the ground that there was no evidence of negligence upon their part, and further, that the evidence proved that as a matter of law plaintiff was guilty of contributory negligence which proximately contributed to his injuries. This motion was granted, and pursuant to the court's direction the jury returned a verdict in favor of defendants. From the judgment entered upon such verdict plaintiff prosecutes this appeal.

Respondents do not seriously deny negligence upon their part by reason of the manner in which the ramp was maintained without safety guard rails and with meager lighting in and about such open space. To sustain the judgment respondents rely, first, upon what they claim is as a matter of law contributory negligence upon the part of appellant.

[1, 2] Before giving consideration to this claim, we are disposed to consider respondents' contention that appellant, with reference to the spot where the accident happened, was a licensee rather than an invitee, and that they did not in any way violate the duty owed appellant as such licensee, in that they were free from any conduct which wilfully inflicted injury upon him. This contention rests upon the claim that the parking facilities ended at the rear wall of the theater, and that the invitation of the theater management did not extend to that portion of the premises easterly of the building. It is true that one may be an invitee upon a certain portion of the premises of another for a proper purpose, and yet may become a mere licensee on other portions of the property, dependent upon the particular circumstances of the case (Medcraft v. Merchants' Exchange, 211 Cal. 404, 407, 295 P. 822; State Compensation Insurance Fund v. Allen, 104 Cal.App. 400, 413, 285 P. 1053); but the circumstances surrounding the present case are not such as to warrant the conclusion that appellant at any time occupied a status other than that of invitee. The record is barren of any evidence which indicates the presence of any fence, barrier, or notice by which the use of the rear portion of the premises was reserved to the theater management; while the manager of respondents' theater testified to the absence of any such barrier or notice; and further, with reference to the use of the questioned portion of the premises for parking purposes, such witness testified as follows:

"Q. By Mr. Rosenstein (Plaintiff's counsel): Now, you say the parking area as exhibited in Defendants' Exhibit C, I believe—the map on the diagram, on the blackboard, rather—cars parked, do they not, east of the rear wall of the parking space? A. At times now, yes, sir.

"Q. And on December 26, 1937, they parked there, did they not? A. Probably there were times when they parked back beyond the end of the building, but very rarely.

"Q. But they parked there, however? A. Yes.

"Q. By the Court: You are speaking of the night of December 26th? A. Yes, sir.

"Q. By Mr. Rosenstein: And there was no fence or barrier extending from the east or rear wall of the theater building north on the parking lot? A. No, sir."

[3, 4] It cannot, therefore, reasonably be held that as to the rear portion of the premises appellant was not invited but merely tolerated, but rather must be assumed that in entering upon such portion of the parking lot, he did so as the invitee of respondents and at least with their implied, if not express authority. Respondents were therefore bound to exercise reasonable care in providing a safe place for his protection while thereon as such invitee. We conclude, and respondents do not with an vehemence challenge the conclusion, that the record contains substantial proof of the negligence of defendants in failing to provide reasonable prudent means of warning the plaintiff against the imminence of danger or of protecting him by guard rails or otherwise against falling into the ramp.

We come now to a consideration of respondents' contention that appellant ventured into unknown territory in utter darkness and was therefore guilty of contributory negligence as a matter of law. This claim is predicated upon the testimony given by plaintiff, who was the sole witness to the accident. In substance, the pertinent portion of his testimony was that on leaving the theater at about 8:30

in the evening he went safely and without difficulty through the parking lot to the left front door of the car he mistook for his own. In getting to that portion he passed through a shallow puddle of water behind such automobile. When he got to the driver's seat and found the door locked he realized he had approached the wrong car. But he was aware of the fact that his own car was to the west of the automobile which he mistook for his own. Instead of retracing his steps, not wishing to step through the puddles of water, he proceeded along the left side of the automobile toward the front thereof, feeling his way because it was so dark that he could not see in front of him. He then turned to the right in front of the car, keeping his hand on the fender and later on the radiator as he attempted to pass between the car and what proved to be the northerly side of the ramp wall. For the most part he looked westward toward the exit of the parking lot. The witness further testified that it was "very dark". As he moved along attempting to pass between the north wall of the theater and the front end of the other automobile and toward his own, he stepped off and into the ramp.

[5] In determining the presence or absence of negligence, the test is not what others would have done in that regard, but, rather, what would a reasonably prudent person do under similar circumstances. Wolfsen v. Wheeler, 130 Cal.App. 475, 483, 19 P.2d 1004. The question for decision, therefore, is, would a person situated in appellant's position, possessing ordinary prudence, knowing what he knew, and seeing what he was able to see, have used greater caution than he used, and instead of going around the front of the parked automobile have retraced his steps in the direction from which he had come without mishap; or would the average person presuming on the safety of travel upon the ground of the parking lot, probably have acted as did appellant?

[6] Unless we can say from a review of the evidence, disregarding the fact that there may be a conflict therein, and giving full credit only to that portion of the evidence, whether produced by plaintiff or defendant, which tends to support the allegations contained in plaintiff's complaint, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such verdict were given, then under the well-established rules and settled law of this state, we must reverse the judgment herein, based as it is upon a verdict directed by the court. Estate of Flood, 217 Cal. 763, 768, 21 P.2d 579; Estate of Lances, 216 Cal. 397, 14 P.2d 768.

[7-10] Where different conclusions may be reasonably drawn by different minds from the same evidence, the decision must be left to the triers of fact. And in the instant case it is clear to us that whether the situation in which he found himself was such as to impress upon the mind of appellant the danger incident to going around the front end of the parked automobile, was for the jury to decide as an issue of fact. The question of contributory negligence is always one of fact for the jury to decide under proper instructions, except in those cases in which, judged in the light of common knowledge and experience, there is a standard of prudence to which all persons similarly situated must conform. It is only in these last-named cases that failure to adhere to that common standard is as a matter of law contributory negligence. We are not unmindful of respondents' claim that appellant was negligent in feeling his way around the automobile on the parking lot in the darkness and falling into the ramp; but the answer to this contention is that the jury might well and reasonably have found that the presence of appellant in the area of danger was due to the negligence of respondents in failing to provide sufficient illumination of the parking lot at and near the retaining walls and open ramp. The lack of adequate illumination might well have been held by the jury to be the efficient and proximate cause of appellant's injury. True, respondents may argue that the fact of insufficient illumination was as obvious to appellant as it was to respondents, and that if they were negligent he was equally so and is therefore barred from a recovery. If the jury had so found, such an argument might prevail, but that is not the case, and we are asked to hold that appellant, in acting as he did, was negligent as a matter of law. This we cannot do, because we feel that reasonable people might well differ on the question whether a man situated as appellant was, seeing what he was able to see and knowing what he knew, would have proceeded as

he did, or as suggested by respondents, would have returned by the same route he had traversed in coming around from the rear of the automobile in the first place. The motion for a directed verdict should not have been granted.

[11] The attempted appeal from the verdict is dismissed.

For the foregoing reasons, the judgment is reversed and the cause remanded for a new trial.

We concur: YORK, P. J.; DORAN, J.

SEEGER et al. v. ODELL et al.*

Civ. 2498.

District Court of Appeal, Fourth District, California.

Dec. 17, 1940.

Hearing Granted Feb. 13, 1941.

1. Evidence ⟹66

The rule that a person is conclusively presumed to know the state of his own title to realty is based on both actual and constructive knowledge of the person involved, and expresses a public policy for the protection and repose of land titles.

2. Evidence ⟹66

Landowners were presumed to know whether an execution had been levied on a judgment against them, whether a sale of their realty had been had, and whether a sheriff's deed had issued, and in addition a duty rested on them to make use of the available means for ascertaining the truth.

3. Mines and minerals ⟹54½, 59

Plaintiffs were "estopped" from seeking to cancel an oil lease, to set aside foreclosure sale and deed, and for an accounting of profits received under lease on ground that a fiduciary relationship existed between parties and that defendants' representations that execution on a judgment against plaintiffs had been levied, that their land had been sold, and that purchasers were going to submit to foreclosure of mortgage were false, where it appeared that plaintiffs had charged all defendants except one with fraud and misrepresentation in two former actions and that after lease had been executed many other persons offered to lease land from plaintiffs during period of redemption and advanced sums sufficient to pay off mortgage debt, and plaintiffs signed lease and took no action for nearly three years, knowing that a large amount had been expended on land, and accepting substantial returns from oil produced.

See Words and Phrases, Permanent Edition, for all other definitions of "Estopped".

Appeal from Superior Court, Orange County; Franklin G. West, Judge.

Action by Nettie L. Seeger and others against A. J. Odell and others, to cancel a lease, to set aside a foreclosure sale and deed, and for an accounting of profits received under the lease. From a judgment on the pleadings entered in favor of defendants, plaintiffs appeal.

Affirmed.

Daniel A. Knapp, of Los Angeles, and Fred A. Wilbur, of Santa Ana, for appellants.

Louis N. Whealton, of Long Beach, for respondent Odell.

Wm. H. Neblett, B. H. Neblett, and E. Walter Guthrie, all of Los Angeles, for other respondents.

BARNARD, Presiding Justice.

The plaintiffs appeal from a judgment on the pleadings entered in favor of the defendants. The action was one to cancel a lease, to set aside a foreclosure sale and deed, and for an accounting of profits received under the lease.

The appellants owned a small lot in Huntington Beach which they had leased to the respondents McAdoo and Colter, out of which transaction grew two former actions which reached this court. Seeger v. McAdoo, 110 Cal.App. 48, 293 P. 694; Gibbs v. Seeger, 130 Cal.App. 123, 19 P.2d 514. The complaint herein alleges that in July, 1933, after the judgment in the foreclosure action (Gibbs v. Seeger, supra) became final, they were invited to a conference by the respondents Odell and Gibbs; that at this conference these respondents and their attorney, Ben H. Neblett, assured the appellants "that they were plaintiffs' friends and that they were going to make a very unselfish proposition out of the goodness of

* Subsequent opinion 115 P.2d 977.

their hearts for the benefit of plaintiffs and not otherwise, so that plaintiffs, otherwise without any possible returns from said land, would get some benefit therefrom after all"; that the proposition was that if they would join the respondent Gibbs in leasing said land to respondent Odell they would receive a definite royalty from the production of an oil well which was to be forthwith drilled on said land; that the said Neblett then told the appellants that they could rely on all he said; that he had superior knowledge of many facts concerning said land; that he had acted as attorney for McAdoo and Colter in Seeger v. McAdoo, supra, and had levied execution on their judgment for costs in that action; that the land had been sold thereunder to McAdoo and Colter and a sheriff's deed had been issued to them; and that "also out of the goodness of their hearts" McAdoo and Colter were going to submit to the foreclosure of the mortgage which they had assigned to respondent Gibbs, the sale being set for August 2, 1933, and would exercise no equity of redemption in connection therewith. It is then alleged that the appellants knew of the judgment in the case of Seeger v. McAdoo, supra, and knew "of the possible execution on their property in payment of said judgment debt", but that appellants did not live at or near said land and by reason of financial reverses had been unable to pay said debt or watch the proceedings in that case but supposed that no levy had yet been made and "that when so made they would take steps to redeem the same"; that the respondents then realized that by virtue of said sheriff's deed they had lost all their interest in said property and could have no rights of redemption subsequent to the foreclosure sale in the mortgage action; that, relying upon the representation that their land had been sold upon execution in the former action, they joined with respondent Gibbs in a lease to respondent Odell, which lease provided that he would immediately drill for oil, giving the appellants a 2½ per cent royalty interest and the respondent Gibbs a 12½ per cent royalty interest; that, thereafter, they permitted the period of redemption after the sale of the land in the mortgage foreclosure action to expire; that during this period of redemption many other persons offered to lease this land, with advances sufficient to cover "said mortgage indebtedness", which offers they refused "in never ending reliance on the said representations of their alleged friends and well-wishers, the defendants herein"; and that save for said misrepresentations they would have refused to sign said lease and would have redeemed said land shortly after the foreclosure sale on August 2, 1933.

It is then alleged that the representations as to the levying of the execution and the issuance of the sheriff deed in the first of the former actions were false; that no such levy or sale had been made or had; that the appellants were aged and poor and lived in Pasadena, far removed from the offices of the sheriff and recorder of Orange county; that they had no convenient means for inspecting the records of said offices; that in May of 1936, through a friend, they discovered that no such levy or sale had been made; that shortly after August 2, 1933, the respondent Odell caused an oil well to be drilled on said land, from which he has profited to the extent of more than $100,000; and that the respondent Gibbs secured title to said land through the foreclosure sale held on August 2, 1933. In a supplemental complaint it is alleged that the respondent Gibbs had conveyed title to the land to respondents McAdoo and Colter. The complaint in this action was filed on July 25, 1936.

In Robins v. Hope, 57 Cal. 493, where a deed had been obtained without consideration upon a representation that the plaintiffs were without any claim or title to the property since their mother had previously given a deed thereto as their guardian, the court said: "The misrepresentation complained of was as to the title of the plaintiffs to the premises which they were induced to convey, under the impression that they had no title thereto, and we understand the rule to be, as stated by the learned judge who sustained a demurrer to this complaint, that 'a person is conclusively presumed to know the state of his own title to real property. This is always the case where the party deals with a stranger, as in the present case. No misrepresentations made by Hope or his agents, therefore, as to the proceedings in probate concerning plaintiffs' title, or as to the state of their title in any respect, could have had the effect of misleading them.'"

The rule there applied was approved in Parsons v. Weis, 144 Cal. 410, 77 P. 1007.

The appellants argue that this rule is not applicable here since the representation here, that a sheriff's deed after execution sale had been issued, is one of fact rather than one of law, and for the further reason that a confidential or fiduciary relation existed between the parties here since the appellants had been friendly with the respondent Gibbs after the judgment in the mortgage action was affirmed, and since at the conference in July, 1933, the attorney for the respondents assured the appellants that the respondents were their friends.

[1, 2] Such a rule and the presumption that a person knows the state of his own title are based upon both the actual and constructive knowledge of the person involved, and express a public policy for the protection and repose of land titles. Not only does a person ordinarily possess opportunities through public records and other sources for acquiring knowledge of all facts affecting title to his own land, which are at least equal to those possessed by an outsider, but the public policy requires him to vigilantly use these opportunities before surrendering his rights. In Robins v. Hope, supra, it is stated that no misrepresentations as to the previous proceedings in probate concerning the plaintiffs' title could have had the effect of misleading them. In principle, there is no real distinction between that case and the one now before us, where the representation was that the proceedings in a prior action had been carried to a final conclusion through an execution sale and sheriff's deed. The real substance of the matter here, actually and as understood by the appellants, was that they had no title to the land because the proceedings of the prior action had been culminated in the issuance of a sheriff's deed. Whether an execution had been issued, a sale had, and a sheriff's deed issued, could have easily been ascertained and it may fairly be said that not only were the appellants presumed to know the facts in this regard with respect to their own title but a duty rested upon them to make use of the available means for ascertaining the truth. It may be further observed in this connection that, strictly speaking, the appellants did not accept and act upon the representation that they no longer had any interest in the property because they then exercised a right of ownership and joined in an instrument leasing their interest for oil development purposes upon the consideration of a substantial share in any oil that might be produced.

[3] It not only appears from the complaint that no confidential or fiduciary relation existed between the parties, but that there were a number of circumstances which in an unusual degree should have put them upon their guard. The fact that the respondents were so anxious to have the appellants sign this new lease and were willing to give them 2½ per cent of the production or 1/6th of the entire landowner's royalty was very suggestive under the circumstances. The most natural inference to be drawn was that the appellants had some equity or right in the premises which it was necessary for the respondents to acquire in order to make a lease which would justify the expenditure of large sums for drilling purposes. Not only are no facts alleged which show any confidential or fiduciary relationships between the parties, but the appellants had been engaged for years in rather bitter litigation with all of the respondents except Odell, who then appeared in company with respondent Gibbs who had just secured final judgment in a hotly contested foreclosure action, and Odell was then represented by one of the attorneys who had represented all of the other respondents in the two former actions. In the two former actions these appellants had charged all of the respondents except Odell with fraud and misrepresentation. While this would indicate that the parties were dealing at arm's length the appellants argue that this is not the case because they were then friendly with the respondent Gibbs. The allegation as to this friendship contains nothing to indicate confidential or fiduciary relations, and the further fact that the appellants were then told that respondents McAdoo and Colter, although they then held a deed to the property, would submit to respondent Gibbs' foreclosure of the mortgage and would not redeem the property was practically a confession that those three parties were working together and should have been a warning to the appellants that they were, in fact, dealing with the same parties with whom they had been fighting for some years. The very fact that respondents McAdoo and Colter were willing to submit to the foreclosure of the mortgage and waive their right of redemption, although they claimed to have a deed to the property, should have indicated to the appellants both that these parties were working together and that the respondents McAdoo and Colter did not have the complete title which it was claimed they had. There was a further and significant warning to the appellants, in this regard, in that the lease to Odell did not mention and was not signed by McAdoo and Colter, al-

though they were supposed to have a deed conveying the full legal title. Moreover, while it is alleged that shortly after the lease was executed Odell caused an oil well to be drilled on the land, it is also alleged that many other people offered to lease the property from the appellants and advance a sum sufficient to pay off the mortgage debt. This was during the period of redemption and the fact that other people were willing to make such offers to lease the property at a time when the respondent Odell was drilling a well thereon indicates that such people had information causing them to believe that Odell's lease was invalid or voidable and should have put the appellants upon their guard, and any reasonable investigation then made would have disclosed the true facts before the period of redemption expired.

In the face of all of these things, which should have been a sufficient warning, the appellants not only signed the lease but allowed the matter to rest for nearly three years, knowing that a large amount had been expended upon the property, and accepting very substantial returns from oil that was produced. While they allege that they were without means to redeem the property from the mortgage sale and that they lived in Pasadena, far from the county offices of Orange county, it also appears from their complaint that they received somewhere from $2,500 to $3,000 as royalty from the production of oil under the terms of the lease. While it does not appear exactly when this was received, in view of the fact that Pasadena is only a few miles from Santa Ana, it can hardly be held that the facts alleged constitute a sufficient excuse for their failure to make a reasonable investigation and examination of the records. The complaint alleges that the appellants were unable to pay the judgment for costs in the first action, they have never paid or offered to pay the mortgage debt involved in the foreclosure action, and the allegations of the complaint, taken as a whole, rather clearly indicate that their desire to save something out of the property and participate in the profits of an oil well which could be drilled thereon were such that they shut their eyes to ample warnings which should have put them on their guard, that they proceeded to deal with their former enemies on a basis that seemed at the time advantageous to them, and that this action is more of an afterthought than anything else.

All of the circumstances, taken together, are sufficient to justify a court of equity in holding that the appellants are estopped from now asserting the claim here made. If it be assumed that the rule that a person is presumed to know the state of his own title to real property and may not rely on misrepresentations affecting that title should not always be applied, or that exceptions to that rule should be allowed in some cases where the circumstances warrant equitable relief, the allegations of the complaint here in question fail to present a situation justifying such a relaxation of the rule or the applying of any exception thereto. After being twice amended, the complaint failed to set forth a cause of action which justified a trial of the issues attempted to be raised. The granting of the motion for judgment on the pleadings was therefore proper.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

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42 Cal.App.2d 38

BARTHOLOMAI v. OWL DRUG CO. et al.

Civ. 12101.

District Court of Appeal, Second District,
Division 1, California.

Dec. 17, 1940.

Rehearing Denied Jan. 13, 1941.
Hearing Denied Feb. 13, 1941.

1. Negligence 🔑121(3)

In drug store patron's action against the store, subcontractor in charge of electric welding operations in store, and subcontractor's employee who did the welding, for injuries sustained in fire in store, the mere fact that the fire occurred was insufficient to raise an inference of negligence on the part of defendants.

2. Negligence 🔑134(11)

In drug store patron's action against the store, subcontractor in charge of electric welding operations in store, and subcontractor's employee who did the welding, for injuries sustained in fire in store, patron had burden of proving by a preponderance of the evidence that defendants' negligence was the proximate cause of the fire.

3. Evidence ⚷597

A judgment cannot be based upon guesses or conjectures.

4. Negligence ⚷134(11)

In drug store patron's action against the store, subcontractor in charge of welding operations in store, and subcontractor's employee who did the welding, for injuries sustained in fire in store, where there was no evidence that false ceiling which was constructed of 2 by 12 inch planks covered on under side with heavy paper and in which fire started and above which welding was being done, was erected by or under direction of defendants or that they had knowledge of inflammable nature of planks, and there was no evidence that welding apparatus was operated in a negligent manner, evidence sustained finding for defendants on ground fire was not proved to have been proximately caused by any negligence of defendants.

5. Evidence ⚷314(1)

In drug store patron's action against the store, a subcontractor in charge of welding operations in store, and subcontractor's employee who did the welding, for injuries sustained in fire in store, testimony as to conversations between witness, who was a fireman, and an employee of the subcontractor relating to an earlier fire which employee told witness was caused by sparks from welding, was properly excluded as being "hearsay" as to the subcontractor.

See Words and Phrases, Permanent Edition, for all other definitions of "Hearsay".

6. Trial ⚷46(2)

In drug store patron's action against the store and subcontractor in charge of welding operations in store for injuries sustained in fire in store, testimony as to conversations between subcontractor's employee and a fireman who did not arrive at the scene until fire was well under way, which conversations related to another fire in the store the night before which employee stated was caused by sparks from welding, was properly excluded where offer of proof did not disclose that conditions under which the two fires occurred were similar.

7. Witnesses ⚷276

In drug store patron's personal injury action against the store and a subcontractor in charge of welding operations in store, the subcontractor's employee who was partly in charge of the welding operations was not a person whom patron was entitled to examine under statute relating to examination of adverse parties. Code Civ.Proc. § 2055.

WHITE, J., dissenting.

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by Emma Bartholomai against the Owl Drug Company and others for injuries sustained in fire by plaintiff while a patron in the named defendant's store. From judgment for defendants, plaintiff appeals.

Affirmed.

Rehearing denied; WHITE, J., dissenting.

Hearing denied; **TRAYNOR, J.**, dissenting.

Edward A. Penprase and B. W. Burkhead, both of Los Angeles, for appellant.

Joe Crider, Jr., and Elber H. Tilson, both of Los Angeles, for respondents Owl Drug Co., Louis C. Dunn, Charles L. Dunn and Louis C. Dunn, Inc.

Jennings & Belcher and Stevens Fargo, all of Los Angeles, for respondent Soule Steel Co.

Reginald I. Bauder and Wayne Veatch, both of Los Angeles, for respondent L. S. McDonald.

YORK, Presiding Justice.

On October 23, 1935, appellant, while a patron of the Owl Drug Company at its store situate at Sixth and Broadway in Los Angeles, received severe injuries as the result of a fire which started in a false ceiling of said storeroom. This false ceiling was constructed of 2x12 inch Oregon pine planks laid side by side, and was erected to enable the respondent Drug Company to make certain alterations in the said storeroom and at the same time permit it to conduct its business without interruption. Said false ceiling was erected about 8 feet from the floor and completely covered the storeroom. Its upper side was unfinished wood without covering, and is under side was covered with heavy paper from which were suspended paper pennants advertising various articles of merchandise then being sold by the Drug Company. As part of the construction work the general contractor, Louis C. Dunn, Inc., Louis C. Dunn and Charles L. Dunn, contracted with respondent Soule

Steel Company to furnish and install the necessary steel joists in the ceiling of the mezzanine floor immediately above the false ceiling, the steel company in turn employing respondent McDonald to do the welding incident thereto.

At about 3 o'clock in the afternoon of the day in question, respondent McDonald was using his welding apparatus in the welding of said joists and in doing so was standing on a scaffold made of 2x12 inch planks set on saw horses resting on the false floor, when he observed smoke coming up through the planks thereof at a distance of 10 or 12 feet from the point where he was working. Immediately thereafter he saw a burst of flame which "covered the whole building in about a minute".

Appellant while making a purchase in the storeroom of the Owl Drug Company looked up and saw the fire just over her head about 10 feet from the entrance on the Broadway side of the store; she attempted to get out that way, but "the flames came down so fast" she was unable to do so, whereupon she dropped everything and ran to the Sixth street entrance, sustaining severe burns as she progressed. When she reached the door she felt the fresh air, but lost consciousness and remembered nothing more until she was placed in an ambulance and taken to a hospital.

At the trial appellant presented her evidence, but respondents declined to offer any testimony. After argument of counsel the cause was submitted for decision to the trial judge, who entered judgment that appellant take nothing and that respondents recover their costs. Appellant's motion for a new trial was thereafter denied, and she now prosecutes this appeal from the aforesaid judgment, contending (1) that the findings of the trial court are contrary to and not supported by the evidence; (2) that the court committed prejudicial error in excluding certain evidence and in declining her offer of proof with regard thereto; and (3) that the court erred in refusing to permit her to examine the witness Moore under section 2055 of the Code of Civil Procedure.

In support of her first contention, appellant argues that the "real question to be determined by this appeal is whether or not the findings of the trial court, and particularly finding No. 7, find support in the evidence presented"; all evidence before the court being undenied and uncontradicted.

Finding VII was to the effect that all the allegations contained in paragraph VII of plaintiff's first amended complaint are not true. Said paragraph VII of the said complaint reads as follows:

"That the defendants, and each of them, through their agents, servants and employees in the performance of the remodeling and repair work as hereinbefore alleged, caused to be constructed a false ceiling between the first and second floors of said building, which false ceiling was constructed of materials and substances highly inflammable in their nature. That on the 23rd day of October, 1935, the defendants, and each of them, with knowledge of the highly inflammable nature of the said false ceiling and its attendant fire hazard, through their agents, servants and employees, carelessly and negligently used an electric welding machine in the performance of said work, and as a direct and proximate result of the negligence of the defendants, and each of them, as aforesaid, a fire occurred in said premises."

Appellant has excerpted from the bill of exceptions herein the following testimony which she claims clearly proved the allegations of paragraph VII of the amended complaint:

Frank Mittenzwei, a building inspector for the city of Los Angeles, testified: "The entire storeroom of the Owl Drug Store was covered with a wooden scaffolding made of two-inch planks constructed of Oregon pine planks. This scaffolding was eight feet from the floor. On the underside of the scaffolding building paper was tacked, and fastened to this ceiling were paper triange pennants."

Respondent Lancell McDonald, who was operating the welding apparatus, testified: "The false floor was unfinished bare wood of two-inch planks. * * * I was welding immediately prior to observing the fire. In doing the welding I stood on a scaffold made of 2x12 inch planks set on saw horses which rested on the false floor. I was about ten or twelve feet from the spot where I first observed the fire. I first saw smoke underneath the plank, later I saw light * * * through the cracks of the planks. Immediately after observing the smoke and light there was just a burst of flames. * * * It covered the whole building in about a minute. There was no one at the point where I saw the smoke and light at the time I saw it. I saw no one smoking at that point. There were no electric wires that I know of in the area where I was working."

Captain Paul Wolfe of the fire department, assigned to the bureau of fire investigation, testified "2" x 12" Oregon pine planks will ignite in the neighborhood of 180° to 220° F. * * * heavy building paper will ignite in the neighborhood of 300° F. I am familiar with the type of paper used in the Owl Drug Store under the false ceiling, and it was a soft type of paper and it would ignite around 140° F. * * * The paper pennants * * * would ignite at around 150° F."

Appellant also calls attention to the following evidence as to the occurrence and cause of the fire, to-wit: That of respondent McDonald, who testified that "The smoke when I first saw it was from ten to twelve feet from me. It looked like—well, smoldering and black smoke was just drifting along beneath the planks. You could see it through the planks. * * * The arc was nine or ten feet from the false floor. We make some sparks when we weld. They drop approximately straight down. * * * They are white hot scalings. Sometimes there is a little white metal that falls away, the amount of which depends on the amount of heat used."

The testimony of James W. McCartney, an expert welder, to-wit: "The melting point in welding varies generally from 2900° to 3200° F. The heat of the electrode in electric arc welding is about 7200° F. When the electrode comes in contact with the parent metal it becomes molten in the heat of the arc. The molten metal is generally known as 'puddle' or pool of molten metal. The temperature of the puddle is somewhat higher than the melting point of the metal. It is superheated."

It is appellant's theory that this evidence shows as a matter of law that the "defendants in using or permitting to be used the fire-producing apparatus without any precautions being taken for the safety of those who might be in the store were guilty of the grossest negligence".

[1-4] The mere fact that the fire occurred is insufficient to raise an inference of negligence on the part of respondents. No evidence was produced which tended to prove that the false ceiling was erected by or under the direction of respondents, or that they had knowledge of the inflammable nature of the planks with which it was constructed. It was proved that the welding apparatus was being operated by respondent McDonald on a platform above the ceiling at the time the fire broke out, this witness describing the beginning of the fire as a rising of smoke through and between the planks which comprised this false ceiling, but there was no evidence tending to prove that he operated the welding apparatus in a negligent manner.

Before respondent could be held to answer in damages for the injuries suffered by appellant, it was incumbent upon the latter to assume the burden of proof and show by a preponderance of the evidence that the negligence of respondents was the proximate cause of the fire. A judgment cannot be based upon guesses or conjectures. Reese v. Smith, 9 Cal.2d 324, 328, 70 P.2d 933, citing Puckhaber v. Southern Pac. Co., 132 Cal. 363, 64 P. 480.

Because of the lack of evidence upon the main issue presented by the pleadings herein, the court's finding in favor of respondents was proper.

[5, 6] With respect to the conversations of the witness Mize, a member of the fire department, with Percy Moore, an employee of respondent Steel Company, who was partly in charge of the welding job, which conversations were excluded, and properly so, as being hearsay as to the said Steel Company, it should be noted that the witness Mize did not arrive at the scene of the fire in question until "flames were shooting out of the ground floor approximately half way across the street". The conversation sought to be introduced was one relating to an earlier fire which occurred "on the other false ceiling" at which time Mr. Moore told the witness Mize that "it was caused by the welding which was then being done—sparks from the welder the night before".

The offer of proof did not disclose that the conditions under which the earlier fire occurred were similar to those under which the fire of October 23d occurred. For all that the offer shows, the other fire may have been caused by entirely different circumstances, and therefore there was no error on the part of the trial court in its ruling with regard thereto. Furthermore, the witness Moore when questioned by appellant as to whether or not a small fire occurred there on the night of October 22d, replied, "I don't remember."

[7] There is no merit in appellant's final point, for the reason that the witness

Moore did not fall within the category of persons who may be examined under section 2055 of the Code of Civil Procedure.

For the reasons stated, the judgment is affirmed.

I concur: DORAN, J.

WHITE, Justice.

I dissent,—except as to respondent Owl Drug Company. As was said in Arundell v. American Oil Fields Co., 31 Cal.App. 218, 235, 160 P. 159, negligence, like any other fact, may be inferred from a preponderance of the evidence, whether it be circumstantial or direct, and the plaintiff is not required to prove his case beyond a reasonable doubt. It seems to me that the conduct of the general contractor, the subcontractor and the latter's agent and employee in permitting and doing welding in a downtown building situated in the heart of a metropolitan city under the conditions shown by the record in this case, clearly constitutes negligence, for after all, negligence is but the failure to observe, for the protection of the interests of another person, that degree of care, protection and vigilance which the circumstances justly demand. And certainly the circumstances as reflected in the main opinion in the instant case demanded that precautions be taken against fire, when, as the record reveals, the heat and sparks from the welding apparatus were liable to ignite the flimsy paper attached to the false ceiling.

True, there was no witness who could testify at the trial that a particular spark from, or the heat produced by, the welding apparatus started the fire, but since no plausible explanation was offered for the origin of the fire, and having in mind that it is not necessary in the trial of a civil case that the circumstances should establish the negligence of the defendant as the proximate cause of the injury with such absolute certainty as to exclude every other conclusion, it seems to be irrefutable that the only conclusion to be drawn is that the conduct of the parties who were responsible for allowing this highly dangerous welding to be done without taking precautions to prevent the ignition of the inflammable material in proximity to it and to prevent injury to customers in the store, was negligence. As was said in Orander v. Stafford, 98 W.Va. 499, 127 S.E. 330, 331, 42 A.L.R. 780, 782, "'The general rule is that persons in the lawful use of fire must exercise ordinary care to prevent it from injuring others. What is ordinary care and prudence depends on the circumstances of the particular case. The greater the danger of communicating fire to the property of others, the more the precautions and the greater the vigilance necessary to constitute such care. Reasonable care and negligence are relative terms and depend upon the circumstances and exigencies of the particular case. The greater the danger to others from failure to exercise care, the greater is the degree of care required.' * * * An ordinary oil stove might not be considered dangerous when used in a residence, but no one would consider it a safe appliance for heating a barn stored with hay, fodder and other dry and very combustible materials." By the same token, welding apparatus might not be considered dangerous when in operation upon a public street or in the open air, but certainly no one is warranted in permitting such operations under the circumstances present in the instant case.

As to defendant Owl Drug Company, while it may be that as operator of the business conducted in the building it should have known of the dangers attendant upon the hazardous work being done therein, yet I am inclined to the belief that it should be exonerated because there is no claim that it did not use reasonable care and prudence in the selection of a general contractor to do the work, or if the Owl Realty Company, as owner of the building, selected such general contractor, that it also did not use reasonable care therein.

As to the other defendants, it seems to me that in view of their negligence in doing work fraught with danger of fire under the circumstances shown, they are not entitled to be exonerated of negligence, and the judgment in their favor should not be permitted to stand.

42 Cal.App.2d 4

HOWLAND v. HOWLAND et al.

Civ. 11539.

District Court of Appeal, First District, Division 2, California.

Dec. 16, 1940.

Hearing Denied Feb. 13, 1941.

1. Exceptions, bill of 🔑51

Motion to terminate proceedings for settlement of defendants' proposed bill of exceptions, on appeal from judgment for plaintiff in a quiet title action, on ground that appeal had been dismissed because of unreasonable delay, laches and lack of due diligence was proper practice.

2. Appeal and error 🔑1024(5)

Where affidavits in support of motion to terminate proceeding for settlement of defendants' proposed bill of exceptions on appeal from adverse judgment and opposing affidavits were conflicting, the power to resolve the conflict rested with the trial court.

3. Appeal and error 🔑1024(5)

By order granting plaintiff's motion to terminate proceedings for settlement of defendants' proposed bill of exceptions on appeal from adverse judgment, the trial court made implied findings that the facts set forth in affidavits supporting plaintiff's motion were the true facts and such implied finding was controlling on appeal from the order.

4. Exceptions, bill of 🔑43(2), 51

In proceeding for settlement of defendants' proposed bill of exceptions, the burden of going forward rested on defendant and if there was considerable delay, it was defendant's duty to produce the facts, if any, which excused the delay, when plaintiff moved to terminate the proceeding on ground that appeal had been abandoned.

5. Exceptions, bill of 🔑43(2)

Where record on appeal from order granting plaintiff's motion to terminate proceeding for settlement of defendants' proposed bill of exceptions, on appeal from judgment for plaintiff, on ground that appeal had been abandoned showed that there had been delay of seventeen months and there was no excuse therefor except claim of one of defendants' attorneys that plaintiff's attorney had stated he would prepare amendment but trial judge expressly directed defendants to prepare and serve amended bill which defendants failed and neglected to do even after filing of plaintiff's motion, trial court did not abuse its discretion in granting the motion.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action to quiet title by Lotus Howland against George D. Howland and others. From an order terminating proceedings for settlement of defendants' proposed bill of exceptions on appeal from a judgment in favor of plaintiff, defendants appeal.

Affirmed.

George D. Howland, of Los Angeles, for appellants.

Glen Behymer and D. Howard Painter, both of Los Angeles, for respondent.

STURTEVANT, Justice.

In an action to quiet title the trial court made findings in favor of the plaintiff and from the judgment entered thereon the defendants appealed. In support of their appeal the defendants prepared a purported bill of exceptions. Later they presented the purported bill to the trial court and several hearings were had and numerous arguments were made. The matter was finally continued until February 17, 1936. On that date the further hearing of the settlement of the bill was had and the hearing was ordered off calendar. On the 22d day of June, 1937, the plaintiff served a notice that she would move to terminate proceedings for the settlement of the bill of exceptions. In her notice she designated the grounds on which the motion would be presented, and, among others, "* * * the grounds that the defendants and appellants by their conduct and actions have in effect abandoned the appeal, have been guilty of unreasonable delay, laches and lack of due diligence, * * *." It was also recited that the motion would be based "* * * upon all of the records and files in said action, upon the affidavits filed concurrently herewith, and upon the defendants' proposed bill of exceptions * * *." Therewith the plaintiff served and filed in support of her intended action her own affidavit, also the affidavits of Glen Behymer and D. H. Painter, her attorneys. On June 29, 1937, the defendants served a counter-action to settle the bill of exceptions. The defendants served and filed the affidavit of George Howland in support of their motion and in opposition to the action of the plaintiff. Later the plaintiff filed the affidavit of D. H. Painter in rebuttal. After hearing said motions on the 2d day of July, 1937, the trial court made an order refusing to settle the bill of exceptions and made an order terminating the settlement thereof. From that order the defendants have appealed and have brought up a bill of exceptions.

Both parties make statements outside of the record. Confining our statement of the facts to the record before us it is clear a purported bill of exceptions was filed in the office of the county clerk on October 24, 1935. Except as herein recited no amendments were offered to said proposed bill and no notice was given that the judge would be asked to settle said bill. On January 28, 1936, an order was made that the proposed bill would be settled on February 4, 1936. On the latter date the hearing was continued "* * * to February 17, 1936, at 9:30 a. m. for defendants to draw a new proposed bill of exceptions". The minutes of the clerk show that on the date last mentioned the hearing was ordered off calendar—to be reset at a later date. Nothing further occurred until the 22d day of June, 1937, and then the proceedings were had mentioned hereinabove in paragraph 1.

In the affidavit of Mr. Painter made in support of the plaintiff's motion he stated the following facts:

"D. Howard Painter, being first duly sworn, deposes and says: That he is an attorney at law, and was the attorney of record for the plaintiff Lotus Howland in the above-entitled matter; that affiant was in Department 29 of the Superior Court, before the Honorable Thomas C. Gould, on the 4th day of February, 1936, when defendants' proposed bill of exceptions came on for settlement; that Judge Thomas C. Gould after considerable argument by both parties, advised the defendant George D. Howland, and his attorney, Leslie R. Hewitt, that he would not settle the proposed bill of exceptions or permit the same to be engrossed in its then form and that counsel for the plaintiff should not be required to do the work of correcting the proposed bill of exceptions and that defendants and defendants' counsel who had presented the objectionable bill would be required to put it in proper shape and would be given a reasonable time to do so and advised counsel that the bill should be redrawn by defendants and defendants' counsel by the 17th of February, 1936, which was fixed by the court as a reasonable time within which to perform such labor and that the matter would be continued to the 17th of February, 1936, for that purpose; that after further argument, Judge Thomas C. Gould advised the defendant George D. Howland and his attorney, Leslie R. Hewitt, to prepare a rough draft of the new proposed bill of exceptions and submit the same to the attorney for plaintiff, affiant herein, and endeavor to agree upon the form thereof. That shortly after the 4th of February, 1936, affiant called the said Leslie R. Hewitt on the telephone and asked him when he would have the new bill of exceptions prepared; that said Leslie R. Hewitt advised affiant that he had been unable to get to the matter but that he would get to it within a few days. That on the 17th day of February, 1936, when the matter came on for hearing before Judge Thomas C. Gould, on the date to which the matter had been continued, and the court was then advised that no new proposed bill of exceptions had been prepared but that within a short period of time it was hoped that the matter would be completed. That on said latter date the court then placed the matter off calendar." In reply thereto Mr. Howland, in support of the motion of the defendants and in opposition to the motion of the plaintiff, presented his affidavit that Mr. Leslie R. Hewitt (now deceased) was one of the attorneys for the defendants. Continuing, he averred: "* * * that after said hearing (on February 17, 1936) said Leslie R. Hewitt told affiant that the Honorable Thomas C. Gould had directed Mr. Painter, plaintiff's attorney, to make his objections to said bill and state them in writing and serve the same upon defendants, and that defendants had nothing more to do in the matter until Mr. Painter had served them with a written copy of his proposed amendments to said bill." In rebuttal the plaintiff served and filed another affidavit of Mr. Painter. Among other things he averred as follows: "That at the hearing on the 4th day of February, 1936, the said Leslie R. Hewitt did not, as set forth in the affidavit of George D. Howland, argue or contend that the bill of exceptions proposed by the defendants was a true, full and complete bill, but on the contrary acquiesced in the order of the court requiring a redrafting thereof and the only argument which took place in the court was as to the procedure to be followed in the drafting of said proposed bill of exceptions and that the order of the court based thereon is set forth in the original affidavit of affiant on file herein. That immediately after the hearing on the 4th day of February, 1936, the said Leslie R. Hewitt advised affiant that he realized that the bill was improperly drawn and that a redraft thereof should be undertaken and that he, the said Leslie R. Hewitt, would see that that was done."

[1] The defendants assert that the plaintiff, in making a motion to terminate proceedings, did not follow the proper practice. We think she did. Curtin v. Ingle, 155 Cal. 53, 59, 99 P. 480.

[2, 3] The defendants quote from their affidavit and contend that the trial court should have denied the plaintiff's motion. We think they are mistaken. The affidavits were conflicting. The power to resolve those conflicts rested with the trial court. All of the proceedings mentioned in said affidavits had occurred in that court and before the same judge presiding over said court. By its order, from which the defendants have appealed, the trial court made the implied finding that the facts set forth in the affidavits filed by the plaintiff were the true facts. Said implied finding is controlling on this appeal. Hassell v. Bunge, 167 Cal. 365, 139 P. 800. That case presented the testimony given by witnesses in open court. But the rule is the same when the trial court's determination rests on the averments contained in affidavits. 2 Cal.Jur. 931; Patterson v. Keeney, 165 Cal. 465, 132 P. 1043, Ann.Cas.1914D, 232.

[4, 5] As it was the defendants' proposed bill of exceptions that was being prepared the burden of going forward rested on them and, if there was considerable delay, it was their duty to produce the facts, if any, which excused the delay. Miller v. Queen Ins. Co., 2 Cal.App. 267, 83 P. 287; Wilson v. Wilson, 207 Cal. 364, 278 P. 440. The record shows there was a delay of seventeen months and there was no excuse therefor except the claim that Mr. Hewitt, one of the defendants' attorneys, had said that the plaintiff's attorney had stated he would prepare amendments. But the affidavit of Mr. Painter quotes the language of the trial judge showing the latter expressly directed the defendants to prepare and serve an amended bill. In effect the order of the trial court held that they did not do so during an otherwise unexplained delay of seventeen months. Such facts do not show that the trial court abused its discretion. Wilson v. Wilson, supra, 207 Cal. page 366, 278 P. 440. We note that defendants claim after the order made February 17, 1936, the duty rested on the trial court to designate a date for the settlement of the bill. But, as we have shown, the burden of going forward rested on the defendants. The defendants also claim the trial court should have directed changes and should not have dismissed the proceedings. That claim overlooks the record. On February 4, 1936, the court directed defendants to prepare a redrafted bill. They did not do so. On February 17, 1936, according to the affidavit of Mr. Painter, the trial court again gave the same direction. The bill was not changed. After the plaintiff served her notice of motion to terminate proceedings the defendants still failed and neglected to make any changes. We have not been cited to any decision which holds the trial court was called upon to do more to protect the defendants in their rights.

The order appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

42 Cal.App.2d 23

THOMAS et al. v. DRISCOLL et al.

Civ. 12674.

District Court of Appeal, Second District, Division 2, California.

Dec. 16, 1940.

1. New trial 🔑163(1)

Under amended statute providing that, when a new trial is granted upon ground of insufficiency of evidence to sustain verdict, order shall so specify in writing, and shall be filed with clerk within 10 days after motion is granted, otherwise it will be conclusively presumed that order was not based upon such ground, trial court's minute entry granting motion for new trial alone, or taken in conjunction with nunc pro tunc order entered 5½ months after entry of minute order, specifying insufficiency of evidence as a ground for granting motion, was invalid, since it was not made within 10 days after the motion was granted or "filed with the clerk". Code Civ.Proc. § 657, subd. 7; St. 1939, p. 2234; Pol.Code, § 4178.

2. New trial ⚷163(1)

The use of imperative auxiliary "shall", in statute providing that, when new trial is granted on ground of insufficiency of evidence to sustain verdict or decision, order "shall" so specify in writing and "shall" be filed with clerk within 10 days after motion is granted, signifies a command. Code Civ. Proc. § 657, subd. 7; St.1939, p. 2234.

See Words and Phrases, Permanent Edition, for all other definitions of "Shall".

3. Statutes ⚷227

Although imperative words are sometimes held to have only a directory meaning, such rule of interpretation is not applicable when a consequence or penalty is provided by a failure to do the act commanded.

4. Statutes ⚷147

Fact that lawmaking body knew decisions of appellate courts and made a substantial change in phraseology of subdivision of statute indicated an intention to effect a change of its meaning.

5. Statutes ⚷206

The rule of statutory construction requiring that effect must be given to each sentence, phrase, and word applies to an amendment which has evidently been enacted to abolish an evil or to approve a practice.

◆

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Personal injury action by Elly J. Thomas and others against John W. Driscoll and others. From an order granting plaintiffs' motion for new trial after judgment had been entered upon a verdict in favor of defendants, the defendants appeal.

Reversed.

Parker & Stanbury, Harry D. Parker, Raymond G. Stanbury, and White McGee, Jr., all of Los Angeles, for appellants.

Bernard Brennan, of Los Angeles (Paul S. Ottoson, of Los Angeles, of counsel), for respondents.

MOORE, Presiding Justice.

This is an appeal by defendants from an order granting plaintiffs' motion for a new trial. The sole grievance is that the order was not in writing and filed within ten days after the motion was granted. The action was brought to recover for personal injuries and for special damages flowing therefrom.

After judgment had been entered upon a verdict in favor of defendants, plaintiffs moved for a new trial on the following grounds: (1) Irregularity in the proceedings of the court and jury by which defendant was prevented from having a fair trial; (2) accident or surprise which ordinary prudence could not have guarded against; (3) newly-discovered evidence material for the plaintiffs which they could not, with reasonable diligence have discovered and produced at the trial; (4) insufficiency of the evidence justifying the decision; (5) errors in law occurring at the trial and excepted to by the plaintiffs.

The motion was submitted on January 8, 1940, and on January 30th a minute order was entered by the clerk as follows: "Motion of plaintiffs for a new trial heretofore made is granted." Defendants filed notice of appeal February 23rd and their opening brief on June 29th. On July 17th, without notice to appellants, the trial court entered an order nunc pro tunc amending its order of January 30th, in words and figures as follows: "It appearing to this court that that certain order heretofore made on the 30th day of January, 1940, granting the motion of plaintiffs for a new trial the order was inadvertently by clerk and court made without any statement therein of the fact that such motion for a new trial was granted, among others on the ground of the insufficiency of the evidence to sustain the verdict; and it having been the intention and ruling of this court to base its order granting such new trial upon the ground of insufficiency of the evidence and to so state in the order granting such new trial; that clerk inadvertence did not include said ground in the order granting said motion, it is hereby ordered that such order granting a new trial be and the same is hereby amended to correct such mistake and inadvertence and speak the truth, nunc pro tunc as of the date made, to read: 'It is ordered that plaintiff's motion for a new trial herein be and the same is hereby granted on the ground of the insufficiency of the evidence to sustain the verdict rendered in the action.'"

[1] The question for decision is whether the court's nunc pro tunc order alone, or taken in conjunction with the order of January 30th is a valid order since it was not made within ten days after the motion was granted or "filed with the clerk".

Prior to 1939 amendment to section 657, Code of Civil Procedure, subdivision 7, thereof read: "When a new trial is granted, on all or part of the issues, upon the ground of the insufficiency of the evidence to sustain the verdict, the order shall so specify; otherwise, on appeal from such order it will be presumed that the order was not based upon that ground." The amendment of this subdivision became effective prior to the trial of this action and reads: "When a new trial is granted, on all or part of the issues, upon the ground of the insufficiency of the evidence to sustain the verdict or decision, the order shall *so specify this in writing and shall be filed with the clerk within ten days after the motion is granted*; otherwise, on appeal from such order it will be conclusively presumed that the order was not based upon that ground. The court may direct a party to prepare the order." St.1939, p. 2234.

Before the amendment to subdivision 7, the distinction between the granting of a new trial upon insufficiency of the evidence and the granting of a new trial upon other grounds, was that in the former case the order was required to state the ground but in the latter there was no such requirement. No order granting a new trial, regardless of the grounds, was required to be in writing and no time limit was imposed although the statute did provide that if the order failed to state that it was based upon the insufficiency of the evidence, it would be presumed on appeal that it was based upon other grounds. But it did not expressly declare that the presumption was conclusive. Under the amendment, such an order (1) must specify the ground, (2) must be in writing, (3) and must be filed within 10 days after the motion is granted; (4) otherwise it will be conclusively presumed on appeal that it was not based on the insufficiency of the evidence.

There was no written order granting a new trial upon insufficiency of the evidence until the nunc pro tunc order of July 17th, five and one-half months after entry of the minute order. The minute order of January 30th was a total failure to comply with the requirement that a written order specifying the insufficiency of the evidence be filed within 10 days after a motion is granted. Clearly, the statute was violated. Before the amendment, the provisions of subdivision 7 were complied with if the clerk made minute entries of all orders and decrees. Pol.Code, sec. 4178. Unless something more than a mere minute entry is required that part of the amendment providing for a written order is meaningless. That the order should be written and "filed with the clerk" is definitely intended is manifest from the provision that "the court may direct a party to prepare the order". Since the legislature could not have intended that a party should prepare a minute entry, and since the order "shall be filed with the clerk" it is clear that the amendment requires an order in writing other than a minute entry by the clerk.

[2, 3] Moreover, the provision that "it will be conclusively presumed that the order was not based upon" the insufficiency of the evidence, unless the order be so written and filed, indicates that the legislature intended that for the order to be effective, it must be filed within ten days. Also, the use of the imperative auxiliary "shall" signified a command. 57 Cor.Jur., 548. Although imperative words are sometimes held to have only a directory meaning, this rule of interpretation is not applicable when a consequence or penalty is provided for a failure to do the act commanded. This is a California rule and is supported by the weight of authority in other jurisdictions. In Shaw v. Randall, 15 Cal. 384, where the court, in disposing of a contention that the statute was directory only, said: "In construing the statute we must look to the language used, and endeavor, if possible, to ascertain the intention of the Legislature. * * * Where a consequence is attached to a failure to comply * * * the consequence can be avoided only by a compliance with the statute." This was followed in Perine v. Forbush, 97 Cal. 305, 32 P. 226, and in McCrea v. Haraszthy, 51 Cal. 146. The same doctrine is applied by the courts of Missouri in Hudgins v. Mooresville Consol. School Dist., 312 Mo. 1, 278 S.W. 769 and in Ousley v. Powell, Mo.App., 12 S.W.2d 102.

[4, 5] The authorities cited by plaintiffs (8 Cal.Jur., 522, Brush v. Pacific Electric Ry. Co., 58 Cal.App. 501, 208 P. 997; Beall v. Erickson, 113 Cal.App. 36, 297 P. 960; Lauchere v. Lambert, 210 Cal. 274, 291 P. 412; Livesay v. Deibert, 3 Cal.App.2d 140, 39 P.2d 466) lose their efficacy by virtue of the amendment to subdivision 7. They were all rendered prior to the effective date of the amendment. The contention that the court did not abuse its discretion by making the second order is beside the point. The amendment operates to deprive the court of discretion after the ten days have expired.

If the court could make a nunc pro tunc order in cases where the grounds are the insufficiency of the evidence five months after the granting of the motion for a new trial, it would thereby effectively abrogate the statute which emphatically proscribes such an order after the lapse of the time designated. A determination by the judge that his failure to put his order in writing was a clerical error is not of sufficient potency to outweigh the plain letter of the code section. Livesay v. Deibert, supra, was not decided in the light of a mandatory statute. It was to prevent just such entries that the legislature must have intended by the amendment. The fact that the law-making body knew the decisions of the appellate courts and made a substantial change in the phraseology of the subdivision indicated an intention to effect a change of its meaning. Hoffman v. McNamara, 102 Cal.App. 280, 282 P. 990. The rule of statutory construction requiring that effect must be given to each sentence, phrase and word (Estate of Garthwaite, 131 Cal.App. 321, 324, 21 P.2d 465) applies with emphasis to an amendment which has evidently been enacted to abolish an evil or to improve a practice. If a court can now properly vitalize a void order by a belated entry, the amendment would have been in vain. In making the second order, the court did more than abuse its discretion; it exceeded its jurisdiction. To hold otherwise were to override legislative authority exercised within its constitutional province.

For the foregoing reasons, the order is reversed.

We concur: WOOD, J.; McCOMB, J.

42 Cal.App.2d 1

Ex parte COOK.

Cr. 2170.

District Court of Appeal, First District, Division 2, California.

Dec. 16, 1940.

1. Marriage 🔑11

A purported marriage by one having a living husband or wife is null and its invalidity may be shown at any time. Civ. Code, § 61.

2. Divorce 🔑39, 269(2)

Where husband purportedly married second wife during lifetime of first wife from whom he had not obtained divorce, the second marriage was a nullity and the trial court was without jurisdiction to entertain action by second wife for divorce and to order the husband imprisoned for "contempt" because of failure to comply with purported award of alimony and suit money to the second wife. Civ.Code, §§ 61, 137.

See Words and Phrases, Permanent Edition, for all other definitions of "Contempt".

Petition for habeas corpus by Asa L. Cook against the Sheriff of the City and County of San Francisco and another, to obtain petitioner's release from commitment for contempt of the Superior Court of San Francisco for failure to comply with an order for payment of alimony and suit money.

Petitioner discharged, and his bail exonerated.

Raine Ewell, of San Francisco, for petitioner.

Raymond D. Williamson, of San Francisco, for respondent Sheriff of City and County of San Francisco.

Aaron Vinkler, of San Francisco, for respondent Hilda E. Cook.

NOURSE, Presiding Justice.

Petitioner seeks his release in habeas corpus from a commitment for contempt for failure to comply with an order for payment of alimony and suit money.

The petitioner alleges and the proof is that he was married to Mary Jane Cook on August 2, 1909. She procured an interlocutory decree of divorce from him on July 18, 1928, and on March 31, 1931, the final decree was entered. The parties lived together as husband and wife, and children resulted from the union. On February 28, 1920, while this relation existed, the petitioner married Hilda E. Cook. They also lived together and raised children. On May 31, 1940, Hilda filed an action for divorce against petitioner to which he cross-complained setting up the illegality of this marriage because of the existing marriage with Mary. Upon the demand of Hilda in her divorce proceedings the petitioner was ordered to pay alimony pendente lite and suit money. He was adjudged guilty of contempt for failure to comply with that order. In this proceeding for habeas corpus Hilda filed an answer to the petition denying the allegation that in her divorce proceeding she filed an answer to this cross-complaint in which she denied that petitioner was married to another person at the time of the marriage of these parties. On the hearing of this petition there was received in evidence duly certified copies of the certificate of marriage of petitioner and Mary, certified copy of the final decree of divorce, and proof of Hilda's knowledge of the former marriage relation.

The one question before us is whether the trial court had jurisdiction to make the contempt order. It is the petitioner's contention that the second marriage was void ab initio and that he is not for that reason subject to the orders of the court through an award of alimony payable to the second wife. This position must be sustained.

Section 61 of the Civil Code declares in part: "A subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife, is illegal and void from the beginning, unless:" The exceptions found in subdivisions 1 and 2 of this section are in no sense applicable here.

[1, 2] A marriage so contracted is a legal nullity and its invalidity may be shown at any time. Estate of Gregorson, 160 Cal. 21, 116 P. 60, L.R.A.1916C, 697, Ann. Cas.1912D, 1124; Blumenthal v. Blumenthal, 97 Cal.App. 558, 275 P. 987; People v. Glab, 13 Cal.App.2d 528, 57 P.2d 588; 16 Cal.Jur., p. 923. In the proceedings before the trial court the petitioner endeavored to make the showing that the marriage sought to be dissolved was void from the beginning. He alleges that he was denied that privilege. He has not appealed from the order of commitment, but rests his attack upon the ground that it was beyond the jurisdiction of the trial court. This is so if the marriage to Hilda was void because, under section 137 of the Civil Code, it is only a "husband" or a "wife" who may be required to pay alimony or suit money pending the action for divorce. It should be noted that the action instituted by Hilda is a simple action for divorce. It is not an equitable action by a "putative" wife for the adjustment of "community" property rights, as in Sanguinetti v. Sanguinetti, 9 Cal.2d 95, 69 P.2d 845, 111 A.L.R. 342. The undisputed record before us discloses that the petitioner is not now and never has been the husband of Hilda, that their pretended marriage was void from the beginning, that the superior court was without jurisdiction to entertain her action for a divorce, and equally without jurisdiction to order petitioner imprisoned for failure to comply with the illegal award of alimony and suit money.

The prisoner is discharged and his bail exonerated.

I concur: STURTEVANT, J.

42 Cal.App.2d 19

SMITH v. SMITH.

Civ. 12821.

District Court of Appeal, Second District, Division 2, California.

Dec. 16, 1940.

Divorce 🔑283

Where it appeared on former husband's appeal from order denying his motion to recall and quash a writ of execution that order for support for $150 per month which had been entered in divorce action had been for benefit of two children as well as of former wife, that 16 years had elapsed, that husband had no resources for his own support or out of which execution might be satisfied, except his salary which might be lost in event of levies, that daughter had married and son had attained his majority, that husband had paid more than $17,000 since entry of interlocutory decree, and that wife had been steadily employed, further proceedings under execution were ordered stayed pending appeal. Code Civ.Proc. § 685.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action for divorce by Pearl B. Smith against Dalton L. Smith, wherein a judgment for support and maintenance was entered in favor of plaintiff. From an order denying his motion to recall and quash a writ of execution, defendant appeals.

Proceedings ordered stayed until a decision on appeal from the order.

Earl S. Patterson, of Los Angeles, for appellant.

Joseph Schecter, of Los Angeles, for respondent.

MOORE, Presiding Justice.

This is an appeal from an order denying defendant's motion to recall and quash a writ of execution. The proceeding arose out of a judgment for support and maintenance entered in favor of plaintiff in a divorce action in which the interlocutory decree was entered May 7, 1926. The final decree, including all orders for support, was entered May 17, 1927. The order for the issuance of the writ of execution was entered August 9, 1940.

At the time of entering the interlocutory decree the parties had two minor children, aged seven and thirteen years. The order for support in the sum of $150 per month was for the benefit of the children as well as of plaintiff.

Defendant having defaulted in the payments under the judgment prior to the 12th day of July, 1940, plaintiff filed her affidavit and a motion for the issuance of a writ of execution under section 685 of the Code of Civil Procedure, which reads as follows: "In all cases the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, and after due notice to the judgment debtor accompanied by an affidavit or affidavits setting forth the reasons for failure to proceed in compliance with the provisions of section 681 of this code. The failure to set forth such reasons as shall, in the discretion of the court, be sufficient, shall be ground for the denial of the motion.

"Judgment in all cases may also be enforced or carried into execution after the lapse of five years from the date of its entry, by judgment for that purpose founded upon supplemental proceedings; but nothing in this section shall be construed to revive a judgment for the recovery of money which shall have been barred by limitation at the time of the passage of this act."

On the 18th day of July, 1940, the court issued the writ ex parte. On the second day of August defendant filed and served his notice of motion to recall and quash the execution on the grounds (a) that no personal service of the notice of motion for its issuance was had upon the defendant; (b) that prior to the motion no amount had been fixed as the sum to be paid under the original order; (c) the order authorizing the issuance of the execution made no reference to the change in the status of the parties or to the order of court entered March 17, 1939, reducing the payments to $1 per month until defendant should become employed and $32 per month thereafter; (d) the original order was made for the benefit of the plaintiff and the two children.

The issuance of the execution was ordered without personal service of the notice of motion having been made upon defendant. The only attempt at service was made upon the firm of Fetterly & Fetterly, which had appeared on behalf of defendant at the hearing on March 17, 1939. But on the day of the hearing of the motion for the issuance of the writ, Attorney Fetterly appeared in court and stated that his firm had been discharged following their appearance at the hearing in March of 1939 of the motion to modify the decree. Notwithstanding this positive showing of non-service upon defendant, the court proceeded to order the issuance of the writ.

It has been held that an execution upon a judgment after the lapse of five years from the date of its entry may be ordered upon motion "after due notice to the judgment debtor", and that since the statute is silent as to the manner of giving the notice personal service is required. Tolle v. Doak, 12 Cal.App.2d 195, 55 P.2d 542. Hearing by the Supreme Court was denied in that case. It was subsequently held by the same court in another case that the required service was made upon the defendant by virtue of service made upon his attorney, who had appeared on behalf of the defendant in a court proceeding about one year prior to the order for the issuance of the execution. In the latter case no proof was made that the attorney served with notice was not the acting attorney of the defendant at the time of such service. Widener v. Hartnett, 30 Cal.App.2d 165, 85 P.2d 925. The presumption of the continuance of his agency was the obvious basis of that order.

In support of his demand for the recall of the execution and for a supersedeas, defendant recites the background of the order. After the separation defendant conveyed to plaintiff their former home and its furnishings valued at $17,000. Since the entry of the interlocutory decree he has paid her $17,793.67. Sixteen years have elapsed since the entry of the interlocutory decree. Age has advanced; the children have matured; a new economy has altered the status of defendant, while plaintiff has been steadily employed. Defendant has no resources for his own support or out of which the execution might be satisfied, except his salary, and this might be lost in the event of levies. The daughter married in 1930 and the son attained his majority in February, 1939. In view of these facts further proceedings under the execution pending the appeal should be stayed. The amount fixed in the order was taken from plaintiff's affidavit. Properly to determine this sum will require consideration of the claims of defendant, denied him at the hearing, and they cannot be adequately appraised until the merits of defendant's motion to recall and quash the execution shall have been determined on appeal.

It is therefore ordered that all proceedings in this action in the superior court be and they are hereby stayed until a decision upon appeal from the order refusing to recall and to quash the execution.

We concur: WOOD, J.; McCOMB, J.

42 Cal.App.2d 28

BARTHOLOMEW v. CROSS et al.

Civ. 2903.

District Court of Appeal, Fourth District, California.

Dec. 16, 1940.

1. Appeal and error 🔑612(2)

A county clerk is authorized to certify to, and authenticate as record on appeal, only the judgment roll, order appealed from, and notice of appeal, and trial judge's signature is necessary to authenticate record. Code Civ.Proc. §§ 951, 953a.

2. Appeal and error 🔑616(1)

Records on appeal, as from order approving compromise settlement and contract of release between parties to personal injury suit and orders denying motions by State Compensation Insurance Fund to vacate such previous order and give movant first lien on amount payable to plaintiff under terms of settlement, must bear trial judge's certificate showing that documents in record were those used on hearing. Code Civ.Proc. §§ 951, 953a; Rules for Supreme Court and District Courts of Appeal, rule 29.

◆

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by Clifford I. Bartholomew against Lyle G. Cross and another, to recover damages for personal injuries, in which the State Compensation Insurance Fund filed a notice of lien on any settlement or judgment in plaintiff's favor. From an order approving a compromise settlement and release of plaintiff's demands and orders denying the Insurance Fund's motion to vacate such previous order and declare a first lien in its favor on amount payable to plaintiff under terms of settlement, the Insurance Fund appeals. On motion to dismiss the appeal.

Appeal dismissed.

Roy Weisensel, of Los Angeles, for appellant.

Friis & Schutz, of Anaheim, for plaintiff and respondent.

Forgy, Reinhaus & Forgy, of Santa Ana, for defendants and respondents.

MARKS, Justice.

This is a motion to dismiss the appeal on the ground that the record on appeal is not properly certified so that there is no record on which the issues may be determined.

Plaintiff commenced this action against Lyle G. and Ella Cross to recover damages for personal injuries suffered by him when he was struck by their automobile. Defendants answered denying negligence and alleging the contributory negligence of plaintiff.

On May 23, 1940, the State Compensation Insurance Fund filed a notice of lien on any settlement or judgment in favor of plaintiff by reason of its becoming obligated to plaintiff under its contract of compensation insurance issued to the Orange County District Council of Carpenters, the employer of plaintiff.

On August 1, 1940, defendants filed a notice of motion which was served on plaintiff and his attorneys, Orange County District Council of Carpenters, and State Compensation Insurance Fund, and its attorney, informing them that plaintiff and defendants intended to enter into a compromise of all those portions of plaintiff's demand against defendants "except any claim that Orange County District Council of Carpenters, plaintiff's employer, or State Compensation Insurance Fund, its compensation insurance carrier, may now, or in the future, have by reason of payments made or to be made for compensation, medical, hospital or other expenditures under the provisions of Division IV of the Labor Code. * * *" St.1937, p. 265 et seq. Attached to the notice of motion were copies of a contract between plaintiff and defendant and an unexecuted copy of a proposed release of those portions of plaintiff's demands to which the State Compensation Insurance Fund was not subrogated under the provisions of the Labor Code.

Under date of August 15, 1940, the trial court approved the settlement and the contract of release whereby $2,850 would be paid plaintiff. The order specifically recited that the settlement did "not include any claim or claims of the Orange County District Council of Carpenters or State Compensation Insurance Fund which they may have by reason of payments made or in the future may make for compensation, medical, hospital or other expenditures under the provisions of division IV of the Labor Code of the State of California. * * * That the full amount of said compromise and settlement, to-wit, $2,850.00 is free of any lien of the claim or claims of the Orange County District Council of Carpenters or of the claim or claims of the State Compensation Insurance Fund which they might now or in the future have by reason of payments made or to be made for compensation, medical, hospital or other expenditures under the provisions of division IV of the Labor Code of the State of California."

On August 24, 1940, the State Compensation Insurance Fund gave notice of its motion to vacate the order of August 15, 1940. It also gave notice of a motion for an order to have a first lien in the sum of $2,100.74 in its favor attach to the amount of the money to be paid plaintiff under the terms of the settlement. Copies of affidavits were attached to this notice of motion. On September 10, 1940, the trial judge signed orders denying the motions.

The State Compensation Insurance Fund appealed from these two orders and the order of August 15, 1940.

The appeal is before us on what is called a "Clerk's Transcript". Besides the pleadings, notices of motions, orders, and the other documents we have mentioned, it contains other notices and affidavits, together with the notice of appeal and the request for transcript. The transcript has attached to it a certificate by the county clerk that the named documents in the transcript are "full, true and correct copies of the originals on file in my office". There is no other certificate to the transcript.

[1] It is settled that a county clerk is only authorized to certify to and authenticate as a record on appeal "the judgment roll, the order appealed from, and the notice of appeal. Code Civ.Proc. § 951; Martin v. Pacific Gas & Elec. Co., 195 Cal. 544, 546, 234 P. 321; Jeffords v. Young, 197 Cal. 224, 227, 239 P. 1054. The signature of the trial judge is necessary to authenticate a record under section 953a, supra [Code Civ.Proc.]. Bell v. Brigance, 194 Cal. [445], 448, 229 P. 27." Stern & Goodman Inv. Co. v. Danziger, 206 Cal. 456, 274 P. 748, 749.

[2] Section 951 of the Code of Civil Procedure requires the appellant to furnish a record on appeal from orders such as we have here, containing copies of the "papers used on the hearing in the court below".

Rule XXIX of the Rules for the Supreme Court and District Courts of Appeal provides as follows: "In all cases of appeal from the orders of the Superior Courts, the papers and evidence used or taken on the hearing of the motion must be authenticated by incorporating the same in a bill of exceptions, except where another mode of authentication is provided by these rules or otherwise by law."

It has been held repeatedly that records on appeal such as we have here must bear the certificate of the trial judge and that this certificate must show that the documents in the record were those *used* on the hearing, for without such certificate it might be true that none of the papers in the transcript were *used* on the hearing and that others not in the record *were used* and the decision made upon them. Clark v. McCain, 107 Cal.App. 668, 290 P. 901; Guyot v. Cassab, 118 Cal.App. 742, 5 P.2d 912; Salinas v. Riverside Finance Co., 126

Cal.App. 675, 14 P.2d 1025; Johnson v. Johnson, 133 Cal.App. 151, 23 P.2d 780; Santa Ana, etc., Co. v. E. Rurup Est., 23 Cal.App.2d 445, 73 P.2d 908; Mason v. Coalinga, etc., Dist., 31 Cal.App.2d 317, 87 P.2d 921; San Bernardino, etc., Bank v. Adams, 37 Cal.App.2d 502, 99 P.2d 697; Kwon v. Kwon, Cal.App., 102 P.2d 808. These cases hold that without the correct certificate of the trial judge to the record, there is no record on which the appeal can be considered.

The appeal is dismissed.

We concur: BARNARD, P. J.; GRIFFIN, J.

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42 Cal.App.2d 83

PEOPLE v. NELSON.

Cr. 1743.

District Court of Appeal, Third District. California.

December 19, 1940.

1. Witnesses 🔑293

The statute making proof of father's failure to provide for minor children prima facie evidence of wilfulness merely fixes quantum of evidence necessary to establish guilt, and is not unconstitutional as compelling a defendant to be a witness against himself. Pen.Code, § 270.

2. Criminal law 🔑741(1), 742(1)

In prosecution for failure to provide for accused's minor children, weight of evidence and credibility of witnesses were for trial court sitting without jury. Pen.Code, § 270.

3. Parent and child 🔑17(6)

Evidence sustained conviction of failure to provide for accused's four minor children. Pen.Code, § 270.

4. Indictment and information 🔑176

In prosecution for failure to support minor children, "variance" did not occur because information charged that nonsupport occurred on or about May 29 and evidence was received covering a period both prior and subsequent thereto, since statute deals with a continuing offense, and evidence of acts of accused may be admitted which occurred either subsequent or antecedent to date specified in complaint. Pen.Code, § 270.

See Words and Phrases, Permanent Edition, for all other definitions of "Variance".

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Appeal from Superior Court, Sonoma County; Donald Geary, Judge.

Alvin C. Nelson was convicted of failure to provide for his minor children, and from the judgment of conviction and an order denying a new trial, he appeals.

Affirmed.

J. N. DeMeo, of Santa Rosa, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

PER CURIAM.

Appellant was tried before the court (a jury having been waived) and found guilty of failure to provide for his four minor children. Sec. 270, Pen.Code. This is an appeal from the judgment of conviction and the order denying a new trial, upon the following grounds:

First: The insufficiency of the evidence to prove that the failure of the defendant to provide for his minor children was wilful and without lawful excuse.

Secondly: The court erred in refusing to admit evidence tending to show the motives of the complaining witness.

Thirdly: A fatal variance between the information and the alleged proof, and

Fourthly: That section 270 of the Penal Code is unconstitutional.

[1] The contention that this section is unconstitutional was raised and answered in Re Bryant, 94 Cal.App. 791, 271 P. 926, 927, adversely to appellant. The court there said: "Section 270 merely fixes the quantum of evidence which, until overcome, establishes beyond a reasonable doubt the guilt of a defendant charged with a violation of that section; it does not compel a defendant to be a witness against himself."

As to the alleged insufficiency of the evidence to establish the wilfulness of appellant in his neglect of his children, the record reveals that the defendant and his wife have four children aged 8, 5, 3 and 1. In November, 1939, defendant worked for a roofing contractor and received $22.54 for about five days' work. Of this amount he gave his wife $5 for groceries, retaining the balance for himself. From January to April defendant worked on a ranch. He received two meals at the ranch and slept at the home of a brother. For this period of employment he received $43, giving nothing for the support of his children, although he brought home some eggs and a turkey, which had been given to defendant by his brother. While on an S. R. A. project he received $26, out of which he paid $7.50 on account of rent of the house occupied by his wife and children, and gave her $2 for groceries. For another period of S. R. A. employment he received $30, giving his family about $5; and again out of another S. R. A. check of $30 the family received $2, and at the time of his arrest he gave his wife another $5, he having been paid $42 by S. R. A. shortly prior to his arrest.

Summarizing this financial report, it appears that from November 1, 1939, to June, 1940, defendant had admittedly received approximately $190, and contributed to his family about $26 in cash and helped in no other way except for the eggs and turkey which his brother had given him, and which he brought home to the wife and children.

[2, 3] The evidence was conflicting on many points, a fact upon which the trial judge commented in pronouncing sentence, but the court, sitting without a jury, has had the opportunity to weigh the evidence and determine the credibility of the several witnesses and we are satisfied of the correctness of his findings.

It is argued that defendant is a man of less than average intelligence and stability, and consequently his earnings are small, but he is not being punished because he did not earn more, but that out of those earnings he did not contribute a fair share for the necessary food, clothing, shelter and medical care of his children. They were his children, and the primary care for their support and protection was his.

As to the motives of the complaining witness, that was for the trial court to determine in weighing her credibility, but regardless of what her motives may have been, the facts seem clear that for several months defendant had done little to support his four minor children.

[4] The claim of a variance between the allegations in the complaint and the proof is based upon the fact the information charges the nonsupport occurred on or about the 29th day of May, 1940, and evidence was received covering a period both prior and subsequent thereto. This point is without merit. Section 270 of the Penal Code deals with a continuing offense, and evidence of the acts of the defendant may be admitted which occurred either subsequent or antecedent to the date specified in the complaint.

As pointed out in People v. Wallach, 62 Cal.App. 385, 217 P. 81, 84, "failure to provide upon one day or another day is not the evil aimed at by the statute. It is the continuing offense, the failure to provide for a substantial length of time, without legal excuse, which constitutes this offense."

The judgment and the order are affirmed.

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41 Cal.App.2d 939

BOGARDUS et al. v. SANTA ANA WALNUT GROWERS ASS'N (WYNE et al., Interveners).

Civ. 2497.

District Court of Appeal, Fourth District, California.

Dec. 13, 1940.

Hearing Denied Feb. 10, 1941.

1. Agriculture 🔑6

Marketing contracts between walnut producers and local nonprofit co-operative marketing association and between the local association and central marketing association were not contracts for outright sale and purchase of walnuts but created a fiduciary relationship between the parties, and net crop proceeds in hands of the associations were trust funds, to a pro rata share in which each producer who contributed walnuts to create the funds was entitled, regardless of whether he was still a member of the association at time of distribution of the funds. Civ.Code, § 602; St. 1933, p. 255, § 1192.

2. Agriculture 🔑6

Under marketing contracts, association's by-laws, and general laws, walnut producers who voluntarily withdrew from nonprofit co-operative marketing association and thereby forfeited all interest in association's property and assets other than interest in revolving fund did not lose right to their pro rata share of undistributed crop proceeds from sale of walnuts contributed by withdrawing members prior to withdrawal. Civ. Code, § 602; St.1933, p. 255, § 1192.

3. Appeal and error ⚿659(3)

On plaintiffs' appeal from judgment dismissing action, interveners' motion for diminution of record on ground interveners had not only joined with defendant in contesting plaintiffs' claims, but that interveners' complaint and amendment thereto had sought relief against defendant, would be granted as to interveners' complaint and amendment thereto. Rules for the Supreme Court and District Courts of Appeal, rule 14.

4. Parties ⚿48

In action by members of marketing association for injunction and declaratory relief with respect to proposed payment by association of undistributed crop proceeds to persons who had withdrawn from the association, wherein such persons as interveners not only opposed members' claims but also sought judgment against association for share of the proceeds, judgment dismissing the action brought by members did not operate to dismiss interveners' cause of action which, therefore, was still pending in trial court.

Appeal from Superior Court, Orange County; Franklin G. West, Judge.

Action by Roy C. Bogardus and others against the Santa Ana Walnut Growers Association for an injunction and declaratory relief with respect to the payment of undistributed crop proceeds by defendant association to persons who had ceased to be members of the association, wherein John M. Wyne and others intervened. Demurrers to the complaint were sustained without leave to amend, and, from judgment dismissing the action, plaintiffs appeal.

Affirmed.

Charles D. Swanner and R. Y. Williams, both of Santa Ana, for appellants.

Forgy, Reinhaus & Forgy, of Santa Ana, for respondent Santa Ana Walnut Growers Ass'n.

Harvey, Rimel & Harvey, of Santa Ana, for interveners John M. Wyne and others.

Rutan, Mize & Kroese, of Santa Ana, for intervener H. & J. Mabury Co.

GRIFFIN, Justice.

This is an action for injunction and declaratory relief brought by the plaintiffs and appellants Roy C. Bogardus, Emanuel C. Martin and Stephen Griset, for themselves as individuals, and for the express benefit of all persons who are now members of Santa Ana Walnut Growers Association, a corporation, and were such during some portion of the period between January 1, 1921, and January 1, 1936, against the respondent Santa Ana Walnut Growers Association, a corporation (for convenience hereinafter called the "local association"), for an injunction restraining respondent local association from paying to any person or persons, firm or corporation who has ceased to be a member of the local association, any of the moneys returned to the local association from the California Walnut Growers Association, a corporation, hereinafter called the "central association", out of the operating reserve fund of the latter association, and that the court declare that all the money which the local association has already received from the central association out of the "present operative reserve fund" is the money and property of the local association and that any and all persons, whether or not they have been members of the local association between January 1, 1921, and January 1, 1936, who have ceased to be members of the local association, have no right or title or interest in or to any of said moneys or any part thereof, and that no part thereof should be paid to any of them.

The respondent local association filed a general demurrer to the complaint. Thereafter, by permission of the court, John M. Wyne, W. J. Gould and J. C. Steffens, hereinafter called the interveners, for themselves as individuals and for the express benefit of all persons who were members of the local association during all or any portion of the time from January 1, 1921, to January 1, 1936, but who ceased to be members of the local association prior to April 3, 1939, filed a general and special demurrer to the complaint. They relied only upon the general demurrer at the hearing thereof.

Intervener H. & J. Mabury Company, a corporation, filed a general demurrer to the complaint. All demurrers to the complaint were argued together and upon being submitted the court made its order sustaining all of the demurrers to the complaint without leave to amend, and the judgment of the court dismissing the action as to the appellants herein was thereafter duly entered and this appeal resulted.

The complaint alleges that during all of the years from 1921 to 1939, inclusive, the central association was a nonprofit cooperative walnut marketing association, whose members consisted wholly and solely of numerous localized nonprofit cooperative walnut marketing associations throughout California; that during all of said time one of the members of the central association was respondent local association, which was a nonprofit cooperative marketing association whose membership consisted of numerous walnut growers; that all of the interveners herein, and all persons represented by them, were members of respondent local association during all or some part of the time from the years 1921 to 1935, inclusive, and contributed their walnuts for marketing; that they all ceased to be members of respondent local association prior to April 3, 1939; that all of the appellants herein and all persons represented by them, were members of respondent local association during all or some part of the time from the years 1921 to 1935, inclusive, and contributed their walnuts for marketing and all such persons were still members in good standing on April 3, 1939, the date this action was filed.

The working plan for the marketing of walnuts through these associations was as follows: Each year each local association member of central association, including respondent local association, would receive the walnut crops from their various grower members, would prepare them for market and deliver them to the central association. The central association, in turn, would receive the walnuts from the various local associations, grade them and market them through its sales organization.

From 1921 to 1935, the central association adopted the practice of appraising and estimating the probable gross proceeds which it would receive during each particular crop year for all walnuts which it would market and sell during said crop year, and from that estimate the central association deducted its estimated costs and expenses of operation and thereby arrived at an estimate of its probable net sales proceeds for the particular crop year. Then, before all of the walnuts for said crop year were sold, the central association would advance to its local association members their pro rata share of the estimated net proceeds for that particular crop year. From the amount so received each local association would deduct its actual costs and expenses of operation. The resulting balance would then be distributed by the local association to its grower members pro rata, according to the amount of their respective contributions of walnuts. This practice was followed by the central association, by the local association, and by the grower members of the local association during the entire period from 1921 to 1935, inclusive.

The complaint further alleges that the net proceeds, surpluses or excesses received by the central association were from year to year retained by the central association and placed in a separate special fund known as the "Present Operative Reserve Fund". The amount of net proceeds or surpluses which went into that fund during each year of the period above mentioned, and the amount of the net proceeds or losses suffered in the years 1926 and 1933, are specifically set forth and alleged in the complaint. It is further alleged that at the close of the central association's 1935–1936 fiscal year, the total net amount of proceed-surpluses in the "Present Operative Reserve Fund" after deducting the losses sustained in the years 1926 and 1933, was the sum of $697,479.70.

It is further alleged that respondent local association was and is entitled to receive from the central association a pro rata share of the total net amount of the proceed-surpluses which made up the "Present Operative Reserve Fund". The complaint then alleges in figures the amounts of the net proceed-surpluses which the respondent local association was and is entitled to receive for each of the crop years in which surpluses were realized and the amounts of the net proceed-losses which the respondent local association was required to bear for the two years when losses were sustained. Then it is alleged that after deducting the respondent local association's share of the losses from its share of the surpluses, a net surplus balance remained in the sum of approximately $42,717.08, which sum of money the respondent local association was entitled to receive from the central association out of the "Present Operative Reserve Fund", as its pro rata share of the total net proceed-surpluses derived from the sale of walnuts. It is then alleged that about November 12, 1936, the central and local associations entered into a written agreement wherein it was agreed that the local association's pro rata share of the net balance in the "Present Operative Reserve Fund" was $42,717.08, and that that sum would be paid to respondent local association in five equal annual instalments of approximately $8,543.41 each. A copy of the agreement was attached to the complaint and incorporated therein. It is next alleged that at the time of filing the complaint the central association had already paid three yearly instalments of $8,543.41 each to the local association under the terms of the agreement. Then follows an allegation that all the debts, costs and expenses incurred by the local association for the years 1921 to 1935, inclusive, for maintenance and for receiving, packing, processing, advertising and for all other expenses of marketing, were fully paid and discharged by the local association prior to the execution of the written agreement above mentioned, and that all of the debts, costs and expenses were paid and discharged out of the money which the local association had from year to year received from the central association by way of an advancement on account of crop proceeds as hereinabove set forth. The complaint then sets forth in haec verba portions of the by-laws of the local association which were in effect during the whole of the period in question.

Article X(a) thereof provides that the local association shall not have capital stock, *and that its business shall not be carried on at a profit, but all profits or losses realized or suffered by it in marketing the walnuts for its members shall be distributed to or borne by the persons delivering their walnuts to the local association for marketing,* upon such terms and conditions as prescribed in the by-laws or in any further contracts to be entered into by the respondent local association with its members. Other articles provide for the admission of new members and the issuance of membership certificates. Article X(e) provides that if any member of the local association *ceases to be a grower of walnuts and for that reason ceases to market walnuts through the association, then his membership shall, ipso facto, cease and be canceled;* and such member shall not be entitled to any appraisement of, or *further interest in,* the *property* of the association, other than the interest given him under the by-laws relating to "Revolving Fund", and each member expressly waives his right to said property, other than his interest in the "Revolving Fund", upon the cancellation of his membership. Other articles authorize the creation of the local association's revolving fund, provide rules for the use thereof, and fix the rights of the members in the revolving fund. The complaint then alleges that on March 1, 1925, a written marketing contract called "Growers' Contract" was entered into between all grower members and the local association wherein the contracting parties agreed upon all matters respecting the marketing of walnuts and distribution of the proceeds from the sales thereof. This contract was to continue in force until March 4, 1940. Among its provisions is one in reference to the right of growers to withdraw from the association. "* * * this agreement shall, as to the party withdrawing therefrom, *be terminated* and ended as of said March 1st, *as to the obligation* of said party *to buy and/or to sell* said walnuts." "* * * nothing in this paragraph shall impair or take away any of the rights of either or any of the parties hereto against any other party hereto existing at the time of such termination or withdrawal, except as to the delivery of walnuts produced after March 1st following, * * *." Other provisions are: "(b) LOCAL agrees to resell such walnuts, * * * and to *pay over the net amount* received therefrom as payment in full *to the* Growers, * * *" "* * * (a) Proceeds of resales of walnuts made by Local shall be *distributed to growers* from time to time and as rapidly as Local *receives* the same from Central * * * Each GROWER expressly ratifies, confirms, and adopts the by-laws of Local * * *" (All italics ours.)

A similar agreement, called the "Central-Local Agreement", was executed between the local and the central associations. Among its provisions is to be found: "(a) Central agrees to buy * * * from each Local, and each Local agrees to sell * * * all of the walnuts * * * acquired * * * by such Local * * * (b) Central agrees to resell said walnuts * * * and to pay over the net proceeds received therefrom as payment in full to

Locals * * * (a) Proceeds of resales of walnuts made by Central shall be distributed to Locals from time to time * * *." The complaint then alleges that the interveners signed and subscribed to the by-laws of the local association; that on February 15, 1939, the board of directors of that association adopted a resolution, a copy of which is attached to the complaint, directing that all moneys received by respondent local association from the central association out of the aforesaid "Present Operative Reserve Fund" be immediately paid and distributed by the association pro rata to the persons who contributed to said fund from time to time by marketing their walnuts, in the proportion in which they contributed, whether or not such persons were then still members of the local association.

The complaint further alleges as a conclusion of law, that under the by-laws of the local association, the ex-members of that association are not entitled to share pro rata, or at all, in any of the moneys received by the local association from said fund.

With this comparative brief statement of the very lengthy complaint, we come now to the contentions of the respective parties.

Appellant first argues that under the terms of the by-laws of the local association and the general laws relative to a voluntary withdrawal by a member from a nonprofit marketing association (sec. 602, Civ.Code) any member who voluntarily withdrew from respondent local association thereby lost all right to share or participate in the property of the association, such as the packing house fixtures, equipment and other items of tangible personal property in which title always moves with those members who retain their membership in the association.

Interveners admit that under article X (e) of the by-laws and section 602 of the Civil Code a member who voluntarily withdraws from the association loses his right in the *property of the association* other than his rights created by his interest in the revolving fund, but denies that the money here in controversy constitutes an asset or property of the local association and therefore does not come within the purview of nor is it governed by the terms and provisions of article X(e) of the by-laws or the general laws on forfeiture of rights in the physical properties and assets of the local association.

It is contended by the interveners that the moneys in controversy are not assets or property of the respondent local association but are the unpaid balances of crop proceeds received from the sale of walnuts during the years from 1921 to 1935, and that said moneys belong to the individual growers who contributed their walnuts for marketing during that period of time and that each such grower is entitled to receive his pro rata share of the moneys received from such crop proceeds, according to the proportion of his contribution of walnuts, whether or not he retained his membership in the local association.

Respondents point out that the local association first is a nonprofit co-operative walnut marketing association and cite chapter 4, section 1192 of the Agricultural Code, St.1933, p. 255, which provides as follows: "Associations deemed 'nonprofit'. Associations organized hereunder shall be deemed 'nonprofit,' inasmuch as they are not organized to make profit for themselves, as such, or for their members, as such, but only for their members as producers."

Article X(a) of the by-laws of the local association contains the provision: "This association shall not have a capital stock, and its business shall not be carried on for profit, but all profit or losses realized or suffered by it in marketing the walnuts for its members *shall be distributed to* or *borne by the persons delivering their walnuts* to the association for marketing, * * *."

Appellants do not dispute the fact that the sums herein involved are the net proceeds derived from the sale of walnuts delivered by the growers of the local association for the crop years mentioned. The local association held this money in a separate fund and added to it in the same manner from year to year until the fund was closed at the end of 1935. Under the instalment plan agreed upon respondent local association will have in its possession $42,717.08 which it never had before and for which no consideration has been given by respondent local association, as an association. To allow respondent local association to retain this money for the benefit of the association, as such, or for the benefit of its present members, as such, would result in permitting it to enjoy a profit for itself, as such, or for its members, as such, in contravention of the very purpose for which it was organized, and would result in permitting present members to enjoy the use and benefit of such money, not as producers of walnuts, but simply as members of respondent local association, to the total loss and detriment of the ex-members. Appellants admit the results above suggested but contend that the same rule applies to this money as to the general property of the local association.

In this connection it should be noted that under the terms of the by-laws relating to the revolving fund, that fund is to be used to purchase, operate and maintain all of the physical assets and property of the respondent local association. Thus, a withdrawing member's interest in the revolving fund represents his interest in the property of the association, and he ultimately receives back what he has put into this fund, but he is not entitled to receive back any sum of money in excess of his actual contribution thereto. If we were to adopt the appellants' construction of the by-laws as to the moneys here in controversy, the withdrawing member, who contributed thereto, would lose all rights to the funds in question if the local association were permitted to retain said moneys. Under the by-laws we do not believe this result was intended.

Appellants also contend that the marketing contracts which were entered into are, by their terms, contracts of absolute and outright sale and purchase, and that by reason thereof, there is no fiduciary relationship existing between the parties thereto.

[1] It is respondents' contention, with which we agree, that at all times the relationship between the grower member and the local association, and between the local association and the central association, was that of principal and agent, or beneficiary and trustee; that a fiduciary relationship existed which required at all times that these associations account to the grower member for all proceeds received from the sale of walnuts, and required the grower member to bear his proportionate share of all losses sustained in the marketing and sale of walnut products. In support of this contention Texas Certified Cottonseed Breeders' Ass'n v. Aldridge, 122 Tex. 464, 61 S.W.2d 79, and Rhodes v. Little Falls Dairy Co., Inc., 230 App.Div. 571, 245 N.Y.S. 432, are cited. Both of these cases involve actions between a member of a nonprofit cooperative marketing association and said association for an accounting, and for the determination of rights involving proceeds received from sales of marketed products. In each of these two cases marketing contracts had been entered into between the purchaser and association, which contracts provided for the immediate passage of title and were otherwise couched in terms of outright purchase and sale. In each of the cases cited the court held that the provisions for passage of title, and the terms of purchase and sale, were merely for convenience in marketing operations, and that the real relationship between the parties was one of trust, or of a fiduciary character. Appellants cite several cases which reach a contrary conclusion, and hold that the contracts under consideration were agreements for outright sale and purchase and that no fiduciary relationship existed. McCauley v. Arkansas Rice Growers' Co-op. Ass'n, 171 Ark. 1155, 287 S.W. 419, Winter Garden Citrus Growers' Ass'n v. Willits, 113 Fla. 131, 151 So. 509; Fletcher Cyclopedia Corporations, vol. 16, sec. 8286, p. 1205; Callaway v. Farmers' Union Co-op. Ass'n, etc., 119 Neb. 1, 226 N.W. 802, and Texas Farm Bureau Cotton Ass'n v. Lennox, 117 Tex. 94, 297 S.W. 743.

Respondents claim to have made an exhaustive examination of the California law and are unable to find any cases directly deciding this point. Our attention, however, has been called to the case of Mountain View Walnut Growers' Ass'n v. California Walnut Growers' Ass'n, 19 Cal.App.2d 227, 65 P.2d 80, which was an action between one of the members of a local association and the California Walnut Growers' Association, and involved a controversy regarding a similar fund of money to that which is here in controversy, viz., the "Present Operative Reserve Fund". One of the same forms of marketing contracts, i. e., a "Central-Local Agreement", such as the one here involved, was also there under consideration. The local association in that action was seeking the return of its pro rata share of the "Present Operative Reserve Fund" and at the time that action was instituted and heard no agreement had been entered into between the central association and its local association members for the distribution of that fund, and the central association was still holding that fund in its possession. Although the court there held that the local association's action was premature, it did hold that the "Present Operative Reserve Fund" was not the property of the central association, but was, as agreed upon by the parties, a trust fund, and that the local association was entitled to its pro rata share of the money when the funds should be distributed. It becomes apparent then that the decision does constitute and hold that the "Central-Local Agreement", which is the same in substance as the one here involved, was not a contract of outright purchase and sale, because if it had been so held, then it would have been incumbent upon the court to have said that when from year to year the central association advanced moneys to the local association on account of crop proceeds, under the terminology of the agreement, the local association was paid in full. We are therefore convinced that if the money here in controversy was a trust fund while it was in the hands of the central association, then it clearly is a trust fund while in the hands of the local association and that each member who contributed to that fund is entitled to receive his pro rata share thereof. It therefore appears to us that under the rule here adopted, the ultimate and final benefits should be distributed to those persons who contributed their walnuts in proportion to their contribution. Not only is this rule a fair and equitable one and in harmony with the nonprofit cooperative character of these associations, but it is a rule which was contemplated by the parties to this action as shown by the following excerpts from the by-laws of the respondent local association and from the marketing contracts here involved. Article X(a) provides that the local association's business shall not be carried on for profit, but that the profits realized by it in the marketing of its members' walnuts shall be *distributed to the persons delivering their walnuts* to the association. Section VI(b) of the growers' contract contains this provision: "If Local, * * * shall advance * * * to Growers * * * more than the amount to which said growers are * * * entitled * * * grower * * agrees * * * to * * * repay * * to Local so that said grower shall receive neither more nor less than the amount to which he is entitled."

The Central-Local Agreement contains an identical provision with reference to overpayment to the local association. This clearly indicates that it was the intention of the parties that each contributing member of respondent local association was ultimately to receive the entire net proceeds from the sale of his walnuts, and that no one payment, or advancement, was to be considered as final, or payment in full, if, in fact, later developments should disclose that the net proceeds from the sales of his crops were greater or less than the amount so advanced to him.

[2] Section III(c) of the growers' contract provides for the termination of, or a member's withdrawal from said marketing contract and then provides that *nothing in said paragraph shall impair or take away any of the rights of either or any of the parties to said agreement against the other parties existing at the time of such termination or withdrawal.* It therefore appears that there is no authority under the marketing contract or by-laws of respondent local association which would permit that association to now, for the first time, elect to retain this money, which represents crop proceeds from past years, as a reserve or other fund for future operations, especially where a portion of that money constitutes the balance of net proceeds received from walnuts contributed from persons who no longer are members of the local association and who could receive no benefit from such a reserve or other fund. We therefore conclude that the rule of forfeiture established by the by-laws and by the general laws that a member who voluntarily withdraws from a nonprofit cooperative marketing association loses his right to an interest in association property, other than his interest in the association's revolving fund, applies only to the property or assets of the association, and has no application to unpaid and undistributed crop proceeds money received from the sale of walnuts contributed by the withdrawing member to that association for marketing, prior to the date of his withdrawal, and the balance of crop proceeds money is the property of the person who contributes his crop. Hood River Orchard Co. v. Stone, 97 Or. 158, 191 P. 662; Ozona Citrus Growers' Ass'n v. McLean, 122 Fla. 188, 165 So. 625; Buford v. Florin Fruit Growers' Ass'n, 210 Cal. 84, 291 P. 170 (citing Hood River Orchard Co. v. Stone, supra); Loomis Fruit Growers' Ass'n v. California Fruit Exchange, 128 Cal.App. 265, 16 P.2d 1040. In the last-cited case the court said, 128 Cal.App. at page 280, 16 P.2d at page 1046: "The Buford case need not be considered further than simply sup-

porting what we have said, that the withholdings made by the exchange were of moneys belonging to the association and to the growers marketing fruit through the exchange."

Both under the facts alleged in the complaint and under the law applicable thereto, the moneys in controversy constitute the balance of net proceeds received from the sale of walnuts contributed to the local association for marketing during the years from 1921 to 1935, inclusive, and, as such, are the property of, and belong to, those persons who contributed their walnuts for marketing during that period. It is therefore apparent that the complaint does not state facts sufficient to constitute a cause of action and that the rulings upon the demurrers were proper.

[3, 4] This appeal is taken by appellants from an amended judgment of dismissal, dismissing "the action brought" by them. Respondent local association contended that the dismissal of appellants' action operated as a dismissal of and terminated the action as to all parties, including the interveners, citing Henry v. Vineland Irr. Dist., 140 Cal. 376, 73 P. 1061. Upon motion of interveners for diminution of the record they represented that they filed in the superior court, with its consent, a complaint and an amendment to the complaint in intervention, seeking relief against the respondent local association herein, in addition to joining with said respondent in contesting the claims of appellants.

For the purpose of examining the allegations bearing upon this point, the motion for diminution of the record should be granted only as to the complaint in intervention and the amendment thereto. Rule XIV, Rules for the Supreme Court and District Courts of Appeal. The additional relief sought therein consists briefly in asking for an adjudication as to the ownership of the fund in question, an adjudication as to the portions thereof belonging to the several interveners, an order for the payment thereof to the said interveners, and an adjudication and award by the court of a reasonable amount as attorneys' fees and costs, to be paid out of such fund as may be recovered by such interveners for themselves and the class they represent. It is apparent therefrom that the aforesaid matters raised by the complaint in intervention, as amended, are still pending in the trial court and await trial and decision by that court. We are unable to construe the order from which the appeal was taken as a dismissal of any cause of action other than appellants'. The issues presented by interveners' complaint in intervention should be determined by the trial court.

The motion for diminution of the record only as to the complaint in intervention and the amendment thereto is granted. The judgment of dismissal of appellants' cause of action is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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42 Cal.App.2d 53

SPAULDING v. PHILBRICK et al.

Civ. 6372.

District Court of Appeal, Third District.
California.

Dec. 17, 1940.

1. Officers 🔑11, 103

The State Personnel Board is vested with a large measure of discretion with respect to the classification of positions under the Civil Service Law and its findings of fact supported by evidence are unassailable. but its acts are reviewable by courts to determine whether board has kept within the law and has not abused its discretion. St. 1913, p. 1036, § 5; p. 1043, § 11.

2. Officers 🔑11

A state employee under temporary appointment has no civil service status and does not automatically acquire a permanent status merely by being on the civil service eligible list and continuing to perform duties of the employment. St.1913, p. 1043, § 11.

3. Officers 🔑11

Where petitioner, employed in state highway patrol as inspector under temporary appointment, subsequently passed civil service examination for inspector and for state traffic officer, no appointments were made from eligible lists for inspector, and that list was abolished by State Personnel Board and petitioner was appointed traffic officer, petitioner did not acquire permanent status

as inspector merely by being on eligible list and serving under his temporary appointment for more than 20 months; hence board could not subsequently reclassify petitioner as an inspector equivalent to position of captain, superior in class and rank to a traffic officer. St.1913, p. 1036, § 5; p. 1043, § 11.

* * *

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by George A. Spaulding against Howard R. Philbrick, etc., and others, for a writ of mandate requiring respondents to recognize an order of the State Personnel Board that petitioner be given status and classification in state civil service of "Captain, California Highway Patrol", and to pay him salary of that classification. From an adverse judgment, petitioner appeals.

Affirmed.

Henry & Bedeau and Anthony J. Kennedy, all of Sacramento, for appellant.

Earl Warren, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for respondents.

PER CURIAM.

Petitioner has appealed from a judgment denying his petition for a writ of mandate requiring respondents to recognize an order of the State Personnel Board that he be given the status and classification in State Civil Service of "Captain, California Highway Patrol," and pay him the salary of that classification.

Throughout this opinion we have used the word "Board" when referring to respondent, State Personnel Board, and also to its predecessor, State Civil Service Commission.

The evidence relating to petitioner's state service, as taken from the files of the State Personnel Board, and also from the testimony of William K. Smith, the senior personnel technician of the board, may be briefly summarized chronologically as follows:

October 20, 1930: Petitioner given a temporary appointment under temporary authorization to the position of *inspector,* California Highway Patrol. *November 15, 1930:* Petitioner passed civil service examination for position of *inspector at large, grade 3,* California Highway Patrol, and placed number 6 on the eligible list for that position. *November 15, 1930:* Petitioner took and passed state civil service examination for position of *state traffic officer. May 21, 1931:* Position of *inspector* reclassified by State Civil Service Commission to position of *deputy inspector,* California Highway Patrol. *April 22, 1932:* Eligible list for *inspector at large, grade 3,* abolished without any person having been certified for appointment from such list. *August 4, 1932:* Class title of *deputy inspector,* California Highway Patrol (formerly *inspector)* changed by State Civil Service Commission to *inspector,* California Highway Patrol. *August 25, 1932:* Petitioner certified and appointed to position of *state traffic officer,* California Highway Patrol, at salary of $175 per month. *February 10, 1937:* Petitioner filed petition with State Personnel Board requesting classification as *inspector, grade 3,* California Highway Patrol, or comparable class of *squad captain,* California Highway Patrol. *March 2, 1937:* Hearing held by State Personnel Board on petition of petitioner. *March 18, 1937:* Resolution adopted by State Personnel Board making a finding and decision in favor of petitioner as follows: "That petition of George A. Spaulding be granted and he be given status as Inspector, Grade 3, which class is now entitled Captain, California Highway Patrol".

The trial court found in the following language with reference to the order of March 18th, which appears above: "That said State Personnel Board made its said findings and decision or order with respect to petitioner George A. Spaulding without any competent evidence to sustain said resolution, finding, and decision or order, and that said Board abused its discretion and acted without jurisdiction in making said resolution, finding, decision or order; that said resolution, finding, decision or order is null and void".

The main question involved in this appeal is whether or not there is sufficient evidence in the record to support the finding quoted.

Referring again to the record, it appears that because there was no eligible list of persons who had taken and passed a civil service examination for the position of inspector of California Highway Patrol, the appellant herein was given a temporary appointment to said position on October 20, 1930. While holding said position of inspector under such temporary appointment, appellant, on November 15, 1930, took and passed a civil service examination for inspector at large, grade 3, California Highway Patrol, and on the same day took an examination for the position of state traffic officer, California Highway Patrol. As a result of said examination for said inspector at large, grade 3, appellant was placed sixth on the eligible list for said position. Petitioner was never certified or appointed to the position of inspector or inspector at large from said list. In fact, no person was ever appointed or certified from said list for said position, or any position, and the list was abolished by the board on April 22, 1932. On August 25, 1932, appellant was appointed state traffic officer, California Highway Patrol, as a result of having passed the civil service examination therefor on November 15, 1930.

[1] It is contended by appellant that the acts of the board are not reviewable by any court, and that no court can substitute its judgment for that of the board. A number of authorities are cited upon this question. The Supreme Court of this state has set forth the rule which should be our guide, in the following language, and where it was applied to the acts of the Civil Service Commission of the City and County of San Francisco: "Courts should let administrative boards and officers work out their problems with as little judicial interference as possible. They may decide a particular question wrong—but it is their question. Such boards are vested with a high discretion, and its abuse must appear very clearly before the courts will interfere." Maxwell v. Civil Service Commission, 169 Cal. 336-339, 146 P. 869, 871.

The foregoing quotation is cited with approval in Pratt v. Rosenthal, 181 Cal. 158-164, 183 P. 542. These authorities do not hold, however, that the acts of such a board are not reviewable, but merely prescribe the scope of such review. For illustration, if the board were to place upon the civil service eligible list the name of an individual who had taken no examination whatever where the law requires an examination, it would clearly involve an abuse of discretion. It must be conceded that in spite of the large measure of discretion committed to it, the board or other administrative agency, like all other governmental agencies and departments, must keep within the law, and that resort may be had to the courts to ascertain whether or not they have done so, bearing in mind, however, that in the realm of fact finding which is committed to it by the legislature, the acts of such board are unassailable—assuming, also, that such finding is supported by some evidence, and hence is not an abuse of the fact finding function.

The power of the board to classify positions was derived from section 5 of the State Civil Service Act, Statutes 1913, Chapter 590, page 1036, which reads as follows: "The commission shall: First—Classify positions to be held under state authority in accordance with the provisions of this act and in accordance with the duties attached to such positions. * * Such classes and grades may from time to time be amended, added to, consolidated or abolished by the commission, but persons holding positions under the original classification or grade shall not be affected thereby. * * *"

The result of the order of the board, entered March 18th, was to change the classification of petitioner from *traffic officer,* which was the only civil service status which he had ever attained, to that of *squad captain.* The record shows that the duties of such positions are not the same, and petitioner does not contend otherwise, nor does he contend that the board had any power or authority to classify a traffic officer as a sqaud captain. *His* claim is that upon the last mentioned date, petitioner had attained the permanent status of *inspector, grade 3,* a class which it may be assumed is comparable, in duties, with that of *squad captain.* Such status was attained, he argues, not by virtue of any order of the board conferring it, but by reason of the fact that he had taken the examination of inspector, and been placed upon the eligible list—being sixth on said list—although such list was abolished April 22, 1932, without any person having been certified for appointment thereunder. It is furthermore contended that petitioner acted, under temporary appointment, as such inspector, for more than twenty months, and until such list was abolished, and that such status was recognized by the board. His whole contention is thus summarized in his opening brief:

"In this case, therefore, the eligible list being in existence, and the petitioner being on that eligible list, it must be conclusively presumed from his continued service that he was serving not as a temporary appointee but as a *permanent appointee.* The Personnel Board, on March 18, 1937, was entitled to so consider his continued service."

[2] No authority is mentioned which holds that permanent status of a civil service employee can be attained by such indirection, and we doubt if any can be found. The case of Kraus et al. v. Singstad et al., 275 N.Y. 302, 9 N.E.2d 938, arose under the provisions of the Civil Service Law of New York, Consol.Laws, c. 7. That law is not before us. There, several persons took a civil service examination and were placed upon the eligible list which had expired when the action was brought. It was held that the commission should have continued them in permanent service, for the reason that they should therefore have been appointed, and *would have been appointed.* No showing is made in the instant case that appellant should and would have been appointed inspector. If that case goes to the extent of holding that merely being on the eligible list for some months, and performing the duties of the position, automatically confers permanent status, we are not prepared to accept it. Such procedure would be destructive of the very essence of civil service, as the rights of others who have properly qualified for a position would be ignored and disharmony thereby created. Appellant, when he was discharging the duties of *inspector,* was holding such position under the restrictive provisions of section 11 of the State Civil Service Act mentioned above. As to the status of an employee under such act, this court has held, in Shubert v. Department of Motor Vehicles, 16 Cal.App.2d 353, 357, 358, 60 P.2d 538, 539: "We are of the opinion the last-mentioned section" (section 11, State Civil Service Act) "was enacted to provide for a temporary appointment in an emergency, 'when there is no eligible list from which a position may be filled.' * * * There is no statutory provision making such temporary officers permanent under any circumstances. *They have no civil service status.* They are subject to dismissal at any time without cause."

[3] Summarizing the situation, it appears that four and one-half years after appellant ceased to hold the position of *inspector* under temporary appointment and without civil service status or rights, and that a time when appellant had permanent status as a highway patrolman, the State Personnel Board attempted to reclassify him and place him back in such position of *inspector* and say that such position was the equivalent of a higher position, to-wit: *captain,* though the only position which appellant ever held with civil service status or rights was that of California Highway patrolman, which is inferior in class and rank to that of captain.

We do not regard that the sole test here is the right of the courts to interfere with any *classification* of employees which the board might make, and the cases cited by appellant on that point do not solve the problem. The real question is whether or not the board could consider appellant as having the *permanent* status of inspector or inspector at large when it had never, by any action whatever, conferred that status upon him, nor had he legally attained it. If he did not have that status, it must be conceded that the board had no right or authority to classify him as a squad captain, and the order of March 18th would therefore be void. The whole argument of appellant relative to rights of the board to classify employees is based upon the premise that appellant had *permanent* status as inspector at the time the order was made, —a status which the record shows, without contradiction, he never had.

It would unduly prolong this opinion to discuss other points raised and authorities cited in the very excellent and comprehensive briefs submitted by appellant. We agree with him that the acts of the board here should not be set aside unless an abuse of discretion is shown, but we hold that the record affirmatively shows that there was such an abuse.

Our conclusion is that the order of March 18th was entirely lacking in evidentiary support, and that the board had no right or authority to make it. The findings have ample support in the record.

The judgment is affirmed.

41 Cal.App.2d 797

PEOPLE v. LITTLE.

Cr. 459.

District Court of Appeal, Fourth District, California.

Dec. 17, 1940.

Hearing Denied Jan. 3, 1941.

1. Conspiracy ⚿41

Generally, if in consummation of an express and unlawful purpose of conspiracy one conspirator goes outside of such express purpose and commits another offense, other conspirators cannot escape responsibility where the other offense was not an unreasonable result to be expected from the acts which were contemplated.

2. Municipal corporations ⚿205

Where embezzlements of public funds pursuant to conspiracy occurred each month over particular period, and at end of each month one conspirator filed false statement of accounts, but there was no evidence that other conspirator knew or should have known of the false accounts, other conspirator could not be convicted of falsifying public accounts, though he was convicted of conspiracy to embezzle and of embezzlement.

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

On petition for rehearing.

Petition for rehearing denied.

Prior opinion, 107 P.2d 634.

S. P. Williams, of El Centro, for appellant.

Earl Warren, Atty. Gen., Eugene M. Elson, Deputy Atty. Gen., and Elmer W. Heald, Dist. Atty., and Ralph I. French, Deputy Dist. Atty., both of El Centro, for respondent.

PER CURIAM.

Respondent has petitioned for a rehearing and urges that the part of our judgment which reverses the portion of the judgment of conviction of the crime of falsifying public accounts should be reconsidered.

It is urged that as Little was held guilty of the crime of conspiracy to embezzle, and also of the crime of embezzlement, he should also be guilty of the crime of falsifying public accounts as those criminal acts were committed in the "furtherance of the common object of the conspiracy" to embezzle and were "the ordinary and probable effect of the common design". People v. Sampsell, 104 Cal.App. 431, 286 P. 434, 437, citing People v. Lorraine, 90 Cal.App. 317, 265 P. 893; People v Kauffman, 152 Cal. 331, 92 P. 861; People v. Holmes, 118 Cal. 444, 50 P. 675; People v. Lawrence, 143 Cal. 148, 76 P. 893, 68 L.R.A. 193.

[1] We are not unmindful of this rule which is generally applied in conspiracy cases. It is well settled that "if in the consummation of an express and unlawful purpose of the conspiracy, one of the conspirators goes outside of such express purpose and kills, the other conspirators cannot escape responsibility where, as here, such killing is not an unreasonable result to be expected from the acts * * * which were contemplated". People v. Cowan, 38 Cal.App.2d 231, 101 P.2d 125, 130.

In this case, and others like it, certain of the conspirators went armed to the place of the crime to commit the offense that was the purpose of the conspiracy and the killing then occurred. The fact that they went armed to commit one crime, and the further fact that one of them killed during the commission of that offense, have been considered sufficient to bring the killing within the orbit of the conspiracy and make each conspirator liable to punishment therefor.

[2] There are reasons why this rule is inapplicable in the instant case. First, the conspiracy involved here had as its purpose the embezzlement of public funds. The embezzlements occurred during each calendar month over the period charged. Each part of the crime was complete when the money was misappropriated during a particular month. At the end of each month one conspirator filed a false statement of accounts. This was an act to conceal a former crime and was not a necessary part of that crime. Second, the filing of false statements by Mrs. Richards was not necessarily an incident of, nor was it a result to be expected and to follow from the crime of embezzlement. There are many cases of embezzlement reported in the books where there were no falsifications of public accounts by the embezzlers. Here, the crime of embezzlement was not committed through the falsification of public records nor at the time of filing the false reports. After each series of embezzlements had been

completed Mrs. Richards filed a false statement of her collections. In each case relied upon by respondent the independent crime was committed during the progress of the overt act which was the purpose of the conspiracy. Here, it was not so committed but occurred after each overt act had been completed. In our opinion there should be some evidence in the record from which the reasonable inference could be drawn that Little either knew or should have known that Mrs. Richards was filing false accounts. As such evidence is entirely lacking we cannot affirm that portion of the judgment.

The petition for rehearing is denied.

41 Cal.App.2d 933

In re NORINS' ESTATE.

NORINS v. STARK et al.

Civ. 12829.

District Court of Appeal, Second District, Division 2, California.

Dec. 13, 1940.

1. Executors and administrators 🔑224

Under the Probate Code, the claim of one of two coexecutors of an estate was not required to be presented to the other coexecutor before it was approved by the probate court. Probate Code, § 703.

2. Executors and administrators 🔑236

Construction of provision of Probate Code, that claim of one of two coexecutors was not required to be presented to the other coexecutor before approval by the probate court, would not deprive an heir of the estate of the opportunity to show that the claim should not have been allowed, since the court upon an ex parte application might, on sufficient showing, set aside the allowance of the claim, or the claim could be set aside on the motion of the heir. Probate Code, § 703.

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Proceeding in the matter of Norins' estate, wherein Meyer Stark and J. W. Dewey were coexecutors. J. W. Dewey resigned as an executor, and Meyer Stark filed his final account and report of executorship. A claim of J. W. Dewey against the estate was allowed. From an order approving the final account and report, Edward Norins, an heir, appealed to the Supreme Court, which transferred the appeal to the District Court of Appeal.

Affirmed.

Victor L. Mindlin, of Los Angeles, for appellant.

Maurice Gordon, of Los Angeles, for respondents.

McCOMB, Justice.

This appeal transferred from the Supreme Court to this court for decision, pursuant to article VI, section 4c of the Constitution of the state of California is from an order approving the final account and report of a coexecutor of the estate of decedent upon his resignation.

The essential facts are:

July 28, 1938, letters testamentary were issued to Meyer Stark and J. W. Dewey as coexecutors of the estate of decedent. September 30, 1938, J. W. Dewey filed a claim against the estate based on a promissory note alleged to have been executed by the decedent in his favor. This claim without being referred to the coexecutor was presented to the court commissioner of the probate court, who allowed and approved it. January 9, 1939, J. W. Dewey resigned as an executor of the estate. On April 4, 1939, Meyer Stark moved the court to strike the claim, which motion was by the court denied. July 18, 1939, Meyer Stark filed his final account and report of executorship upon resignation, wherein he included the aforesaid claim of J. W. Dewey as a claim against the estate. Appellant, an heir, filed an objection to the allowance of this claim, which was overruled, and he has appealed.

[1] This is the sole question necessary for us to determine:

Where one of two coexecutors of an estate is a creditor thereof, is it mandatory that such creditor's claim be presented to his coexecutor before it is approved by the probate court?

This question must be answered in the negative. Section 703 of the Probate Code reads in part as follows: "If the executor or administrator is a creditor of the decedent, he shall file his claim with the clerk, who must present it for allowance or rejection to the judge. Its allowance by the judge is sufficient evidence of its correctness, and it must be paid as other claims in due course of administration." The procedure followed in the present case was correct as it conforms to the requirements of the section of the Probate Code just mentioned.

[2] There can be no question that, had Mr. Dewey been the sole executor, the procedure here followed would have been valid and not subject to objection. There is no apparent reason why a different rule should obtain when there are two or more executors or administrators. The court has the final obligation to allow or reject a claim without regard to its approval by the executor. This construction of the code provision in question does not in any way deprive appellant of the opportunity to show that the claim should not have been allowed, for the court upon ex parte application might on sufficient showing have set aside the allowance of the claim (In re Sullenberger's Estate, 72 Cal. 549, 552, 14 P. 513), or the claim could have been set aside upon the motion of appellant, had he introduced on the hearing of such motion evidence to show that the claim had been erroneously approved.

For the foregoing reasons the order is affirmed.

We concur: MOORE, P. J.; WOOD, J.

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41 Cal.App.2d 918

MERCER CASUALTY CO. v. LEWIS et al.

Civ. 11546.

District Court of Appeal, First District, Division 2, California.

Dec. 13, 1940.

Rehearing Denied Jan. 11, 1941.

Hearing Denied Feb. 10, 1941.

1. Appeal and error 🔑712

A party must win or lose on the case made out by him in the trial court.

2. Insurance 🔑379(8)

Where automobile salesman with buyer's consent orally requested insurance broker to procure an automobile liability policy, and broker prepared and forwarded application to another broker who prepared policy of insurance which was executed by buyer who made no representations, and misrepresentations came into contract wholly through act of insurer and its agents without investigation, insurer was not entitled to cancellation of policy on ground that there was breach of material warranties rendering policy void.

3. Insurance 🔑379(8)

Where automobile salesman with buyer's consent orally requested insurance broker to procure automobile liability policy and broker prepared and forwarded application to another broker who prepared policy, including alleged warranties without consultation with buyer who executed policy and it was not shown that buyer or his agents had any knowledge of what had been inserted in the policy, insurer was not entitled to cancellation of policy on ground that insured was "estopped" by his conduct in accepting the policy without objection to misleading warranties inserted by broker.

See Words and Phrases, Permanent Edition, for all other definitions of "Estopped".

4. Insurance 🔑379(5)

An insured has a right to rely on presumption that policy received is in accordance with his application and his failure to read it will not relieve insurer or its agent from the duty of so writing it.

5. Estoppel 🔑53, 54

Knowledge and intent are essential elements of "estoppel".

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

6. Insurance 🔑559(2)

Where insurer under automobile liability policy denied liability and sought cancellation of policy, insurer "waived" any claim that notice of accident was insufficient or not within time. St.1935, p. 510, §§ 553, 554.

See Words and Phrases, Permanent Edition, for all other definitions of "Waived".

7. Action 🔑65

A court of equity having jurisdiction of the parties and of the subject matter will make a final disposition of the litigation governed by the circumstances as they are shown to exist at the time the decree is made rather than at the inception of the litigation.

8. Appeal and error ⟹1030

Where after insurer instituted action to cancel automobile liability policy and for declaratory relief insured's judgment creditor who obtained judgment for injuries arising out of an automobile accident filed cross-complaint against insurer about 30 days before judgment became final, it was the duty of the trial court to continue proceedings until such time as pleading of the judgment might properly be filed, but not having done so, and insurer's rights not having been prejudiced, judgment in favor of the judgment creditor could not be invalidated on ground that cross-complaint on the judgment was prematurely filed.

9. Insurance ⟹514½

In insurer's suit for cancellation of automobile liability policy and for declaratory relief, award on cross-complaint in favor of insured for attorney's fees expended in defending action arising out of automobile accident was proper where there was evidence to sustain finding that insured did not fail to comply with insurer's demand for co-operation.

10. Insurance ⟹514½

An award in favor of insured against automobile liability insurer for attorney's fees expended in defending action arising out of automobile accident would not be held to be excessive where there was substantial evidence to support the judgment.

11. Judgment ⟹739

Where plaintiff in action against insured for injuries joined automobile liability insurer as party defendant with insured, and insurer's demurrer to petition was sustained, judgment in action for injuries was not "res judicata" in subsequent suit by insurer for cancellation of policy and for declaratory relief wherein plaintiff in action for injuries filed cross-complaint seeking to recover amount of judgment recovered against insured, where there was no provision in the policy that it should inure directly to the benefit of any injured person, and no obligation rested on insurer until judgment was secured against insured. St.1935, p. 716, § 11580(b) (2).

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Suit for cancellation of an automobile liability policy and for declaratory relief by the Mercer Casualty Company against Sam N. Lewis and others wherein cross-complaints were filed by named defendant and one Collins who obtained judgment against named defendant in action for injuries resulting from an accident involving automobile covered by policy. From a judgment for the defendants, plaintiff appeals.

Affirmed.

Hearing denied; EDMONDS, J., dissenting.

Elbert E. Hensley and John H. Klenke, both of Los Angeles, for appellant.

W. O. Wanzer, R. G. Akers and C. Ranson Samuelson, all of Long Beach, for respondents.

NOURSE, Presiding Justice.

Plaintiff sued for declaratory relief and to have cancelled a policy of insurance issued to defendant Lewis covering an automobile. Defendant Collins was the victim of an accident in the operation of the vehicle, and he had recovered a judgment for damages against Lewis. Judgment herein went for the defendants.

The material facts are undisputed. Lewis purchased the vehicle from McKenzie through a salesman on a conditional sales contract. The salesman suggested to Lewis that he should have the vehicle insured. With Lewis' consent the salesman orally requested McKenzie to obtain a policy. McKenzie was also operating as an insurance broker. An application was prepared by an employee of McKenzie and forwarded to another broker who prepared a policy of insurance which was executed by the plaintiff. This policy was forwarded to McKenzie and delivered to Lewis. The policy was executed without any written application by the insured, and no inquiries were made prior to its execution of the insured or of McKenzie. All the so-called warranties were inserted in the policy by plaintiff or its agents without consultation with the insured or McKenzie. The written policy was not examined or read by either of the latter. The gravamen of plaintiff's case is that there was a breach of material warranties rendering the policy void.

[1, 2] The case is simple because of the settled doctrine that a party must win or lose on the case made out by him in the

trial court. Here the appellant has relied upon charges of misrepresentation in the inception of the contract which it claims to be void ab initio because of such "fraud". The appellant's proof is that there were no representations at all by the insured, or by any one acting for him. The proof is that what is relied on as misrepresentations came into the contract wholly through the acts of appellant and its agents without proper, or any, investigation. In a similar case it was said in Davern v. American Mut. Liability Ins. Co., 241 N.Y. 318, 150 N.E. 129, 131, 43 A.L.R. 522, "obviously there can be no misrepresentation where there was no representation, and there can be no breach of warranty without warranty".

[3, 4] Appellant seeks to avoid this difficulty by the argument that the insured is estopped by his conduct in accepting the policy without objection to the misleading "warranties" inserted by Mercer. The evidence is that the policy was filed without reading. No evidence was offered to show that Lewis or his agents had any knowledge of what Mercer had inserted in the policy. In a similar case this court held there was no estoppel under such circumstances. Ames v. Employers Casualty Co., 16 Cal.App.2d 255, 266, 60 P.2d 347. We then quoted from McElroy v. British America Assur. Co., 9 Cir., 94 F. 990, as follows: "An insured has the right to rely on the presumption that the policy he receives is in accordance with his application, and his failure to read it will not relieve the insurer or its agent from the duty of so writing it." The reason for the rule is apparent. The insurer had the opportunity to follow the usual practice and require a written application signed by the insured. If at the time the policy was written it deemed these matters material it could have made inquiries since the policy was not delivered until nearly two weeks after the application was made. Again, there was ample time for such investigation and a cancellation of the policy before the accident occurred. All these circumstances would support the inference that the insurer did not deem these matters material at the time or that it waived them. In any event there is ample support for the trial court's finding that there were no fraudulent representations which would void the policy, and that the representations inserted in the policy by the insurer were not ratified or confirmed by the insured through his failure to read the policy and notify the insurer that the so-called warranties were not true.

[5] Appellant argues that, by the conduct of Lewis, both respondents are estopped to assert that the warranties are not those of Lewis. Knowledge and intent are essential elements of estoppel and both are lacking here. 10 Cal.Jur., pp. 636, 637; 10 R.C.L., pp. 696, 697; Killian v. Conselho Supremo, etc., 31 Cal.App.2d 497, 499, 88 P.2d 214.

[6] Criticism of the judgment is directed to the charges that respondent Lewis failed to comply with the terms of the policy relating to notice of the accident out of which the Collins judgment arose. The point is not available because appellant renounced the policy and denied liability thus waiving any claim that notice of the accident was insufficient or not within time. Secs. 553, 554, Insurance Code, St.1935, p. 510; Grant v. Sun. Indemnity Co. of New York, 11 Cal.2d 438, 440, 80 P.2d 996.

[7, 8] The point that the cross-complaint upon which Collins had judgment herein was prematurely filed is not tenable. The Collins judgment against Lewis is for damages arising out of the accident was entered September 27, 1937. It became final on November 26, 1937. The cross-complaint of Collins was filed in this case on October 25, 1937. The trial herein was begun on December 14, 1937, and the judgment entered May 25, 1938. The cause was for declaratory relief and hence in equity. It is a settled rule that a court of equity having jurisdiction of the parties and of the subject matter will make a final disposition of the litigation governed by the circumstances as they are shown to exist at the time the decree is made rather than at the inception of the litigation. 19 Am.Jur. pp. 281, 283. Furthermore, if the pleading of the judgment was insufficient that was so merely because the pleading was prematurely filed. When the point was first called to the attention of the trial court it was the duty of the trial court to continue the proceedings until such time as the pleading might properly be filed. Leggate v. Porter, 26 Cal.App.2d 545, 79 P.2d 756; Smith v. Smith, 134 Cal. 117, 66 P. 81; Dodge v. Superior Court, 139 Cal.App. 178, 181, 182, 33 P.2d 695, 34 P.2d 501. At such later date the pleading could have been properly filed. Such was the situation when the judgment was offered in evidence. It follows that the only possible injury suffered by the plaintiff was that the

pleading was filed about thirty days too soon, and a continuance for that period of time was not ordered. Manifestly those facts did not prejudice the plaintiff's rights.

[9, 10] On a separate cross-complaint respondent Lewis had judgment against appellant for attorney's fees expended by him in defending the action of Collins v. Lewis. Appellant argues that this judgment was improper because Lewis failed to comply with its demands for co-operation. Both parties offered evidence on this issue, and the trial court found the facts in favor of Lewis. There is nothing here but a conflict upon a controversial issue of fact and appellant's attack cannot be sustained. The charge that the award made by the trial court is excessive is met by the same answer—that substantial evidence was offered to support the judgment. Stuart v. Preston, 2 Cal.App.2d 310, 317, 38 P.2d 155; Id., Cal.App., 39 P.2d 441.

[11] The final point raised by appellant that "as to defendant Collins the subject matter was res adjudicata" does not present a debatable question. It seems to have been thrown in at the end of the opening brief without any examination of the principles involved. Respondents' answer to the point raised is of the same character. The doctrine of "res judicata" is not new, and its application to particular circumstances is well settled. In a case of this type it is not sufficient to say that a prior judgment is deemed to have adjudicated the subject matter and to have put an end to the litigation, nor that this principle applies to a prior judgment even though erroneous. Here the point is that since Collins joined the appellant as a party defendant in his action filed in the superior court to recover damages for injuries arising out of the automobile accident, and since the appellant's demurrer was sustained in that action, therefore the judgment in that case must be deemed conclusive against Collins on his cross-complaint in the pending litigation. The answer to the point is simple. The appellant became obligated to Collins under the terms of its policy issued to Lewis pursuant to the provisions of subdivision (b) (2) of section 11580 of the Insurance Code. There being no provision in the policy providing that it should inure directly to the benefit of any injured person, no obligation rested on the insurer until judgment was secured against the insured. Until that contingency arose no right of action against the insurer accrued to the injured person. Cal.Jur.Supp., vol. 2, pp. 145–147. In sustaining the insurer's demurrer to that complaint the court could have held nothing more than that Collins at that time had no right to sue the insurer. The judgment in favor of the insurer which has been introduced in evidence in this case is an adjudication in full accord with the limitations of the Insurance Code; it is an adjudication that the plaintiff Collins had no right of action against the insurer until he had obtained judgment determining the liability of Lewis for the injuries suffered. The action against Lewis was one in tort. The action against the insurer was upon the contract, but the right to sue upon the contract did not accrue until the tort liability had been adjudicated.

For these reasons the judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

RICE v. SCHMID et al.*

Civ. 12625.

District Court of Appeal, Second District, Division 2, California.

Dec. 16, 1940.

Rehearing Denied Jan. 9, 1941.

Hearing Granted Feb. 13, 1941.

1. Damages 🔑79(1)

Whether it would be impracticable or extremely difficult to fix actual damage for breach of contract, so as to make provision for liquidated damages valid under statute, must be determined from particular facts surrounding execution of contract as well as from terms thereof. Civ.Code, §§ 1670, 1671.

2. Damages 🔑77

In seeking to ascertain whether provision for liquidated damages is really a provision for a penalty or for damages, fundamental rule is that construction of the stipulation depends upon intent of parties, as evidenced by the entire agreement construed in light of circumstances under which it was made. Civ.Code, §§ 1670, 1671.

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* Subsequent opinion 115 P.2d 498.

3. Damages ⚷76

Parties to a contract may stipulate the measure of damages in event of breach, and in construing the stipulation, court will, in absence of fraud or circumvention, look to all terms of the contract and the language used to express intention of the parties. Civ. Code, §§ 1670, 1671.

4. Damages ⚷80(1)

Parties may contract concerning measure of damages where the liquidation bears a reasonable relation to the probable damages for the breach. Civ.Code, §§ 1670, 1671.

5. Damages ⚷79(5)

In contract for sale of flour to be shipped on buyer's directions, provision that liquidated damages for buyer's breach should be carrying charges for storage and the like, plus cost of selling, plus or minus amount based on difference between market value per bushel of cash wheat at mill on date of contract and on date of termination of contract, was a valid provision for "liquidated damages" and was not invalid as a "penalty" in view of evidence that fluctuating price of flour made it impracticable or extremely difficult to fix actual damage, and seller's damages should not be limited to loss of profits. Civ.Code, §§ 1670, 1671, 1784(3).

See Words and Phrases, Permanent Edition, for all other definitions of "Liquidated Damages".

6. Sales ⚷384(2)

The statutory measure of damages for buyer's refusal to accept goods is the difference between contract price and market price on the date of breach. Civ.Code, § 1784 (3).

7. Sales ⚷382

In seller's action for buyer's breach of contract for sale of flour, whether seller had all the undelivered flour in his possession on date of breach and thus could have delivered the flour was immaterial where evidence indicated that buyers had not furnished shipping instructions as required by contract, and seller could have secured the necessary flour within time limited by the contract.

8. Appeal and error ⚷878(1)

Where plaintiff but not defendants appealed from judgment for plaintiff in allegedly insufficient amount, errors urged by defendants would not be reviewed.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action for breach of contract to purchase flour by R. L. Rice against John Schmid and others, wherein Augusta Schmid, as administratrix of the estate of John Schmid, deceased, was substituted as a party defendant. From a judgment for plaintiff in the sum of $712.45 actual damages, notwithstanding plaintiff's demand for the sum of $13,251.79 as liquidated damages, plaintiff appeals.

Reversed with instructions.

H. M. Lineman, Mab Copeland Lineman, and Benjamin Lewis, all of Los Angeles, for appellant.

Michael Lavelle, of Los Angeles, for respondents Anthony Marik, Felix Marik, John A. Dull and E. A. Osterman.

W. W. Wallace, of Los Angeles, for respondent Augusta Schmid, as Adm'x of Estate of John Schmid, Deceased.

MOORE, Presiding Justice.

This is an appeal by plaintiff from a judgment for damages resulting from the alleged breach of the contract on the part of defendants to receive and pay for 2755 barrels of flour, the balance of an order of 6000 barrels. The court awarded judgment to the plaintiff for the sum of $712.45 as actual damages notwithstanding plaintiff's demand for the sum of $13,251.79 as liquidated damages.

Plaintiff is a wholesale flour merchant. On July 16, 1937, he entered into a written contract with John Schmid, proprietor of the Eagle Bakery, whereby he agreed to sell and deliver to Schmid 6000 barrels of flour of the following brands at the following prices per barrel, to-wit:

Barrels	*Price per barrel*
2,000 "Ravalli" brand wheat flour at	$7.10
2,750 "Gold Cross" brand wheat flour at	7.65
1,250 "Isis" brand wheat flour at....	7.15

The contract provided that "on directions to be furnished by the buyer, shipment is to be made as follows: 'within ninety days from date'". The contract also provided that shipping instructions should be furnished the seller at least ten days before shipment; that the seller might terminate the contract in the event the buyer should default in the performance of any condition "imposed upon the buyer; that in the event of such termination, the buyer became liable for certain liquidated damages; and that the contract should be automatically extended if, on account of the fault of the buyer, not all of the flour was shipped during the ninety day period".

Contemporaneously with the execution of the contract with John Schmid, plaintiff contracted with the Montana Flour Mills Company, the sole manufacturer of the specified brands of flour for the purchase of flour sufficient to fill the order of 6000 barrels. In his contract with the mill, plaintiff was obligated to pay $6.85 per barrel for "Ravalli" and "Isis" flour and $7.40 per barrel for the "Gold Cross" flour. In turn, after making its contract with plaintiff, the Montana Flour Mills Company purchased sufficient wheat with which to manufacture the flour required to fill plaintiff's order.

A portion of the flour purchased by John Schmid from plaintiff had been delivered pursuant to the agreement when Schmid sold the Eagle Bakery to defendants Anthony Marik, Felix Marik, John A. Dull and E. A. Osterman who assumed and agreed to carry out the obligations of Schmid's contract with plaintiff. After the acquisition of the bakery by the last-named defendants, the latter actually gave shipping instructions for 2995 barrels of flour pursuant to the terms of the contract. Between July 16, 1937, and December 2, 1938, plaintiff shipped to the last-named defendants and their predecessor John Schmid a total of 3245 barrels of flour.

After the expiration of ninety days from July 16, 1937, and prior to December 2, 1938, plaintiff on several dates demanded that the new proprietors of the Eagle Bakery supply him with delivery instructions for the balance of the flour, which had not been delivered. This they refused to do.

Seeking to preserve his rights under his contract, plaintiff on December 2, 1938, notified the new proprietors of the Eagle Bakery by writing of his election to terminate the contract and to hold them liable for the liquidated damages provided for by that instrument. According to the provisions of that instrument, and shipments theretofore made, there still remained undelivered 688 barrels of "Ravalli", 1593 barrels of "Gold Cross" and 474 barrels of "Isis" flour. After the commencement of this action, John Schmid departed this life and Augusta Schmid as administratrix of his estate was substituted as a party defendant.

Plaintiff has pleaded his action in five separate counts, to-wit: (1) damages for breach of the express agreement and the liquidated damages provided therefor in the sum of $13,261.79; (2) demanded actual damages in the same sum; (3) a common count in the same sum; (4) an open-book account in the same sum; (5) an account stated in the same sum.

The court denied relief under the first cause of action on the theory that the provision for liquidated damages was a penalty and therefore void but he allowed recovery for actual damages and fixed the amount at $712.45, consisting of his loss of profit at 25 cents per barrel for "Ravalli" and "Gold Cross" and 30 cents per barrel for "Isis".

The question presented for our determination is whether the court erred in holding that the provision for liquidated damages is void. The language of that provision is as follows: "If the buyer fails to give the seller ample clearance (shipping instructions) as herein defined, the seller may without notice (a) cancel the contract, or (b) terminate its contract, the buyer to pay the seller as liquidated damages, on commodities remaining unshipped, first the carrying charges in the amount per day as provided in number 8 hereof from the date of this contract to the date of termination; and second, as to wheat flour, plus 20 cents per barrel as the cost of selling and also plus or minus the difference between the market value per bushel of cash wheat at mill on the date of this contract and on the date of termination multiplied by four and six-tenths (4 6/10ths) times the number of barrels of wheat flour, this later amount to be added if the value of cash wheat is lower and subtracted if the value of cash wheat is higher on the date of termination than on the date of this contract," etc. Paragraph 8 of the contract provides that if the contract is automatically extended, the buyer shall pay to the seller carrying charges of one-sixth cent (1/6¢) per day per barrel on flour and one cent (1¢) per day per barrel ton on feeds, etc. It is urged that this provision is void under section 1670 of the Civil Code as being in the nature of a penalty while plaintiff contends that it is a proper agreement for liquidated damages under section 1671 of the Civil Code because "from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage".

Evidence tending to prove that it would be impracticable or extremely difficult to fix the actual damage was received. It is thereby made to appear that there is no established market for flour; that it is sold through no exchange but by direct sale only; that it is necessary for salesmen to search for a market; that while there were established markets or exchanges for the sale of wheat, the price of flour fluctuated with great rapidity so that it would be impossible to determine the price of flour at a future date. The price of wheat and the value of the by-products resulting from the manufacture of flour, the quantity of the flour ordered, the manner of delivery, and other elements must be taken into consideration in fixing the price of flour at any given time. On some days, it is impossible to sell any flour; on other days, the same brand of flour might be sold to different purchasers at different prices.

Defendants had the privilege of ordering flour at any time during the life of the contract. Hence of necessity plaintiff was required to maintain a sufficient stock on hand to meet the contractual requirements. It was for the purpose of enabling himself to meet defendants' requirements under the contract that plaintiff had contracted with the mill for the purchase of sufficient flour to fill the orders of defendant. It may be added moreover that the mill in its turn had found it necessary to purchase sufficient cash wheat for the manufacture of the flour and to store it until used for the manufacture of the flour. The expense of storage incurred by plaintiff was estimated at one-sixth of 1 cent per barrel per day (as provided by the contract).

It having been agreed that the buyer should pay the seller as liquidated damages on the unshipped portion of the order "carrying charges", cost of selling, plus the difference between the market value on the date of the contract and on the date of termination, it was proved that the reasonable value of storage was one-sixth of 1 cent per barrel per day; and that the cost of selling was 20 cents per barrel. With these elements proved, the amount of the liquidated damages recoverable under the contract was established. But respondent questions the validity of the provision for liquidated damages.

[1-4] Whether a provision for liquidated damages is void as in violation of Civil Code section 1670 or is valid because "from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage" has been the subject of much litigation and of many decisions. But the type of contract in question here has never been adjudicated by the appellate courts of this state. However, many decisions of other jurisdictions afford ample authority for our guidance here. Whether a contract is of such character that it would be impracticable or extremely difficult to fix the actual damage sustained by reason of its breach must be determined from its own particular facts and the circumstances surrounding its execution, as well as from the terms of the instrument. Pacific Factor Co. v. Adler, 90 Cal. 110, 120, 27 P. 36, 25 Am.St.Rep. 102. In seeking to ascertain whether a provision for liquidated damages is really a provision for a penalty or for damages, the fundamental rule is, "that the construction of the stipulations depends, in each case, upon the intent of the parties, as evidenced by the entire agreement construed in the light of the circumstances under which it was made." Nakagawa v. Okamoto, 164 Cal. 718, 130 P. 707, 709. Where the parties to a contract deem it advisable, they may stipulate what the measure of damages shall be in the event of a breach by either. In construing the stipulation, the court will, in the absence of fraud or circumvention, look to all the terms of the contract and the language used to express the intention of the parties. International Milling Co. v. Reierson, 55 S. D. 139, 225 N.W. 218, 222. "There is no sound reason why persons capable of contracting may not agree upon the subject of liquidated damages when fairly entered into with the view to compensation for anticipated loss." Quaile & Co. v. Wm. Kelly Milling Co., 184 Ark. 717, 43 S.W.2d 369, 371, 79 A.L.R. 183. It is generally held that where it is determined that the parties intend to provide for the amount of damages in case of a breach, effect would be given to such provision for liquidated damages, where such damages are uncertain in nature or amount or difficult to ascertain. The parties may contract as to the measure of damages where the liquidation bears a reasonable relation to the probable damages for the breach. 43 S.W.2d page 371.

[5] The foregoing principles are particularly applicable to the contract under consideration, as they were in a number of cases where substantially the identical

type of contract was adjudicated. International Milling Co. v. Reierson, supra; Quaile & Co. v. Wm. Kelly Mining Co., supra; Larabee Flour Mills Co. v. Carignano, 10 Cir., 49 F.2d 151; Yerxa, Andrews & Thurston, Inc. v. Randazzo Macaroni Mfg. Co., 315 Mo. 927, 288 S.W. 20; Lettelleir et al. v. Abilene Flour Mills Co., 101 Ind.App. 20, 198 N.E. 111; Calvin Hosmer, Stolte Co. v. Paramount Cone Co., Inc., 285 Mass. 278, 189 N.E. 192. The statute involved in each of the foregoing cases was almost identical with section 1671 of our Civil Code.

In the Larabee case, supra, the buyer argued that the damage was readily ascertainable and that it was the difference between the contract price and the market value of the flour at the time and place of delivery. The court said [49 F.2d 154]: "If the commodity sold was wheat or oil, for which there is a ready market, and if the contract called for delivery at a specified time, the argument would be sound. * * * The contract was one to manufacture and deliver flour at the buyer's option as to time, within a period of ten months. Nor does the record disclose any exchange for flour sales * * * on the contrary, it shows that a market for flour must be searched for, and that salesmen are employed for that purpose. * * * Furthermore, there is a distinct trend toward a relaxation of the rules as to liquidated damages. * * * In the complexities of modern business, breaches of contract involve more incidental but real damage than when business was less complicated; in later years, business men and associations of business men have been more desirous of contracting as to damage, in order that their liability may be a known rather than an unknown quantity. Responding to these changing conditions in the business world, the courts have been much less reluctant than formerly to enforce provisions for liquidated damage." The same views were expressed in the Lettelleir case, supra.

In some of the cited cases, the courts have pointed out the distinction between the contract by a milling company as seller and a contract made by a broker. The distinction between the respective losses suffered by a manufacturer and a broker is readily apparent, the broker being merely the selling agent is entitled to recover only a commission for a sale. In his case, there is no impracticability or extreme difficulty in determining the amount of his damages. The futility of the effort of defendants to apply the rule in the broker's case to the case at bar is obvious when it is pointed out that the plaintiff is a flour merchant and not a broker. Plaintiff entered into the contract solely on his own behalf and not as an agent for the Montana Flour Mills. Therefore, the same considerations which apply to the manufacturer of flour apply with equal force to the merchant. The provision in his contract with the buyer providing for liquidated damages in the event of a breach is likewise valid. This was clearly held in the case which was in all practical respects identical with that before us (Calvin Hosmer, Stolte Co. v. Paramount Cone Co., supra [285 Mass. 278, 189 N.E. 195]), where the court held that the stipulation for damages was "an agreed reasonable liquidation of possible charges".

In view of the reasoning of the foregoing authorities as applied to such facts as appear in the case at bar, it must be held that the stipulation for liquidated damages is valid. Reading the contract by its four corners, the intent of the parties is clear. The evidence amply demonstrates that it would have been "impracticable or extremely difficult to fix the actual damage". Civ.Code, sec. 1671. That the provision is reasonable appears from the fact that the principal item of damage, i. e., the difference between the contract price and the market price at the time of the breach is to be determined in accordance with the law. San Francisco Milling Co., Ltd., v. Frye & Co., 2 Cal. App.2d 563, 38 P.2d 165; Boyles v. Kingsbaker Bros. Co., 5 Cal.2d 68, 53 P.2d 141; Civ.Code, sec. 1784, subd. 3.

[6] The contention of defendants that the provision under dispute provides for the determination of the damages in accordance with the price of wheat instead of flour is without merit. It was clearly established that there is no market or exchange for the sale of flour while there is such a market for the sale of wheat. Also, it appears without contradiction that 4⁶⁄₁₀ bushels of wheat are required to manufacture one barrel of flour. These facts demonstrate the wisdom and expediency of the formula used for computing damages as reasonable and free from oppression. The conclusion of the trial court that the sole damage suffered by plaintiff was his loss of profit is untenable. There was no evidence of the

price which plaintiff might have received for the undelivered portion of the flour. In the absence of convincing proof that plaintiff sold such undelivered flour for exactly the same price which he paid for it, the court's conclusion is without support. It was established by uncontradicted evidence that on December 2, 1938, the date of the breach, the market price of "Ravalli" and "Isis" flour was $3 per barrel and the price of "Gold Cross" flour was $3.55 per barrel. Based upon these prices, the total value of the undelivered flour at the date of the breach was $9,141.15 while the contract price for the same flour was $20,460.35. The statutory measure of damages for the buyer's refusal to accept the flour is the difference between the contract price and the market price on the date of the breach. San Francisco Milling Co. v. Frye & Co., supra; Boyles v. Kingsbaker Bros. Co., supra. Applying this measure of damages to the plaintiff's case, his actual damage would be $11,319.20 and not $712.45, as found by the court. But since the provision for liquidated damages is valid, plaintiff is not to be limited to his actual damages but is entitled to recover the damages stipulated in the contract. In deriving the amount of liquidated damages, the first item is the difference between the contract price and the price at the date of the breach, namely, $11,319.20; the second item is the selling cost fixed at 20 cents per barrel, making $551. Inasmuch as the mill waived all charges against plaintiff for the storage of cash wheat, the plaintiff is not in a position to add anything as the cost of storage, as a "carrying charge". The total amount of liquidated damages, therefore, to which he is entitled is $11,870.20.

[7] There is no merit in the contention of the administratrix that plaintiff failed to prove his ability to deliver the balance of the flour called for under the contract. The contract provided that the flour should be shipped on instructions furnished by the buyer. The finding of the court is that defendants refused to give shipping instructions for the balance of the flour. Such finding is supported by ample evidence. Therefore, whether plaintiff had in his possession all of the undelivered flour on the date of the breach was immaterial for the reason that defendants were not entitled to receive it until they furnished shipping instructions for it. The evidence is uncontradicted that plaintiff could have secured the necessary flour to fulfill his obligation within the time limited by the contract. Discussion of the numerous authorities cited by defendants (Greenleaf v. Stockton H. & A. Works, 78 Cal. 606, 21 P. 369; Drew v. Pedlar, 87 Cal. 443, 25 P. 749, 22 Am.St.Rep. 257; Pacific Factor Co. v. Adler, 90 Cal. 110, 27 P. 36, 25 Am.St.Rep. 102; Jack v. Sinsheimer, 125 Cal. 563, 58 P. 130; Green v. Frahm, 176 Cal. 259, 168 P. 114; Knight v. Marks, 183 Cal. 354, 191 P. 531; Stark v. Sehmada, 187 Cal. 785, 204 P. 214; Seid Pak Sing v. Barker, 197 Cal. 321, 240 P. 765; Smith v. Carlston, 205 Cal. 541, 271 P. 1091; Robert March & Co., Inc. v. Tremper, 210 Cal. 572, 292 P. 950; Biescar v. Pratt, 4 Cal.App. 288, 87 P. 1101; Thomas v. Anthony, 30 Cal.App. 217, 157 P. 823; Mente & Co., Inc. v. Fresno C. & W. Co., 113 Cal.App. 325, 298 P. 126; and White v. City of San Diego, 126 Cal.App. 501, 14 P.2d 1062) is omitted for the reason that none of them involves the type of contract before us; in many of them there was no agreement for liquidated damages; many of them involved contracts for services or for rentals; and in some recovery was denied for reasons remote from the question of damages.

[8] Contrary to the findings, it is contended that plaintiff breached the contract by failing to ship all the flour within ninety days, and that defendants who purchased the Eagle Bakery did not assume the contract for the purchase of the flour. The obvious answer to this contention is that since defendants have not appealed, errors urged by them will not be reviewed. Lady v. Palen, 12 Cal.App.2d 1, 54 P.2d 1133.

Since the judgment must be reversed, it is unnecessary to consider the remaining contentions raised on this appeal. For the reasons given and upon the authorities cited, judgment is reversed with instructions to the trial court to enter judgment in favor of plaintiff in the sum of $11,870.20.

We concur: WOOD, J.; McCOMB, J.

MARIN COUNTY v. MESSNER.

Civ. 11177.

District Court of Appeal, First District,
Division 1, California.

Dec. 4, 1940.

Rehearing Granted Jan. 3, 1941.

1. Officers ⚷94

Fees and compensation of public officers are of statutory origin, and they may be collected and retained only when they are specifically provided by law.

2. Officers ⚷94

The laws granting fees and compensation to public officers should be strictly construed in favor of the government, and, where ambiguity arises and the enactment admits of two interpretations, the rule of strict construction in favor of the government must be applied.

3. Counties ⚷73

The provisions of the Political Code authorizing a county board of supervisors to provide for surveyor's use a suitable office, fixtures, books, and other necessary material, and also all necessary expenses and transportation on work performed in the field, do not enlarge upon the provisions of the County Government Act applicable to Marin county providing that the surveyor shall in addition to his annual salary receive his actual traveling and other necessary expenses incurred by him while engaged in work for the county. St.1929, p. 993; Pol.Code, § 4044.

4. Counties ⚷73

The County Government Act applicable to Marin county, providing that the county surveyor shall in addition to his annual salary receive his actual traveling and other necessary expenses incurred by him while engaged in work for the county, imports a clear legislative intent to limit the matter of traveling and other necessary expenses therein mentioned to such as are incurred personally by the surveyor. St.1929, p. 993.

5. Constitutional law ⚷70(1)

The County Government Act applicable to Marin county, providing that the county surveyor shall in addition to his annual salary receive his actual traveling and other necessary expenses incurred by him while engaged in work for the county, may not be extended judicially to include also expenses incurred by surveyor for transporting county employees working under his supervision, much less rentals for engineering equipment used by the employees. St. 1929, p. 993.

6. Counties ⚷73

The fact that the Legislature expressly granted to the surveyors of certain counties the right to be paid for the transportation and subsistence of the members of surveying parties working under their supervision in addition to their own expenses is evidence of a legislative interpretation that that right does not exist under the general provisions of the Political Code relating to the allowance of a surveyor's transportation and other expenses. St.1929, p. 993; St.1931, pp. 1120, 1124; Pol.Code, § 4044.

7. Contracts ⚷123(1)

Any direct or indirect interest of an officer in the subject matter of a contract is sufficient to taint the contract with illegality, if the interest affects the judgment and conduct of the officer either in the making of the contract or in its performance.

8. Counties ⚷122(2)

An agreement whereby the Marin county surveyor in his official capacity agreed to transport men working under his supervision in automobiles owned by him and furnish equipment for their use, and whereby the county board of supervisors made an allowance for use of automobiles and equipment, was invalid because of surveyor's interest in the subject matter. Pol.Code, § 920.

9. Counties ⚷206(1)

Where jurisdiction is vested in the county board of supervisors to determine questions of fact, such as whether particular claims have been necessarily incurred and the claims are valid on their face, the action of the board in approving the claims is not subject to collateral attack.

10. Counties ⚷206(1)

The rule that the action of a county board of supervisors is not subject to collateral attack has no application where the board has acted without jurisdiction and has allowed claims which on their face are invalid and expressly prohibited by law, and the approval of the board adds nothing to the validity of the claims and does not make them immune from attack under statute requiring the district attorney to institute suit in county's name to recover money paid without authority of law. Pol.Code, § 4005b.

11. Estoppel 🔑62(3)

An action, instituted by the district attorney in county's name under statute to recover from former county surveyor money paid under an invalid agreement, was not an action on an implied equitable contract for money had and received, and the doctrine of "equitable estoppel" did not preclude the county from recovering. Pol.Code, § 4005b.

See Words and Phrases, Permanent Edition, for all other definitions of "Equitable Estoppel".

12. Limitation of actions 🔑34(3)

An action instituted by the district attorney in county's name under statute to recover from a former county surveyor money paid under an invalid agreement was not an action on an implied contract for money had and received to which the two-year statute of limitations applied nor one to recover money from an involuntary trustee to which the four-year statute applied, but it was an action based on a liability created by statute and the three-year statute was controlling. Code Civ.Proc. § 338, subd. 1; Pol.Code, § 4005b.

13. Counties 🔑75(4)

In an action instituted by the district attorney in county's name under statute to recover from former county surveyor money paid under an invalid agreement, the matter of awarding 20 per cent. damages for use of money mentioned in statute rested in the sound discretion of the trial court, and there was no mandatory duty imposed on the court to impose such damages, even though it was district attorney's imperative duty under statute to institute action. Pol.Code, § 4005b.

PETERS, P. J., dissenting.

◆

Appeal from Superior Court, Marin County; Donald Geary, Judge.

Action by the County of Marin against Rodney E. Massner, to recover certain sums of money paid by the county to defendant while he occupied the position of county surveyor. From a judgment for plaintiff, both parties appeal.

Affirmed.

A. E. Bagshaw, Dist. Atty., and Harold Jos. Haley, Deputy Dist. Atty., both of San Rafael, for Marin County.

Martinelli & Gardiner, of San Rafael, for Rodney E. Messner.

KNIGHT, Justice.

Section 4005b of the Political Code provides in part that whenever the board of supervisors shall, without authority of law, order any money paid as salary, fees, or for any other purposes, and such money shall have been actually paid, it is the duty of the district attorney to institute suit in the name of the county against such person or persons to recover the money so paid and twenty per cent damages for the use thereof. Acting in pursuance of the foregoing provisions the district attorney of Marin county instituted the present suit in the name of that county to recover certain sums of money paid by the county to defendant while he occupied the position of county surveyor, alleging that such payments were authorized by the board of supervisors and paid by the county treasurer without authority of law. The total sum originally sued for was $28,183, but by an amended complaint was reduced to $24,219.70. The trial court found in favor of the county on the issue of the illegality of the payments, but held that the three-year statute of limitations applied, and that therefore the county was entitled to recover only the moneys paid within the three years next preceding the filing of the complaint, which amounted to $4,122.50. Judgment was entered for that amount, without any allowance being made for damages. Each party has appealed, the defendant contending in support of his appeal that the payments were not illegal, or if so, that because of the circumstances hereinafter stated the county is estopped from suing for the recovery thereof; and in any event, that the two-year statute of limitations applies. The county contends in support of its appeal that the four-year statute of limitations governs, and that as a matter of law the county was entitled to twenty per cent damages on the amount recovered.

It appears from the evidence, which consists for the most part of written stipulations, that between February 3, 1927, and September 6, 1932, defendant presented to the board of supervisors and upon approval of said board the county treasurer paid some 507 separate claims, aggregating the amount here sought to be recovered. The claims so presented, approved and paid included two separate subject matters; first, mileage for the use of defendant's automobiles in transporting surveying parties—transit men, chain men, rod men, and field men, who were county employees working under defendant's direction—to and from the location of county construction and repair work and operations; secondly, for rental of surveying and engineering equipment owned by defendant and used by said surveying parties in and upon county work. The claims for transportation were at the rate of fifteen cents a mile for each mile traveled until about September 4, 1929, and thereafter at the rate of ten cents a mile. The claims for rental of surveying and engineering equipment were at the rate of $2.50 per day for each unit of equipment so used. It further appears, and the trial court in effect so found, that the claims were presented, approved and paid pursuant to an arrangement made between the board of supervisors and defendant at the board's request, at a regular meeting of said board held in December, 1926. The arrangement was brought about in this manner: Defendant was elected surveyor at the August, 1926, primary, and at the following general election in November the county voted a bond issue of $1,250,000 for road construction, which was subject to the engineering control of the county surveyor. At its regular session in December the board called defendant before it and in open meeting informed him of a working agreement then existing between the board and the surveyor whereby the surveyor transported the men working under his supervision in automobiles owned by him and furnished surveyor's equipment for their use at an allowance from the county of fifteen cents a mile for the use of the automobiles, and $2.50 a day of actual use for each complete unit of engineering equipment. Defendant at first objected to a continuation of the arrangement, stating that he had no such transportation facilities or surveying equipment as would be required to take care of the work contemplated under the bond issue. The board then informed him that it did not want the county to spend the money for the purchase of the automobiles and equipment for the reason that the county would no longer have use for the same after completion of the road work under the bond issue, and that defendant would be in a better position to dispose of the automobiles and equipment than the county. Thereupon defendant agreed to proceed in accordance with the board's wishes, and in connection therewith it was further understood and agreed that the moneys thus to be paid to defendant would not provide any profit to defendant, but would compensate him only for the actual, necessary and proper expenses of transportation and performing said engineering work. In consummation of the agreement a motion was unanimously approved that such arrangement be continued with defendant for the duration of his occupancy of the office, but subsequently and at the same meeting the motion was withdrawn on the advice of the county clerk that such motion was unnecessary because the arrangement was merely a continuation of the system then in force. In September, 1929, the rental for the use of the automobiles was reduced from fifteen to ten cents a mile, but otherwise the arrangement so entered into remained unchanged, and in accordance therewith monthly claims were presented, allowed and paid for such mileage and rentals up to September, 1932.

At the trial it was stipulated that each charge made by defendant and each item of every claim allowed and paid involved an actual and necessary transportation or use of the surveying equipment in performing the necessary duties of the office of county surveyor by defendant and said survey parties, in the sense that such transportation and use of engineering equipment were necessary, and that either the county or the defendant was bound to incur the expense therefor, either in the amount charged or some other amount; that the action of the board in allowing the claims was final and binding as to the amounts "if the board of supervisors had jurisdiction to allow anything on these items".

Section 920 of the Political Code as enacted in 1921 is as follows: "Members of the legislature, state, county, city, and township officers, must not be interested in any contract made by them in their official capacity, or by any body or board of which they are members; provided, that when traveling expenses are allowed by law to any such officer, he may contract with the appropriate authorities for an allowance or mileage rate for the use of vehicles owned or rented and used by him in the performance of duty, in lieu of the usual transportation charges." It will be observed that the single exception noted by the section granting the right to contract is restricted to the matter of an allowance for the use of the vehicles; and it is the county's contention that neither under said exception nor any other statutory enactment did defendant have the right to contract with the county for the use of his automobiles except for his own personal transportation; and that there is no statutory justification whatever for that portion of the agreement relating to the rental of the engineering equipment; that therefore the entire agreement was made in violation of express statutory enactment, and the principle of public policy that officers shall not have a personal pecuniary interest in public transactions. In behalf of defendant it is contended that if the payments were authorized by statute they are legal, regardless of the question of the existence of any previous valid agreement between him and the board. Conceding that to be true, we are unable to agree with defendant that the pertinent statutory enactments here involved warrant a construction contrary to the one placed upon them by the trial court.

In this regard it appears that when defendant took office in January, 1927, the County Government Act applicable to Marin county provided that the surveyor should receive "such fees as are now or may be hereafter allowed by law" (Stats.1925, p. 693). That provision was superseded by an amendment effective July 29, 1927, which provided that thereafter the surveyor should receive an annual salary of $4,000 "and in addition thereto he shall receive his actual traveling and other necessary expenses incurred by him while engaged in work for the county" (Stats.1927, p. 1157). The act was again amended in 1929, and it contained the same provision as to the compensation for the surveyor as the 1927 act, but provided also for the appointment by the surveyor of two transit men at $9 a day and three at $8 a day, to be paid as other county officers; also that the surveyor should devote his entire time to the county (Stats.1929, p. 993). In 1931 the county was reclassified but no change was made in the existing provision relating to the office of surveyor (Stats.1931, p. 1078). Furthermore, since 1907 section 4044 of the Political Code has provided: "The board shall provide, for the use of the surveyor, a suitable office, office furniture, heat, light, and care for the same, office and record books, and other necessary material, also all necessary expenses and transportation on work performed in the field." (The remaining portion of the section was declared unconstitutional as being an attempt to delegate to boards of supervisors the power to fix the compensation of the surveyor. Arnold v. Sullenger, 200 Cal. 632, 254 P. 267.)

[1-5] It is well settled that fees and compensation of public officers, being of statutory origin, may be collected and retained only when they are specifically provided by law; moreover, the laws granting the same are to be strictly construed in favor of the government; and where ambiguity arises and the enactment admits of two interpretations the rule of strict construction in favor of the government must be applied. Irwin v. County of Yuba, 119 Cal. 686, 52 P. 35; City of Corona v. Merriam, 20 Cal.App. 231, 128 P. 769; County of San Diego v. Bryan, 18 Cal.App. 460, 123 P. 347; County of Santa Barbara v. Rucker, 35 Cal.App. 676, 170 P. 860; County of Santa Barbara v. Twitchell, 179 Cal. 772, 178 P. 945. Here the three county government acts above referred to provided merely that "in addition thereto [referring to the annual salary] he shall receive *his* actual traveling and other necessary expenses incurred *by him* while engaged in work for the county" (italics ours); and it is apparent that the provisions of section 4044 of the Political Code do not in any way enlarge upon the provisions of the County Government Act. Fairly construed, therefore, in the light of the legal rules above cited, the language employed imports a clear legislative intent to limit the matter of traveling and other necessary expenses therein mentioned to such as are incurred personally by the surveyor. Any other construction would seem to do violence to the wording of those provisions. That being so, there is no legal ground upon which those provisions may be extended judicially to include also expenses incurred by the surveyor for the transportation of county employees working under his supervision, much less rentals for engineering equipment used by said employees.

[6] If it had been the intention of the law-making body to include therein the traveling and other expenses of the surveyor's assistants and other employees of the surveying party, it could easily have been accomplished by the use of appropriate language to that effect, as was done in the cases of several other counties. For example, the provision relating to Mendocino county (Stats.1931, p. 1120) reads: "The surveyor shall also be paid

the actual and necessary expenses of transportation of himself, his deputy and surveying crews, and subsistence of himself and deputy, all while in the field." And in the case of Siskiyou county the provision reads (Stats.1931, p. 1124): "* * * that said county surveyor shall be allowed all necessary transportation and expenses incurred by himself or deputies for work performed in the field." The provisions relating to some of the other counties have been framed in substantially the same language. Moreover, the fact that in the provisions relating to other counties the legislature expressly granted the right of the surveyor to be paid also for the transportation and subsistence of the members of the surveying party working under his supervision, may be taken as evidence of a legislative interpretation that such right did not exist under the general section 4044 of the Political Code; otherwise it would not have deemed it necessary to include the same in provisions relating to particular counties.

Defendant has cited in support of his position the cases of Victors v. Kelsey, 31 Cal.App. 796, 161 P. 1006; Darrah v. County of San Joaquin, 103 Cal.App. 76, 283 P. 962; and Severance v. Ball, 93 Cal.App. 56, 268 P. 1068. A review of the cases proves, however that they are not in point. The first two involved the matter of expenses incurred by the district attorney in connection with the prosecution of criminal cases, which is specifically authorized by a general statute (subd. 2, sec. 4307, Pol.Code) which reads: "The following are county charges: * * * 2. District attorney and sheriff. The traveling and other personal expenses of the district attorney and the sheriff incurred in criminal cases arising in the county, * * * and all other expenses necessarily incurred by either of them in the detection of crime, and in the prosecution of criminal cases * * *." In the Darrah case it was held that under the foregoing code provisions the expense of employment of detectives was a proper county charge, and when advanced by the district attorney was recoverable by him from the county in his own name. As will be noted, the above code provision covers two separate and distinct subject matters, first, the traveling and other expenses of the officer himself, and secondly, other expenses incurred by him in the detection of crime and the prosecution of criminal cases; whereas the provision of the County Government Act here under consideration covers but one subject matter, to-wit, the traveling and other expenses of the officer. Moreover the expenses so recoverable by the district attorney and the sheriff are not made part of the legislative act fixing the compensation of such officers, but are declared to be county charges, in a general statute which designates also as county charges fourteen other items unrelated to either of those offices; whereas in the case of the surveyor the expenses allowed are declared to be compensation in addition to his annual salary. In the Victors case it is held merely that the determination by the board of supervisors in approving the claims for expenses was final upon the question as to whether the items allowed constituted "necessary expenses". In Severance v. Ball, supra, certain employees of the surveyor's office filed claims against the county for their services, and the major question there presented and decided was whether the payment of such claims constituted an increase in the compensation of the county surveyor, and therefore was illegal. No such question is here presented.

[7, 8] Nor is there any merit in defendant's contention that if there was a contract, express or implied, between him and the board of supervisors, it was made by him in his private and not in his official capacity. The general rule is that "Any direct or indirect interest in the subject matter is sufficient to taint the contract with illegality, if the interest be such as to affect the judgment and conduct of the officer either in the making of the contract or in its performance." 2 Dillon on Municipal Corporations, p. 1146. In the present case the agreement was made with defendant solely because of his official position as county surveyor, and was carried out by him as such. It was intended that the automobiles and engineering equipment which were the subject of the agreement were to be used and they were used in performing county work, planned and supervised by defendant in the exercise of his duties as county surveyor; and the claims were filed by him while he occupied that position. Therefore the case is no different in principle from Osburn v. Stone, 170 Cal. 480, 150 P. 367, and must be governed by the doctrine stated therein.

[9, 10] Likewise without merit is defendant's point that the action herein con-

stitutes an illegal collateral attack upon the decisions and quasi-judicial determinations of the board of supervisors. It is quite true that where jurisdiction is vested in the board to determine questions of fact, such as whether particular claims have been necessarily incurred, and the claims are valid on their face, the action of the board in approving the same is not subject to collateral attack. The cases cited and relied upon by defendant are to that effect. But that doctrine has no application where, as here, the board has acted without jurisdiction and allows claims which upon their face are invalid, and expressly prohibited by law. In such cases the approval of the board adds nothing to the validity of the claims and they are subject to attack under the provisions of section 4005b of the Political Code. County of Alameda v. Evers, 136 Cal. 132, 68 P. 475; County of Shasta v. Moody, 90 Cal.App. 519, 265 P. 1032.

[11] Defendant's contention that the county is estopped from recovering the moneys paid is based principally upon the premise that the action is one upon an implied equitable contract for money had and received; that in equity and good conscience the moneys sought to be recovered do not belong to the county, and that therefore the doctrine of equitable estoppel precludes the county from recovering any part thereof. The case of County of Sacramento v. Southern Pacific Co., 127 Cal. 217, 59 P. 568, 825, is mainly relied upon in support of the foregoing contention. Obviously, however, the action is not one upon an implied equitable contract, but as already pointed out is a statutory action based on Political Code section 4005b, wherein it has been shown that the board and the defendant acted, although perhaps innocently, in violation of statutory mandate. Under such circumstances the doctrine of equitable estoppel declared in the case cited has no application.

[12] With respect to the disputed question as to which of the three statutes of limitations must govern, it will suffice to say that the action is not one, as contended by defendant, upon an implied contract for money had and received, wherein the two-year statute is controlling; nor is it one, as contended for by the county, to recover money from an involuntary trustee, wherein the four-year statute applies. As heretofore stated, it is an action based upon a liability created by statute, to-wit, section 4005b of the Political Code; and therefore, as held by the trial court, the three-year statute (sec. 338, subd. 1, Code Civ.Proc.) is controlling.

[13] The second point made by the county in support of its appeal, that in addition to the recovery of moneys paid it was entitled as a matter of law to an additional judgment for twenty per cent damages, cannot be sustained. While said section 4005b makes it the imperative duty of the district attorney to institute suit for the recovery of moneys alleged to have been illegally paid "and twenty per cent damages for the use thereof", there is no mandatory duty imposed upon the court by statute or judicial decision to impose such damages. Therefore the matter of awarding damages rested in the sound discretion of the trial court; and in view of the facts it cannot be said that such discretion has been abused.

The judgment is affirmed. The plaintiff will recover its costs on the defendant's appeal, and the defendant will recover his costs on the plaintiff's appeal.

I concur: WARD, J.

PETERS, Presiding Justice (dissenting).

I dissent.

The majority opinion has carefully, fully and fairly set forth all the pertinent facts and all the pertinent statutory provisions. I agree with that opinion in so far as it holds that there is no statutory authority for the contracting by the surveyor for the rental of engineering equipment by him to the county. I agree also with the discussion of the statute of limitations and the applicability of the doctrine of estoppel, and with the discussion of the 20 per cent penalty. I disagree with the opinion only in so far as it holds that the surveyor was not legally entitled to recover for transportation furnished by him to his employees. It is my opinion that sections 920 and 4252(12) of the Political Code, properly interpreted, authorize the mileage rate allowance for transportation of necessary workers.

Section 4252(12) provides that the surveyor shall receive a designated salary "and in addition thereto he shall receive his actual traveling *and other necessary expenses* incurred by him while engaged in work for the county; * * *". What are "other necessary expenses incurred" by him? Under prior decisions of the courts of this state this is no longer an open question. Without reference to whether defendant could personally recover for transportation furnished his employees by himself, the cases clearly establish that under such a section the county surveyor could lawfully incur county liability for transportation of workers as a "necessary" expense. Stated another way, the courts have established the right of county officers under sections similar to section 4252(12) to make arrangements with third persons to hire necessary workers and to bind the county by such agreement. Thus in Langdon v. Koster, 157 Cal. 39, 106 P. 209, the district attorney secured a writ of mandate to compel the auditor of the county to audit the demand of petitioner for expenses incurred by him in hiring detectives. It was held that section 4307(2) of the Political Code, which provides that the traveling expenses of the district attorney and sheriff "and all other expenses necessarily incurred by either of them" in the detection of crime and in prosecution of criminal cases are county charges, authorized the district attorney to incur the expense. The same reasoning and result was arrived at in Darrah v. County of San Joaquin, 103 Cal.App. 76, 283 P. 962 and Fulkerth v. County of Stanislaus, 67 Cal. 334, 7 P. 754. In the above three cases the county officer himself brought the action. There are many other cases under that section where the claimants who furnished the services contracted for by the sheriff or district attorney were permitted to maintain the action. Thus, in Victors v. Kelsey, 31 Cal.App. 796, 161 P. 1006, it was held that the district attorney could lawfully contract under the above section for the services of an expert witness; in County of Yolo v. Joyce, 156 Cal. 429, 105 P. 125, that a district attorney could lawfully bind the county for charges incurred in transcribing testimony in a criminal case; in Cunning v. County of Humboldt, 204 Cal. 31, 266 P. 522, that a district attorney could lawfully contract for detective services. Reference could be made to many other cases. They all hold that the expenses involved were authorized under that portion of section 4307(2) of the Political Code providing that the district attorney or sheriff is entitled to "all other expenses necessarily incurred by either of them in the detection of crime". Do these cases not conclusively establish that the similar phrase in section 4252(12) of the same code to the effect that the surveyor shall receive his "other necessary expenses incurred by him while engaged in work for the county" permit the surveyor to contract with third persons to transport the workers? No other reasonable construction is possible. Although the language employed in the two sections differs slightly, both are dealing with what are necessary expenses. The interpretation of the two sections, in my opinion, should be the same.

If it once be conceded that under section 4252(12) of the Political Code the surveyor could lawfully contract with third persons for the necessary transportation of his employees, then it follows that under section 920 of the Political Code he can lawfully collect such transportation charges when they are personally furnished by him. That section, after prohibiting public officials from being interested in any contract made by them in their official capacity, contains the proviso that "when traveling expenses are allowed by law to any such officer, he may contract with the appropriate authorities for an allowance or mileage rate for the use of *vehicles* owned or rented and used by him in the performance of duty, in lieu of the usual transportation charges". Note that the opening clause is that "when traveling expenses are allowed by law". It does not say "when *his* traveling expenses are allowed by law". The expression "traveling expenses" includes not only his personal traveling expenses, but also allowances for transportation of county workers which come within section 4252 (12) of the Political Code. This is also indicated by the use of the plural *"vehicles"* later in the section. That clearly indicates that there might be the simultaneous use of several cars, which in turn indicates intent to allow a mileage rate for transportation of persons other than the surveyor himself. The interpretation of the words "traveling expenses" in the opening clause of section 920 as including transportation charges for other necessary workers is fortified by the presence of the words "transportation charges" as the concluding words of the section. The section does not read that the officer shall receive mileage in lieu of his usual traveling expenses, or in lieu of *his* usual transportation charges, but "in lieu of *the* usual transportation charges."

I believe that this is the only reasonable construction to be placed on the two sections. While I quite agree that fee, compensation and expense statutes should be strictly construed, that does not mean that a court is compelled to so construe such statutes that they will constitute a trap for public officials acting honestly and reasonably. It must be remembered that, under section 71 of the Penal Code, defendant herein could have been criminally prosecuted for having misinterpreted the section. After conviction he could have been fined not more than $1,000, or imprisoned for not more than five years, and been forever disqualified from holding any state office. Moreover, under section 4005b of the Political Code the 20 per cent penalty discussed in the majority opinion could have been imposed. It must also be remembered that the board of supervisors and apparently its then legal advisor, as well as defendant, interpreted these sections as they are interpreted in this dissent when the contract was entered into. There is no question but that defendant and the board acted honestly and reasonably. It was stipulated that defendant made no profit on the deal. Under all these circumstances it seems to me that the cases involving the interpretation of section 4307(2) of the Political Code are controlling. It is quite significant that no case involving the interpretation of the same or similar language as that contained in section 4252(12) is cited in the majority opinion.

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BARRY v. GLENN COUNTY.

Civ. 6069.

District Court of Appeal, Third District, California.

Dec. 19, 1940.

Hearing Denied Feb. 13, 1941.

1. Evidence 🔑158(17)

In action against county to recover compensation for services performed by plaintiff as defendant's purchasing agent, testimony of members of county board of supervisors as to dates of board's rejections of plaintiff's claims, which defendant contended were barred by statutes of limitations, was inadmissible as not best evidence. Pol. Code, § 4078; Code Civ.Proc. § 343.

2. Evidence 🔑158(17)

In action to recover compensation from county for services performed by plaintiff as defendant's purchasing agent, defendant's plea of statutes of limitations was not well taken, in absence of record of vote on and rejection of plaintiff's claims by county board of supervisors, as such facts could not be established by oral evidence. Pol.Code, § 4078; Code Civ.Proc. § 343.

3. Counties 🔑75(1)

Where Superior Court for certain county ordered by judgment that such county pay salary due its former purchasing agent, he was entitled to recover amount thereof from county, though there was no budget appropriation covering such salary. Pol.Code, § 3714.

4. Counties 🔑75(3)

In action against county to recover compensation for services performed by plaintiff as defendant's purchasing agent during portion of certain fiscal year, where there was no evidence that obligation sued on exceeded county's revenue for such year and county auditor testified that there was surplus in county funds for period involved, defendant's contention that obligation was void as exceeding constitutional debt limitation was untenable. Const. art. 11, § 18.

5. Counties 🔑64

A county purchasing agent, employed from month to month, as provided by county board's ordinance creating such "position", was not an "officer", but "employee", of whom no oath of office was required. Pol. Code, § 4041.13.

See Words and Phrases, Permanent Edition, for all other definitions of "Officer" and "Employee".

6. Counties 🔑74(6)

A county purchasing agent's failure to file bond until date on which county board required him to do so did not preclude him from recovering unpaid salary for period of his service before such date.

7. Counties 🔑74(6)

A county purchasing agent, employed from month to month, was entitled to recover salary for whole month during which he was discharged by county board of supervisors. Pol.Code, § 4041.13.

Appeal from Superior Court, Glenn County; Albert F. Ross, Judge.

Action by Thomas L. Barry against the County of Glenn to recover compensation for services performed as purchasing agent of defendant. Judgment for plaintiff, and defendant appeals.

Affirmed.

W. T. Belieu, of Willows, for appellant.

Carter, Barrett, Finlay & Carlton, of Redding, for respondent.

PULLEN, Presiding Justice.

This action was brought by Thomas L. Barry to recover $460.39 from the County of Glenn, for services claimed to have been performed as purchasing agent during the first nineteen days of March and the months of April, May and June, 1935. The answer denied the indebtedness and set up the bar of the statute of limitations, and further asserted that if any indebtedness was incurred during that time such debt became payable during the fiscal year in 1934–35 and was not payable in a succeeding fiscal year. The case was tried before the court, and judgment rendered in favor of Barry. From that judgment this appeal is taken.

The evidence discloses that on February 11, 1935, the board of supervisors of the County of Glenn duly declared the position of relief agent in the county welfare office vacant, and thereupon a motion was duly passed by the board that Thomas L. Barry, the respondent herein, be appointed relief agent, in this form: "It was moved by Supervisor Haigh, seconded by Supervisor Murch, declared carried and ordered that Thomas Barry be appointed relief agent succeeding Cora Jenks, commencing February 13, 1935."

On the same day and at the same session of the Board, by motion, the position of county relief agent was combined with the position of purchasing agent; and also at this session on February 11, 1935, Ordinance No. 132 was adopted, to become effective March 13, 1935, which provided for the employment of a purchasing agent, and fixed his duties, salary and term of office. This ordinance reads:

"The Board of Supervisors of the County of Glenn, State of California, do ordain as follows:

"Section 1. There is hereby created the position of Purchasing Agent in and for the County of Glenn, State of California.

"Section 2. That the duties of said Purchasing Agent shall be to purchase for the County, and the officers thereof, all materials, supplies, furnishings, equipment, livestock, and all other personal property; to rent, for the County and the officers thereof, furnishings, equipment and livestock; to engage independent contractors to perform sundry services for the County and the officers thereof, with or without furnishing material where the aggregate cost thereof does not exceed the sum of $1,000.00.

"Section 3. It is hereby provided that said Purchasing Agent shall make all purchases, rentals and contracts only upon proper written requisition therefor, and by and with the consent of the Board of Supervisors of the County of Glenn, State of California.

"Section 4. That said Purchasing Agent shall be employed by the Board of Supervisors from month to month for the salary of $100.00 payable at the time and in the manner of other salaries in the County of Glenn, State of California.

"Section 5. That the Board of Supervisors may employ for such Purchasing Agent such assistants as may be necessary for him to fulfill his duties.

"Section 6. This ordinance shall take effect and be in force on and after the 13th day of March, 1935. * * *"

The position of relief agent was accepted by plaintiff, and he entered upon the duties of that office on February 13, 1935, and continued to perform the same until December 13, 1935. On March 13, 1935, he commenced serving also as purchasing agent and continued to serve in that position until December 13, 1935, when he was, by ordinance, discharged from both positions.

About July 1st, and some time after the beginning of the fiscal year the board fixed the salary of relief agent at $75 and purchasing agent at $100 or a combined salary of $175.

It is not disputed that plaintiff was discharged on December 13, 1935, and that he was ready and willing to continue to perform the duties of relief and purchasing agent but was prevented from so doing by the County of Glenn. He claims therefore to be entitled to compensation for the remaining eighteen days in December, 1935, for both positions at the rate of $175 per month, and for the nineteen days in March and for the full months of April, May and June, 1935, as purchasing agent at $100 a month, making a total of $460.39, the amount of the judgment. There was no dispute that plaintiff was paid for his services as both purchasing agent and relief agent for the period from July 1st to December 13, 1935.

The testimony reveals that early in the spring of 1935, the board of supervisors of Glenn county desired to change the personnel of the welfare agency of the county. Two of the members of the board of supervisors called upon respondent at his home.

They explained to him they were contemplating making a change in the welfare office and asked him to take that department at a salary of $100 per month and traveling expenses. They also told him they would like to have him act as purchasing agent but there was no money in the budget to employ a purchasing agent and such office could not be set up until after July 1, 1935, at which time he would be appointed to that position also. Mr. Barry accepted.

From the fact that these various proceedings were all had and done by the supervisors at the same time would seem to indicate it was the plan to name plaintiff relief agent, and to create the position of purchasing agent as of March 13th, and to combine the two positions to become effective on March 13, 1935, and that plaintiff was to assume the duties of purchasing agent upon March 13th.

Nothing seemed to have been done by Barry in regard to the collection of salary as purchasing agent for the time prior to July 1, 1935, until after he was discharged by the board of supervisors on December 13th. He then presented claims to the board for salary for his services as purchasing agent for part of March and for the full months of April, May and June as stated before. Just when these claims were presented to the board does not appear. This question of time becomes material as to whether or not this action was brought within the time prescribed by law.

[1] The County of Glenn contends that these claims are barred by section 4078 of the Political Code and section 343 of the Code of Civil Procedure. Both of these claims here sued upon were filed December 31, 1935, and the complaint was filed on September 29, 1936. These statutes require an action such as this to be brought within six months after rejection by a board of supervisors, and section 4078 of the Political Code provides that if the board neglects to act on a claim, the claimant may deem the claim rejected on the ninetieth day at his option. Plaintiff's claim for $361.28 was presented to the board and was marked "Rejected W. T. Belieu D. A." Another claim for $99.11 was endorsed "Rejected W. T. Belieu D. A. Rejected, Board of Supervisors, Henry McMahon, Chairman." The date of these actions does not appear, but by the testimony of several members of the board an attempt was made to establish these dates. To this evidence objection was interposed that oral testimony was not the best evidence. Such objection was well taken and this testimony should not have been received. In 7 California Jurisprudence 448, it is said:

> "The Board of Supervisors is a body with limited jurisdiction, and its jurisdiction must appear in the record of its proceedings. It cannot be bound by acts in pais; the best and only evidence of its intentions is to be drawn from its records. * * *
>
> "The Board must further cause to be kept a 'minute book', in which must be recorded all orders and decisions made, and the daily proceedings had at all regular and special meetings."

[2] It is admitted there is no record of a vote upon these claims, nor of their rejection. Such facts cannot be established by oral evidence, and it would therefore appear that this action was filed in time, and that the plea of the statute of limitations is not well taken.

[3] Another point urged by the county has to do with the provisions of section 3714 of the Political Code and the question of debt limitation as fixed by the Constitution (Sec. 18, art. XI). It is the claim of defendant that there was no budget appropriation covering the salary of a purchasing agent for the fiscal year 1934–35, which in the instant case includes the period from March 13th to July 1, 1935.

It is true that section 3714 of the Political Code provides that the supervisors shall allow no claim for an amount in excess of, or not provided for in the budget, but the exception to this section reads as follows: "* * * except upon an order of a court of competent jurisdiction, or for an emergency, as hereinafter provided." This exception has been recognized and considered in Niceley v. County of Madera, 111 Cal. App.731, 296 P. 306, 308. The court, in considering that question, there said: "Before considering the question of whether section 3714 of the Political Code, by implication or otherwise, repeals the provisions of section 4307 of the Political Code, it is important to observe that subdivision 5 of section 3714, supra [the provision here involved], does not make final the budget as adopted by the board of supervisors, nor does it make final the sum or allowance made or allotted to any particular official. The question is left open for a determination by the court as to whether any other items of expenditure shall be determined to be a claim against the county, and whether the county shall be held liable therefor. This plainly appears from the words specifying that no payment shall be made, 'except upon the order of a court of competent jurisdiction.' And this provision follows that portion of the section relating to expenditures outside of, and in excess of, the budget allowance."

Here, a court of competent jurisdiction, a Superior Court, in and for the County of Glenn, has, by its judgment, ordered that the obligation to plaintiff for salary as purchasing agent be paid.

[4] The contention that this obligation (to pay plaintiff's salary for the period of March to July 1, 1935) is void because it is in excess of the debt limitation as provided by the Constitution, supra, is also untenable. Section 18 of article XI provides that a county shall not incur any obligation during any fiscal year in excess of the revenue provided for that year. There is no evidence here, however, showing that the obligation here sued upon was in excess of the revenue for that year, but on the contrary the auditor of the county testified that there was a surplus in the county funds for the period under consideration.

[5, 6] Another contention by appellant is that Barry was not eligible or qualified to draw any salary from the county as purchasing agent between the months of March, April, May and June as he had failed to file any bond or oath of office.

On June 12, 1935, the board of supervisors passed a minute order as follows: "Order that Purchasing Agent Thomas L. Barry, furnish an official Bond of $2,000.00". On July 1, 1935, Barry filed a proper bond together with an oath of office.

In support of its contention appellant cites various sections of the Political Code and of the Constitution. These citations are concerned with officers as distinguished from employees. From a study of the provisions of the Political Code relating to purchasing agents it seems clear that such a one is an employee. Section 4041.13 of the Political Code empowers the board to employ a purchasing agent. An officer is not employed; he is appointed or elected. Ordinance No. 132 creating this employment provides, "There is hereby created the position of Purchasing Agent. * * * That said Purchasing Agent shall be employed * * * from month to month. * * *" If it had been the intention of the board to make the purchasing agent an officer of the county it would not have created the "position", but rather the office. It would not have provided the purchasing agent be employed from month to month, but rather it would have appointed him, to hold office at the pleasure of the board.

In Couts v. County of San Diego, 139 Cal.App. 706, 34 P.2d 812, the supervisors, by resolution, employed a road superintendent, and provided for the filing of a bond. It was held the employment of the road superintendent did not purport to create an office, but was purely an employment incidental to powers which the supervisors were charged with exercising.

In People v. Rapsey, Cal.App., 96 P.2d 1000, a city attorney of the sixth class was held to be an employee and not an officer of the city.

A bond can be required of an employee as well as of an officer, but until July 1, 1935, when the board required a bond, plaintiff was under no duty to file any bond, and no oath of office is required of an employee.

[7] In support of the demand of respondent that he, having been employed from month to month, was entitled to pay for the whole month of December, the case of Ross v. Board of Education, 18 Cal.App. 222, 122 P. 967, seems to fully support the claim of respondent, and we need not elaborate upon that point.

The Superior Court has heard the issues here presented and has found in support of respondent upon the several disputed questions of fact. There is ample evidence to support those findings.

For the foregoing it appears that the judgment should be affirmed. It is so ordered.

We concur: THOMPSON, J.; TUTTLE, J.

42 Cal.App.2d 70

PEOPLE v. DAVIS.

Cr. 2141.

District Court of Appeal, First District,
Division 1, California.
Dec. 19, 1940.

1. Criminal law ⚷620(2)

The Penal Code does not permit indictments or informations charging different defendants with separate and distinct crimes alleged to have been committed against different persons at different times to be joined and consolidated for trial. Pen.Code, §§ 954, 1098.

2. Criminal law ⚷1186(4)

Where the crimes charged in separate indictments were distinct, occurring at different times, against different persons, and were charged against different defendants, the consolidation of such indictments for trial was so prejudicial to either or both defendants as to require reversal of conviction. Pen.Code, §§ 954, 1098; Const. art. 6, § 4½.

3. Criminal law ⚷1186(4)

Where accused and another were indicted for robbery of a drug store and charged in a separate indictment with an entirely different robbery, consolidation for trial over accused's objections of indictments and a third indictment charging second person and a third person with robbery of a physician, in which indictment accused was not even mentioned, was such prejudicial error as required a reversal of judgment convicting accused under the first-mentioned indictment. Pen.Code, §§ 954, 1098; Const. art. 6, § 4½.

◆

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Roy Davis was convicted of the crime of first-degree robbery, with a prior conviction of a felony, and from the judgment of conviction and the orders denying his motions for a new trial and in arrest of judgment, he appeals.

Reversed and cause remanded for a new trial.

A. J. Hennessy, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and Dennis Hession, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Defendant appeals from a judgment convicting him of first-degree robbery, with a prior conviction of a felony, and from orders denying his motions for a new trial and in arrest of judgment. The main point urged by appellant is that it was reversible error for the trial court, over his objections, to consolidate for trial, with the charge upon which he was convicted, other indictments charging other defendants with other crimes occurring at different times, in which he was not involved. With this contention we agree.

Appellant was convicted under indictment 31072. In that indictment he and George Miller were charged with the robbery of a drug store alleged to have been committed on December 23, 1939. In indictment 31070 appellant and George Miller were charged with a separate and distinct robbery alleged to have been committed on January 14, 1940. In indictment 31071 George Miller and Miss Doris Miller were charged with the robbery of Dr. Hagan alleged to have been committed on January 12, 1940. Appellant was not mentioned in this last-mentioned indictment at all. At the commencement of the trial appellant objected to the consolidation of these indictments, and particularly to the consolidation of No. 31071 with the other two, but his objections were overruled, and the three cases tried together. Doris Miller pleaded guilty to the robbery charged in case 31071, and testified as a prosecution witness in all of the cases. Both George Miller and appellant secured an instructed verdict of acquittal in case 31070, and George Miller secured an instructed verdict of acquittal in case 31072, but appellant was convicted of the charge contained in that indictment. Thus, when the case went to the jury, it had before it the charge of robbery by George Miller, alleged to have been committed on January 12, 1940 (case 31071), and the charge of robbery against appellant, alleged to have been committed against a different person on December 23, 1939 (case 31072).

[1] Although there has been a gradual relaxation of the rules in regard to the joinder in the same indictment or information of offenses, and the consolidation of separate indictments or informations for the purpose of trial (14 Cal.Jur., p. 64, § 50), sections 954 and 1098 of the Penal Code do not permit the joinder, or consolidation for trial, of indictments or in-

formations charging different defendants with separate and distinct crimes alleged to have been committed against different persons at different times. The Attorney General concedes that there is no statutory authority for the consolidation, concedes that it was error to have overruled the objection to the consolidation, but urges that the error was not prejudicial, and that under article VI, section 4½ of the Constitution the judgment and orders appealed from should not be reversed.

There are four cases discussing this general problem in California, but, as will be seen, none of these cases presents as strong a case for reversal as the instant case. In People v. O'Connor, 81 Cal.App. 506, 254 P. 630, an information was filed charging Fitzgibbons and O'Connor jointly with burglarizing the Lillard home and with forcibly and feloniously taking the property of the Lillards on a specified date. Later a separate information was filed jointly charging Franks and Brock with the same two offenses. Neither information referred to the other. The court, over objection, ordered the causes to be tried jointly. The appellate court discussed the problem at some length, analyzed many cases, and came to the conclusion that such procedure was not authorized by law, was error, and specifically held that article VI, section 4½ of the Constitution had no application. It is to be noted that this case involved the consolidation for trial of charges involving different defendants, but all charged with the same crime. These charges, under section 954 of the Penal Code, could have all been contained in one indictment or information, while in the instant case the trial court has attempted to consolidate for trial not only charges involving different defendants, but defendants charged with different, unconnected offenses.

The O'Connor case, supra, was followed in People v. Foward, 134 Cal.App. 723, 26 P.2d 532. In that case appellant was charged in one information with two counts of robbery. One Wooden was charged, by a separate information, with the crimes of robbery and assault with a deadly weapon. The two defendants were tried together. The opinion does not indicate whether the separately charged offenses were connected, but the inference is that they were. The court held that such procedure was not authorized by either section 954 or section 1098 of the Penal Code. In that connection the court (134 Cal.App. at page 725, 26 P.2d at page 532) stated: "There is nothing in the language of either section authorizing the consolidation of separate informations against separate and distinct defendants. Where, as here, neither information refers in any way to the other, there can be no consolidation, regardless of evidence produced during the trial indicating that the charges relate to the same set of circumstances. This is so because in determining the rights of the parties relative to joint or separate trials in such cases, the trial court is bound by the contents of the information or indictment and cannot look beyond its averments. The matter is jurisdictional. In case the trial court, as it did here, disregards the defendant's rights and unlawfully consolidates trials, it is not mere error which can be cured by the application of the provisions of section 4½ of article 6 of the Constitution. All of the above legal propositions are decided in People v. O'Connor, 81 Cal.App. 506, 254 P. 630, which authority is determinative of this appeal."

In People v. Aguinaldo, 3 Cal.App.2d 254, 39 P.2d 505, 506, the appellate court was again presented with a situation similar to the one involved in the O'Connor case, supra—that is, several defendants, all separately charged, but all charged with the same offenses. The various charges were consolidated for trial. The court held that the consolidation was error, but held that it was "in sharp disagreement" with the O'Connor and Foward cases, supra, in so far as those cases held that the error was not one of procedure but was jurisdictional. After discussing the point at some length, the court concluded (3 Cal.App.2d at page 260, 39 P.2d at page 508): "We have reached the conclusion that, while the order consolidating the two cases for trial was erroneous, it was an error of procedure only and subject to the provisions of section 4½ of article 6 of the Constitution." The court held that no prejudice was shown and affirmed the conviction.

The Aguinaldo case, supra, was followed in People v. Shepherd, 14 Cal.App.2d 513, 58 P.2d 970. That case also involved different defendants separately charged with the same offense. Unlike the preceding three cases, no objection to the consolidation for trial was made. Although the court reversed the conviction on other grounds, it was held that, although it was error to consolidate, article VI, section 4½, was applicable.

[2] As has been indicated, none of these cases is directly in point. In all of them the defendants could have been jointly charged in the same indictment or information. Instead, they were separately charged, and then ordered tried together. What the trial court did by such consolidation was to accomplish, in a roundabout unauthorized fashion, a result that could have been lawfully accomplished. We are inclined to agree with the Aguinaldo and Shepherd cases, supra, that, in the absence of prejudice shown, the error there involved was merely one of procedure and did not justify a reversal under section 4½ of article VI of the Constitution. But that is not the situation here. In the instant case, the charges contained in indictment 31071 could not have been joined in a single indictment with the charges contained in the other two. The crimes charged were separate and distinct crimes, occurring at different times, against different persons, and were charged against different defendants. We have been cited to no case holding that the error in consolidating such indictments is not prejudicial. It would seem to us that in the very nature of things the consolidation of such separate unconnected charges for trial could not help but be prejudicial to either or both defendants. The United States Supreme Court, in McElroy v. United States, 164 U.S. 76, at page 80, 17 S.Ct. 31, 33, 41 L.Ed. 355, in a case factually similar to the instant one, has expressed this view in the following language: "It is admitted by the government that the judgments against Stufflebeam and Charles Hook must be reversed, but it is contended that the judgments as to the other three defendants should be affirmed, because there is nothing in the record to show that they were prejudiced or embarrassed in their defense by the course pursued. But we do not concur in this view. While the general rule is that counts for several felonies of the same general nature, requiring the same mode of trial and punishment, may be joined in the same indictment, subject to the power of the court to quash the indictment or to compel an election, such joinder cannot be sustained where the parties are not the same, and where the offenses are in nowise parts of the same transaction, and must depend upon evidence of a different state of facts as to each or some of them. It cannot be said in such case that all the defendants may not have been embarrassed and prejudiced in their defense, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions. The order of consolidation was not authorized by statute, and did not rest in mere discretion." Although there is other language in the McElroy case which goes beyond the question here involved, and, although that broad language has frequently been questioned and explained by the federal courts, every case that we have found involving a situation similar to that here presented has resulted in a reversal on the ground the error was prejudicial. Brimie v. United States, 7 Cir., 200 F. 726; Coco v. United States, 8 Cir., 289 F. 33; Gallaghan v. United States, 8 Cir., 299 F. 172; Zedd v. United States, 4 Cir., 11 F.2d 96; Castellini v. United States, 6 Cir., 64 F.2d 636; Culjak v. United States, 9 Cir., 53 F.2d 554, 82 A.L.R. 480. There is a good discussion of the various types of factual situations that may be presented in United States v. Ashe, D.C., 2 F.2d 735, 738.

That such consolidation cannot help but be prejudicial is well illustrated by the record in this case. Appellant was convicted of the robbery of a drug store. He had one prior conviction. George Miller, charged with Doris Miller in indictment 31071 with the robbery of Dr. Hagan on January 12, 1940, was apparently an habitual criminal under life sentence. Doris Miller pleaded guilty and asked for probation. She testified against Davis admittedly in the hope of securing probation. The crime charged in indictment 31071 was one well calculated to shock the sensibilities of the jury. The record shows that Doris Miller, representing that she was a nurse, telephoned Dr. Hagan from a hotel room asking him to come to attend a sick man. When he arrived, George Miller held a gun to his back and forced him to write out several morphine prescriptions. All narcotics were taken from the doctor's kit and some money from his person. He was then tied up, placed face downwards on a bed, and left. Appellant was not charged with this crime nor in any way connected with it.

[3] As to the drug store robbery of which appellant was convicted and Miller acquitted, although the evidence is sufficient to sustain the conviction, it is also true that the evidence was highly conflicting. Under

such circumstances, the joining of the Hagan charge with the drug store charge, in spite of the attempt of the trial court by its instructions to keep the charges separate, could not help but prejudice the appellant for the reasons stated in the McElroy and other cases cited supra.

The judgment and orders appealed from are reversed, and the cause remanded for a new trial.

We concur: KNIGHT, J.; WARD, J.

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41 Cal.App.2d 908

PARKER v. RIDDELL.

Civ. 11306.

District Court of Appeal, First District, Division 1. California.

Dec. 13, 1940.

1. **Fraudulent conveyances** 🔑298(3)

Evidence *held* to support finding that husband's transfers of property to wife, made while corporation in which husband was interested was in bad financial condition and after husband had executed continuing guaranty of corporation's debts, were not made with fraudulent intent. Civ.Code, § 3442.

2. **Fraudulent conveyances** 🔑57(3)

Where guarantor of corporation's debts transferred properties to his wife, transfer rendered him "insolvent" within terms of fraudulent conveyance statute, unless his remaining property was worth the amount in connection with which he was guarantor. Civ.Code, §§ 3442, 3450.

See Words and Phrases, Permanent Edition, for all other definitions of "Insolvent".

3. **Bankruptcy** 🔑303(5)

In action by husband's trustee in bankruptcy to set aside allegedly fraudulent conveyances to wife, evidence *held* to support finding that transfers did not render husband insolvent, though husband was liable on guaranty of corporation's debts, and at respective times of transfers the corporation was largely indebted and was under supervision of creditors' committee. Civ.Code, §§ 3442, 3450.

4. **Appeal and error** 🔑1011(1)

An appellate court may not disturb findings of facts based on conflicting evidence, and test is not how court would find the facts to be, but whether there was substantial evidence strong enough to justify the conclusion reached.

5. **Bankruptcy** 🔑303(1)

A husband's bankruptcy trustee seeking to set aside transfers to wife as fraudulent had burden of proving husband's insolvency at time of transfers, and wife was not required to introduce evidence that stock retained by husband could have been sold on dates of the transfers for amounts large enough to show solvency. Civ.Code, §§ 3442, 3450.

6. **Fraudulent conveyances** 🔑52(1)

Conveyances of property made to hinder and delay creditors are permissible if the property conveyed is homestead. Civ.Code, §§ 1240, 1241.

7. **Homestead** 🔑5

Homestead statutes are benevolent and remedial in character, to protect property from existing debts, and may be liberally construed. Civ.Code, §§ 1240, 1241.

8. **Homestead** 🔑186

Unless a judgment constituting a lien is obtained before filing of declaration of homestead, the homestead property is ordinarily exempt from execution. Civ.Code, §§ 1240, 1241.

9. **Homestead** 🔑90

Where proceeds from property fraudulently obtained find their way into a homestead for purposes of seclusion, the right of defrauded creditor may become paramount to that of homestead owner, dependent upon facts of the case. Civ.Code, §§ 1240, 1241.

10. **Fraudulent conveyances** 🔑52(2)

Creditors have no greater rights against homestead property because such property was transferred to wife before the placing of homestead on the property. Civ.Code, §§ 1240, 1241.

11. **Homestead** 🔑43

The statute governing selection of homestead from wife's separate property authorizes a joint declaration of homestead. Civ. Code, § 1239.

12. **Homestead** 🔑43

A joint declaration of homestead reciting that parties were husband and wife, and executed by both, was sufficient, though not reciting specifically that husband was head of the family, since husband was head of the family by statutory definition. Civ.Code, §§ 1238, 1239, 1261, 1263.

13. Bankruptcy ⚷152

The trustee in bankruptcy is vested with title to bankrupt's assets as of the date of adjudication, except property which is exempt. Bankr.Act § 70, sub. a, 11 U.S.C.A. § 110, sub. a.

14. Bankruptcy ⚷400(1)

In action by husband's trustee in bankruptcy to set aside allegedly fraudulent transfers to wife, wherein only one creditor was affected, time for filing claims had expired, and equity of husband and wife in their home was less than the $5,000 exemption, claim of homestead was available without necessity of first asserting it in bankruptcy proceedings. Bankr.Act, 11 U.S.C.A. § 1 et seq.

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Ignatius F. Parker, as trustee in bankruptcy of the estate of Louis Cass Riddell, against Jeannette W. Riddell, to set aside allegedly fraudulent transfers to defendant. From a judgment in favor of plaintiff as to one piece of property and in favor of defendant as to other property, plaintiff appeals.

Affirmed.

Louis Ferrari, of San Francisco, and Edmund Nelson and Hugo A. Steinmeyer, both of Los Angeles, for appellant.

Benjamin, Lieberman & Elmore, of Los Angeles, for respondent.

WARD, Justice.

This is an action by plaintiff as trustee in bankruptcy of the estate of Louis Cass Riddell to set aside five transfers made by the bankrupt to respondent, his wife, and alleged by the trustee to be fraudulent.

The complaint sets forth in five causes of action the different pieces of property conveyed. They consist of three blocks of stock, one piece of real property and an automobile. Judgment was rendered in favor of plaintiff as to the transfer of the automobile, but as to the stock and real estate, the court held that the transfers, of a value in excess of $26,000, were not in fraud of creditors and that they did not render the transferor insolvent. Plaintiff appeals from the judgment except as to that portion thereof in his favor as trustee.

For many years prior to 1929, the Bank of Italy National Trust and Savings Association had granted a line of unsecured credit to the A. E. Little Company, a corporation engaged in the printing and stationery business in Los Angeles. Louis Cass Riddell was one of the stockholders of the company, his holding being 675 shares of 2,400 shares outstanding. In 1928, this unsecured credit was $100,000. A similar line of credit was extended for 1929, but upon the condition that the three principal stockholders, including Mr. Riddell, execute a continuing guarantee of the indebtedness. It is in connection with this guarantee to the bank, the predecessor of the Bank of America National Trust and Savings Association, the only creditor to present a claim against Mr. Riddell's bankrupt estate, that this case deals.

The first two transfers of property by Mr. Riddell to his wife were made on May 10, 1931. They consisted of 8,862 shares of the capital stock of the Kendrick Mercantile Company and 241 shares of the capital stock of the Hoffman Hardware Company. At this time the Little company was indebted to the bank in the amount of $50,000. An investigation by the bank in June revealed accounts receivable of $53,000, $29,000 of which was three months or more past due; and accounts payable of $78,000, $6,000 representing current accounts, and more than $40,000 representing accounts more than six months past due, for which in some instances notes had been given the creditors. An audit of the books of the company by the bank as of August 21, 1931, showed a loss for the fiscal year ending June 30, 1931, amounting to $67,000. On September 1, 1931, the bank required that one of its officers supervise the financial affairs of the company. Shortly thereafter, on September 16, 1931, Mr. Riddell made the conveyance of the real property to his wife. At this time the indebtedness to the bank was $72,500. In January, 1932, the indebtedness to the bank was $56,500, and in February of the same year letters were addressed to all creditors stating that the company was unable to meet all of its obligations. Shortly thereafter a creditors' committee was formed, which supervised the operations of the company for the balance of the year, during which a portion of the inventory was liquidated. On October 18th of the same year, Mr. Riddell conveyed to his wife 5,350 shares of the capital stock of the Kendrick Mercantile Company which he had received from his mother's estate. At this time the indebtedness of the Little company to the bank was $53,672.33. The creditors' committee having determined that it was impossible to continue the business of the company, a federal equity receiver was appointed with the consent of the company, and an audit by the receiver as of January 14, 1933, shows assets, carried on the books of the company at $229,974.97, to be of an appraised value of $98,076.73. Thereafter, the company being shown to be insolvent, the receiver proceeded to liquidate the business. On October 21, 1935, the transfer of the automobile was made by Mr. Riddell to his wife. During the early period of the Little company's financial difficulties the bank continued to make loans to it. Riddell, so far as the evidence shows, transferred practically all of his property to his wife except the stock held in the A. E. Little Company. There is no evidence that he had any other debts except that arising under the guarantee to the bank.

[1] Appellant contends that the Little company was insolvent at the time of the Riddell transfers; that the stock was practically worthless, and that by reason of Riddell's indebtedness to the bank in connection with the guarantee of the company's obligation to the bank, the transfer to the wife, without consideration, was void. Respondent urges that the retention by her husband of the 675 shares of the Little company stock precluded his being classified as an insolvent at the time the transfers to her were made. The court found against appellant's theory that the transfers were made with fraudulent intent. Assuming that a finding could have been made either way, there is sufficient evidence to support the court's view. It is apparent that Riddell's personal solvency at the time he made the transfers depends in great measure on the value of the stock he retained. The transfers in this case were made prior to the effectiveness of the Uniform Fraudulent Conveyance Act. Stats.1939, chap. 329, p. 1667. In 1931 and 1932, a debtor was an insolvent when he was unable to pay his debts from his own means as they became due. Civ.Code, sec. 3450. Any transfer of property made by an insolvent or in contemplation of insolvency, without a valuable consideration, was void as to existing creditors. Civ.Code, sec. 3442.

[2] It is a fact that at the times of the four transfers by Riddell to his wife, the company was unable to pay its debts as they became due. It must be admitted also that Riddell on the dates of the transfers could not have paid the amounts in connection with which he was guarantor except from proceeds derived from the sale of the properties, and stock of the Little company owned by him. Unless, therefore, the 675 shares were worth the amount in connection with which he was guarantor, the transfer of the four properties rendered him insolvent. Dixon Lumber Co. v. Peacock, 217 Cal. 415, 19 P.2d 233. The guarantee was a demand obligation. The trial court found that Riddell was at all times able to pay his debts and was not insolvent at the time of making the conveyances. It is the evidence in support thereof to which we must direct our attention.

If the highest estimate of the value of the Little company stock is accepted—which is necessary if the trial court's finding is to be upheld—the value of the 675 shares held by Riddell was in excess of the company's indebtedness to the bank at the date of the first two transfers, May 10, 1931. The value of the stock at such date was fixed at $100 to $120 a share by the manager of the Little company, and by Riddell at $100. Thus the Riddell stock at that time was worth at least $67,500. The indebtedness to the bank at that time was $50,000. Based upon the profit and loss statement of June, 1932, the manager of the company fixed the value of the stock on October 18, 1932, the date of the transfer of another block of stock, at $90; Riddell fixed the value at such time as $72.50 a share, making the holding worth from $60,750 to $48,937.50. Accepting the highest figure, as the trial court must have, the value of the stock was in excess of the amount owed the bank by the Little company, $53,672.33. On the date of the transfer of the real property, the indebtedness guaranteed was $72,500. The highest value given by any witness as of that date, September 16, 1931, was $90 to $100 a share, or a total value of between $60,750 and $67,500. Therefore, as to that transaction, the value of Riddell's stock in the Little company was less than his guaranteed indebtedness at that time.

[3] Eliminating for a moment the matter of the transfer of the real estate, which will be discussed separately, we find sufficient evidence to support the trial court's

finding that the transfers of stock on May 10, 1931, and October 18, 1932, did not render Riddell insolvent. There is also evidence to support the trial court's finding that the transfers were made without actual fraudulent intent, although a contrary finding could have been sustained.

[4] The rule is that an appellate court may not disturb findings of facts based on conflicting evidence. The trier of facts has the opportunity of observing the witness and his general demeanor. The appellate court simply reads the record in cold type and sometimes does not obtain from it the impression received by the hearer of the spoken word. The tongue is simply the means or method of conveying thought. An impulsive or unconscious gesture, the intonation of the voice, a hesitant or an alert answer may possibly exclude an inference otherwise reasonably drawn from the written record. In considering an attack upon the findings, the test is "not how we would find the facts to be", but whether there was substantial evidence strong enough to justify the conclusion reached. Still v. San Francisco etc. Ry. Co., 154 Cal. 559, 98 P. 672, 20 L.R.A.,N.S., 322, 129 Am. St.Rep. 177; Foster v. Foster, 8 Cal.2d 719, 68 P.2d 719. We are unable to interfere with the finding that Riddell was solvent and that he did not contemplate insolvency on the dates of the transfers.

[5] Appellant contends that unless Riddell's stock in the Little company could be sold on the dates of the transfers for amounts equal to the indebtedness of the company to the bank as of those dates, the finding of solvency is not true. The burden of presenting proof of the insolvency of Riddell was upon appellant. It was not incumbent upon respondent to introduce evidence that the stock could have been sold at the times mentioned at the valuations placed thereon by the witnesses. Our attention has not been called to any evidence that the stock could not have been sold for such amounts, the evidence introduced being such that an inference could have been drawn either way.

Relative to the transfer of the real property, upon which Mr. and Mrs. Riddell made their home, assuming that the trial court was technically in error as to the solvency of Riddell on the date of its transfer, respondent contends that the judgment in her favor as to that transfer should be affirmed for the reason that there is a declaration of homestead upon this property which renders it exempt from execution.

[6-8] Conveyances of property made to hinder and delay creditors are permissible if the property so conveyed is a homestead. Civ.Code, secs. 1240, 1241; Lucci v. United Credit & Collection Co., 220 Cal. 492, 31 P. 2d 369; Montgomery v. Bullock, 11 Cal.2d 58, 77 P.2d 846; Prudential Insurance Co. of America v. Beck, Cal.App., 103 P.2d 241. Such statutes are benevolent and remedial in character and may be liberally construed. Unless a judgment which constitutes a lien is obtained before the filing of the declaration of homestead, the property is ordinarily exempt from execution. A homestead law is to protect property from existing debts. Gray v. Brunold, 140 Cal. 615, 74 P. 303. In Jacobson v. Pope & Talbot, 214 Cal. 758, 760, 7 P.2d 1017, 1018, the court said: "The authorities construing and applying these Code provisions are uniform to the effect that a valid declaration of homestead serves to exempt the homesteaded property from execution or forced sale in satisfaction of all claims and liens, arising or obtained either prior or subsequent to the declaration, other than those specifically enumerated in and excepted by section 1241, supra [Civil Code]." There is an exception to this rule but it does not apply to the facts of this case.

[9] When the proceeds from property fraudulently obtained find their way into a homestead for the purposes of seclusion, the right of a creditor thus defrauded may become paramount to that of the owner of the homestead, dependent upon the facts of the case. An illustration of this principle is found in Kemp v. Enemark, 194 Cal. 748, 230 P. 441, where the husband of plaintiff, by perpetrating a forgery, obtained a loan from a bank. The wife was not a party to the transaction and had no knowledge of the fraud until long afterward. The husband disappeared, and the bank brought an action on the note given in connection with the loan. Judgment was obtained and a writ of execution issued. Prior to judgment the wife filed two declarations of homestead on the property for the joint benefit of herself and her husband. After levy of the writ, the wife, joining her husband as plaintiff, sought an injunction against the assignee of the bank and the sheriff. The assignee and the sheriff answered, alleging, among other things, that the wife was not residing on the premises

at the time the homesteads were declared, and that fraud had been practiced by the husband upon the bank. On the trial the fraud was not disputed but the wife contended that she was not a party thereto. At pages 752, 753 of 194 Cal., 230 P. at page 443, the court said: "As pointed out in Shinn v. MacPherson, 58 Cal. 596: 'It is not important that it does not appear that Mrs. MacPherson (the wife) participated in the wrongful acts of her husband. If the transaction is permitted to stand, she, as well as he, will reap the fruit of the fraud. * * * Neither ever had, or ever could have, any right founded on the fraudulent appropriation of funds of other parties.' It will be noted that the claim sought to be satisfied is not in excess of the amount out of which the bank was defrauded by Kemp, and to the extent of the money obtained by her husband by fraud, invested in the homestead, the plaintiff in the case at bar is seeking to retain for herself that which is not rightfully hers. And, while retaining that which rightfully belongs to another, she seeks the aid of a court of equity to make secure her wrongful possession thereof. In other words, the plaintiff herein is seeking the aid of a court of equity to preserve to her the fruits of the fraud of her husband. Plaintiff does not offer to do equity. She cannot therefore successfully seek the aid of equity." The Kemp case cites Ohio Electric Car Co. v. Duffet, 48 Cal.App. 674, 192 P. 298, where a wife sold fraudulently acquired property and invested the proceeds in improving real property owned by her which she subsequently homesteaded. In these cases the crime or tort is apparent and the creditors' claims are therefore paramount to those of the owner of the homestead upon the theory that in the matter of declaring homesteads it was never intended that one should reap "the fruit of the fraud" (Kemp v. Enemark, supra) to the disadvantage of the particular creditor defrauded. In the instant case, the court found against the claim of fraud.

[10] Two declarations of homestead were introduced in evidence. If the first declaration is legally sufficient in form, it will not be necessary to consider the second. The first declaration was executed January 3, 1933, after the transfer of the property to the wife. Its conveyance to her of September 16, 1931, may have been in fraud of her husband's creditors, but the homestead would have been effective had the property not been conveyed to the wife. The claim of the bank in connection with the husband's guarantee had not been reduced to judgment when the homestead was filed. The creditors have no greater rights because prior to the placing of a homestead thereon the property was transferred to the wife. If in other respects the declaration conformed to recognized legal tests, the homestead was exempt in the usual manner, irrespective of the transfer.

The homestead was by joint declaration of Riddell and his wife. It recited that the parties were husband and wife; it gave the location and character of the property and stated that no former declaration of homestead had been made thereon by either of the parties; that the parties resided in the dwelling on the land, and an estimate of the value of the property was given. Appellant contends that this declaration is defective in that it fails to recite that the husband is the head of the family, and that there is no provision for a joint declaration by husband and wife.

[11, 12] The declaration must contain a statement that the person making it is the head of the family, and if married, the name of the spouse must be given. Civ. Code, sec. 1263. The head of the family is the husband when the claimant is a married person. Civ.Code, sec. 1261. Under Civil Code, sections 1238 and 1239, a homestead may be selected from the separate property of the wife when she gives her consent "shown by her making or joining in making the declaration of homestead". Section 1239 furnishes an express authorization for a joint declaration. The document in question declared the parties to be "husband and wife". It is sufficient to show Louis C. Riddell as a male, married person. As a married person, by statutory definition he was the head of the family. There was a sufficient compliance with the statute. Yager v. Yager, 7 Cal.2d 213, 60 P.2d 422; Lucci v. United Credit & Collection Co., supra; Simonson v. Burr, 121 Cal. 582, 54 P. 87. In Reid v. Englehart-Davidson, etc., Co., 126 Cal. 527, 58 P. 1063, 77 Am.St.Rep. 206, the declaration was signed "R. M. Reid". It could not be determined from the contents of the declaration whether "R. M. Reid" was husband or wife. If the wife, the declaration was deficient in that it did not aver that the husband had not previously made a declaration. Civ.Code, sec. 1263. In the instant matter, both husband and wife made the declaration. It is indicated that the masculine proper name

"Louis" was the name of the husband, and that the feminine proper name "Jeanette", the equivalent of Jeanne or Jane, was the name of the wife. The sufficiency of the declaration may be determined from the contents of the document expressly set forth. The first declaration of homestead was valid and the property exempt from execution. It is not necessary therefore to pass upon the validity of the transfer of this property by Mr. Riddell to his wife, nor that of the second declaration of homestead recorded subsequent to the adjudication of Riddell as a bankrupt.

Appellant urges that the defense of homestead must be asserted in the bankruptcy proceedings. This contention is primarily urged against the second declaration, though in his closing brief appellant attempts to broaden the terms of the Bankruptcy Act, 11 U.S.C.A. § 1 et seq., to include the first declaration, this upon the theory that if the transfer of the property to Mrs. Riddell was void as in fraud of Mr. Riddell's creditors, it is entirely immaterial whether or not either declaration of homestead was valid, and that the bankruptcy court has exclusive jurisdiction of any exemption claimed.

[13] The trustee in bankruptcy is vested with title to the assets of a bankrupt as of the date of the adjudication except as to property which is exempt. In White v. Stump, 266 U.S. 310, 45 S.Ct. 103, 69 L.Ed. 301, relied upon by appellant, the property was not exempt under the state law, but was subject to levy and sale. In that case the declaration was filed for record one month after adjudication of bankruptcy. In this case, the first declaration of homestead was recorded over three years before the adjudication of bankruptcy.

[14] There may well be situations where a trustee in bankruptcy should be permitted to ask the court to set aside a conveyance of property fraudulently made, but homesteaded, without determination by the court in such action as to the extent of the exemption, as where there may be more than one creditor, or whether the claims vary on judgment liens, which may or may not attach before the filing of the declaration. In the instant case, the only creditor is the Bank of America National Trust and Savings Association. There is no contention made that other creditors may be affected, and it appears that the time for filing claims has expired. The equity of the Riddells in their home was less than the $5,000 exemption. Section 70, sub. a of the Bankruptcy Act, 11 U.S.C.A. § 110, sub. a, recognizes that title to exempt property does not pass to the trustee. Sustaining the trustee's technical objection would simply mean that the state court having declared the first declaration of homestead valid, the trustee would take over the property and then be required to recognize the bankrupt's wife's claim that it is exempt by reason of the decree of the state court to that effect as the result of the declaration of homestead thereon—an idle and a futile act.

The judgment is affirmed.

We concur: PETERS, P. J.; KNIGHT, J.

JENSEN et al. v. HUGH EVANS & CO. et al. (BOOKER et al., Third Party Claimants).*

Civ. 11550, 11551.

District Court of Appeal, First District, Division 2, California.

Dec. 13, 1940.

Hearing Granted Feb. 10, 1941.

1. Joint-stock companies and business trusts 🔑19

In proceeding by third party claimants to determine rights to fund held by trustees of Massachusetts trusts, and upon which judgment creditors of Massachusetts trusts had caused execution and levy to be made, third party claimants' right to attack judgment against trusts for failure of judgment creditors to use correct name when suing trusts was "waived" by counsel's entry in such suit of stipulation for trusts as designated in complaint, and going to trial without objection that trust was improperly designated. Code Civ.Proc. §§ 434, 689.

See Words and Phrases, Permanent Edition, for all other definitions of "Waived".

2. Joint-stock companies and business trusts 🔑19

Under statutes, an action can be brought and judgment entered against a Massachusetts trust as distinguished from the individuals acting as trustees. Code Civ.Proc. § 388; Gen.Laws 1937, Act 8447a, § 3.

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* Subsequent opinion 115 P.2d 471.

3. Joint-stock companies and business trusts 🔑1

A Massachusetts or business trust is an "association" within statute permitting association to be sued by common name. Code Civ.Proc. § 388.

See Words and Phrases, Permanent Edition, for all other definitions of "Association".

4. Joint-stock companies and business trusts 🔑19

In proceeding by third party claimants to determine rights to funds held by trustees of Massachusetts trusts, and upon which judgment creditors of Massachusetts trusts had caused execution and levy to be made, objection that judgment was entered against trusts, rather than against individuals acting as trustees, was "waived" by appearance of trusts in action in which judgment was rendered, under common or trade name by which they were sued, without any objection that they did not have legal capacity to be sued as such. Code Civ.Proc. §§ 388, 689; Gen.Laws 1937, Act 8447a, § 3.

5. Corporations 🔑207½

An action by stockholders of corporation to redress some wrong done to corporation cannot be maintained by individual shareholders to redress wrongs peculiar or individual to the individual shareholders, but the wrong must be to the shareholders collectively, and the suit is for the benefit of the corporation.

6. Joint-stock companies and business trusts 🔑19

Judgments recovered by substituted trustees of Massachusetts trusts, suing "on behalf of said trust estate and of all purchasers or owners of beneficial interests therein", for recovery on behalf of the trusts of moneys claimed to be due the trusts from former trustees because of mismanagement of affairs of trust, were assets of the trusts, and were subject to lien of judgment against the trusts.

7. Joint-stock companies and business trusts 🔑19

Under execution statute, property held by business trust is subject to execution. Code Civ.Proc. §§ 388, 681 et seq.; Probate Code, § 732.

8. Associations 🔑20(1)
Corporations 🔑523
Joint-stock companies and business trusts 🔑19

In absence of exception in execution statute affecting property of corporation, association, or business trust, court would assume that none was intended and that execution statute was general in its application. Code Civ.Proc. § 681 et seq.

9. Execution 🔑200

In third party proceeding, striking motion for new trial from files was proper, since statute relating to third party proceeding does not permit a new trial. Code Civ. Proc. § 689.

10. Execution 🔑179

An agent will not be permitted to assert a third party claim where his principal had no valid third party claim. Code Civ.Proc. § 689.

◆

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by A. P. Jensen and others against Hugh Evans & Company and others. The plaintiffs recovered judgment and caused execution and levy to be made against certain funds held by trustees of Massachusetts trusts. L. H. Booker and others filed third party claims. From a judgment in favor of the plaintiffs on such claims, and from an order denying new trial, the third party claimants appeal.

Appeals from order striking motion for new trial, and other orders, dismissed, and judgment affirmed.

Olson & Ahlport, of Los Angeles, for appellants.

Max Lewis, A. Arnold Klein, and Laurence M. Weinberg, all of Los Angeles, for respondents.

NOURSE, Presiding Justice.

On March 22, 1932, plaintiffs commenced an action against several defendants, including Diversified Real Estate Investments Trust No. 1 and Diversified Real Estate Investments Trust No. 2, unincorporated business, or "Massachusetts" trusts. Judgment for approximately twelve and seventeen thousand dollars were recovered against the two named trusts respectively. Thereafter Booker and his associates, having by order of court been substituted as trustees of both of said trusts, commenced two separate actions against the former trustees and other defendants to recover on behalf of each of said trusts moneys claimed due because of the mismanagement of the affairs of these trusts. By stipulation the bonding company agreed to pay and judgment was entered for the two sums of twenty-five thousand dollars in each action. The trustees-plaintiffs in those actions authorized their attorneys to accept payment of the fifty thousand dollars. The attorneys retained twenty-five thousand dollars for their legal services and paid over to the plaintiffs-trustees the balance. These trustees then deposited in bank the sum of twelve thousand five hundred dollars to the commercial account of Diversified Real Estate Investments, and, a like sum to the account of Diversified Real Estate Investments Trust No. 2. Thereafter the plaintiffs in the Jensen case caused execution and levy to be made against the two funds. In due time the trustees of each of these separate trusts filed third party claims. In proceedings held under section 689 of the Code of Civil Procedure these parties contended that they had sued for and recovered the judgments as constructive trustees holding for the individual certificate holders of beneficial interests, and that the judgments recovered were for the benefit of these individual holders and not for the trust estates. After a full hearing the trial court rejected this claim and gave judgment for the execution creditors. Thereafter two new third party claims were filed by attorney Olson as agent for subscribers for shares of beneficial interests in the two trusts. After trial and hearing, judgment went for the execution creditors upon these claims. Notices of appeal were filed from these judgments and from several orders made during the proceedings which counsel have stipulated shall be consolidated for hearing on appeal. We will consider the appeals from the judgments and from the order striking appellants' motion for a new trial, and will deem all others abandoned for want of proper prosecution.

[1] The appellants attack the original judgment against the two trust estates because one was sued as "Diversified Real Estate Investments Trust No. 1", whereas the correct name of the trust was "Diversified Real Estate Investments". But the cause was tried on the fourth amended complaint of plaintiffs after counsel for defendants had appeared and entered into stipulations as attorneys for the trust as designated in these complaints, and went to trial without any objection that the first trust was improperly designated. The right to so object was therefore waived. Sec. 434, Code Civ.Proc.; Herald v. Glendale Lodge, etc., 46 Cal.App. 325, 330, 189 P. 329.

[2, 3] The original judgment in the Jensen case is attacked upon the ground that the action was brought and the judgment entered against the two trust estates rather than against the individuals then acting as trustees. Authority for the procedure followed is found in section 388 of the Code of Civil Procedure which provides in part: "When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name * * *." Before its repeal in 1939, and while this action was pending, section 3 of Act No. 8447a, Deering's General Laws, read: "The term Massachusetts or business trust as herein used shall include every business organization consisting essentially of an arrangement whereby property is conveyed to trustees where the trustees are not restricted to the mere collection of funds and their payment to the beneficiaries but are associated together with similar or greater powers than the directors in a corporation for the purpose of carrying on some business enterprise." Appellants argue that a business trust is not an association within the contemplation of the section, but Jardine v. Superior Court, 213 Cal. 301, 320, 2 P.2d 756, 79 A.L.R. 291, is authority to the contrary.

[4] Aside from this the two trusts appeared in the Jensen action under the common or trade name by which they were sued, without any objection that they did not have legal capacity to be sued as such, and such objection must be deemed to have been waived. Jardine v. Superior Court, supra, 213 Cal. at page 308, 2 P.2d 756, 79 A.L.R. 291.

The vital issue here raised is whether the proceeds of the Booker judgments belonged to the trust estates, or to the individual certificate holders. If title rested in the trust estates against which the Jensen judgments ran, then the trial court properly held that appellants were not third party claimants. Booker and his associates were substituted as trustees of the two trusts and brought their actions in that capacity "on behalf of said trust estate and of all purchasers or owners of beneficial interests therein". Such was the pleading of their fourth amended complaint upon which they had judgment. That they were then trustees for all the certificate holders is conceded, but the latter had no interest or title adverse to the trust estate. This follows from the declarations of trust upon which all the rights of these parties rest. It is there declared that "title to the trust property is vested solely in the trustees and they have complete control over it to the same extent as if they were sole owners". "Shareholders have no interest of any kind in the trust property, nor right to a division of the profits." (We take this matter from appellants' opening brief. There is no reference to the transcript where the trust indenture may be found, but the parties seem to agree that it was either in evidence or used during the trial. We have followed the same course as to matters appearing in respondents' brief. Where quotations are made in the briefs from pleadings or documents without citation or reference to the transcript, but are not controverted, we assume they are correct.)

When the substituted trustees sued to recover for the mismanagement of the former trustees they sued in the capacity of trustees of the trust estate and the basis of both complaints was that, through the acts complained of, "said trust estate was and is damaged in the total sum of $———." Under the express terms of the trust indenture, title to the fruits of that litigation vested in the trustees just the same as profits of any other operation of the business. By the express terms of the trust indenture title did not vest in the certificate holders. The Booker judgments were in favor of those plaintiffs as trustees of the "trust estate". The parties at that time treated the proceeds of the judgment as trust property and deposited the moneys in bank to the account of the estate. The certificate holders as such did not pray for or receive any damages to themselves other than as beneficiaries of the assets of the trust estate.

[5, 6] The action in all its aspects is the same as that class of actions instituted by stockholders of a corporation to redress some wrong done to the corporation. Actions of that class cannot be maintained by individual shareholders to redress wrongs peculiar or individual to themselves. The injury is to the shareholders collectively and the suit is one for the benefit of the corporation. Whitten v. Dabney, 171 Cal. 621, 624, 154 P. 312; Anderson v. Derrick, 220 Cal. 770, 772, 32 P.2d 1078; Nighbert v. First Nat. Bank of Bakersfield, 26 Cal. App.2d 624, 631, 79 P.2d 1105. We conclude from the foregoing that when Booker and his associates recovered their judgments the fruits of those judgments were assets of the trust estate. As such they were subject to the lien of the Jensen judgment.

[7, 8] Appellants argue that property held by a business trust is not subject to execution, but that the creditor's only remedy is a suit in equity. No California authority is cited to the point. Those from other jurisdictions are not applicable because the right is controlled by statute. Section 388 of the Code of Civil Procedure authorizes suit against the legal entity, and the judgment in the Jensen case was so taken. Section 681 et seq. of the same code authorize the levy of execution upon the property of the "judgment debtor". Section 732 of the Probate Code makes an exception under certain circumstances. We find no exception affecting the property of a corporation, association, or business trust. None having been made by statute, we must assume that none was intended and that the execution statute is general in its application.

[9] Finally it is argued that the trial court erred in striking from the files appellants' motion for a new trial. The order was proper because section 689, Code of Civil Procedure, does not permit a new trial. Wilson v. Dunbar, 36 Cal.App.2d 144, 97 P.2d 262.

[10] The second appeal is submitted on the briefs covering the first. It presents no legal difficulties. After the former judgment was entered, Mr. Olson, as agent of the shareholders, filed a third party claim in their behalf. Judgment went for respondents. Manifestly if the principals had no valid third party claim their agent had none.

The appeals from the order relating to the motion for a new trial and from all other orders are dismissed. The judgments are affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

41 Cal.App.2d 935

PEOPLE v. HELSLEY.

Cr. 3400.

District Court of Appeal, Second District, Division 1, California.

Dec. 13, 1940.

1. Burglary ⚷41(5)

Evidence that in heavily populated residential district in city of Los Angeles while occupants of respective houses were sleeping, accused burglariously entered one residence between the hours of 2 a. m. and 6 a. m. and another residence between 3 a. m. and 6 a. m., and that sun arose on those days at 5:28 a. m. and at 5:30 a. m., respectively, justified finding that burglary was committed "between sunset and sunrise" authorizing conviction of "burglary in the first degree".

See Words and Phrases, Permanent Edition, for all other definitions of "Between Sunset and Sunrise" and "Burglary in the First Degree".

2. Criminal law ⚷1083

The effect of an appeal is to remove from jurisdiction of trial court the subject matter of the judgment or order appealed from, and it therefore has no power to vacate or set it aside.

◆

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Frederick W. Helsley was convicted of burglary in the first degree, and he appeals.

Affirmed.

Gladys Towles Root and Eugene V. McPherson, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

Appellant was charged in an information containing four counts with the crime of burglary. He entered a plea of "guilty" as to counts 3 and 4 and applied for probation. The court denied the application for probation and found the crimes to be burglary of the first degree as to these two counts. Counts 1 and 2 were dismissed in the interest of justice.

This appeal is prosecuted from the judgments of conviction and relates particularly to the order fixing the crimes as burglary of the first degree.

Stipulations were entered into for the purpose of fixing the degree of the crimes as follows: As to count 3:

"The Court: According to the probation officer's report, count 3 charges that some time between the hours of 2:00 a. m. and 6:00 a. m. on the 6th day of September, 1939, the defendant burglariously entered the residence of Emil Rinus, 1288½ West 39th Street, Los Angeles, while Mr. Rinus was sleeping in bed, and he stole about $35.00 in cash from a purse belonging to Mrs. Rinus, entrance being gained through the front window after a screen had been cut and the catch broken. The money was removed from a table in the front part ot the house. Is it stipulated those are the facts as to this burglary, for the purpose of fixing the degree?

"Mrs. Root: I will so stipulate.

"Mr. Barnes: So stipulated."

With respect to count 4: "The Court: In Count 4 it is charged that at some time between the hours of 3:00 and 6:00 a. m. on the 1st (3rd) day of September, 1939, the residence of one Ileen Bleick, 1191 West 39th Place, in Los Angeles, was burglarized by the defendant, entrance being gained through an open rear door, and a purse was stolen off of a davenport while Miss Bleick was in bed asleep in the bedroom, $15.00 in cash being stolen. Is it stipulated those are the facts for the purpose of fixing the degree?

"Mrs. Root: So stipulated.

"Mr. Barnes: So stipulated."

It is here contended by appellant that the judgment of burglary of the first degree is contrary to the law and the evidence for the reason that the sun arose on September 9, 1939, at 5:28 a. m., and at 5:30 a. m. on September 6th, and so far as is shown by the record the entry could have been made after sunrise, thus constituting the offenses burglary in the second degree.

Outside of the stipulations hereinbefore set forth, there is nothing in the record which throws any light on the subject except the following statement of appellant's counsel made in her appeal to the court "to find the degree to be the second degree, because there was a question at the time of the preliminary, whether or not the burglary occurred between nighttime and daytime, as the people awakened some time around 8:00 o'clock in the morning; and certainly the benefit of the doubt as to second degree should inure to the benefit of the defendant".

However, it will be noted that these two burglaries occurred in a heavily populated residential district in the city of Los Angeles, while the occupants of the respective houses which were burglarized were sleeping. Entrance in one case was gained through a front window after the screen had been cut and the catch broken, and in the other, entrance was made through a rear door. It was stipulated that the offenses were committed some time prior to six o'clock on the two mornings in question, therefore, in the four-hour period between two and six o'clock in the morning of September 6th, there were three hours and thirty minutes before sunrise and only thirty minutes after; and in the three-hour period between three and six o'clock on the morning of September 3d, there were two hours and twenty-eight minutes before the sun arose, and only thirty-two minutes after sunrise.

In the case of People v. Ross, 61 Cal.App. 61, 214 P. 267, appellant therein was convicted of burglary in the first degree, in that he broke a glass show-window in a jewelry store in San Francisco and took therefrom eight strings of pearls valued at several thousands of dollars, between the hours of 6:15 o'clock (after sunset) January 19, 1922, and some time prior to 8:30 o'clock (one hour and seventeen minutes after sunrise) on the following morning. In the cited case appellant contended that the evidence was insufficient to sustain a verdict of guilty of burglary in the first degree, committed between the period "between sunset and sunrise". The court held that since "the store where the burglary was committed is located at a corner of two of San Francisco's principal business streets", it was a reasonable inference for the jury to draw from the evidence that the crime was committed in the "nighttime" rather than in the "daytime"; that "consummation of the crime after sunrise would have necessitated breaking the window and taking the pearls in full view of passing pedestrians. The conclusion is obvious that the crime was committed at dead of night. People v. Schafer, 161 Cal. 573, 119 P. 920."

Again, in People v. McCarty, 117 Cal. 65, 48 P. 984, it was urged that the evidence was insufficient to support the verdict of burglary in the first degree, under the following facts: "The defendant and others constructed a tunnel some 120 feet in length from the cellar of a certain saloon to a point immediately beneath the floor of a certain bank building in the city of Los Angeles, for the purpose of committing larceny. Upon the day set for the actual entry through the floor into the building the defendant and his confederates sometime during the afternoon entered the cellar, one of them emerging therefrom at 7 o'clock p. m., for the purpose, he stated, of securing fresh air. The others came out of the cellar at 12 o'clock that night. The burglary was committed by these men at some time during these hours. The finding of the jury on this question was a matter peculiarly within their province, and upon this evidence the court will not disturb the verdict in this regard."

[1] In the circumstances presented by the instant prosecution, it was a reasonable conclusion for the trial court to make that the appellant would hardly take the risk of breaking into these buildings in a heavily populated residential district in broad daylight, and that therefore the offenses here charged were consummated between "sunset and sunrise", constituting them burglary in the first degree.

Although no mention is made thereof in respondent's brief, and appellant makes only casual reference thereto, it is shown by the record that after the judgment herein was pronounced on August 1, 1940, and appellant had given oral notice of appeal therefrom, the trial court purported to vacate and set aside such judgment, as well as the pleas of guilty theretofore entered by appellant as to counts 3 and 4, that it re-established appellant's pleas of not guilty to said counts, and reset the cause for trial as of September 16, 1940. In making said order vacating and setting aside the judgment, the trial court made the following statement: "I think, in view of the stipulation, there is no question in the world in the court's mind as to this matter, but there may be a technicality based on the question of time, it being 6:00 a. m. in the morning, as to whether the sun had come up by that time or not, if the defendant wants to stand on that, in view of his stated attitude, I am inclined to agree with the District Attorney that he had better be tried on these issues and have evidence presented to a court." Apparently, the failure to present these facts in the briefs was on the theory that the order of the trial court purporting to vacate and set aside said judgment was void.

[2] The effect of an appeal is to remove from the jurisdiction of the trial court the subject-matter of the judgment or order appealed from, and it therefore has no power to vacate or set it aside. 14 Cal.Jur. 1017.

"The appeal having been regularly taken, its effect was to transfer the cause to the [appellate] court and to suspend the power of the trial court pending such appeal to vacate the judgment. Parkside Realty Co. v. McDonald, 167 Cal. 342, 139 P. 805; Kinard v. Jordan, 175 Cal. 13, 164 P. 894; Crawford v. Meadows, 55 Cal.App. 4, 203 P. 428; Jackson v. Dolan, 58 Cal.App. 372, 208 P. 315." California Real Estate Exchange v. Sequoyah Hills Co., 75 Cal.App. 695, 696, 243 P. 54, 55.

For the reasons stated, the judgments appealed from are, and each of them is, affirmed.

We concur: DORAN, J.; WHITE, J.

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42 Cal.App.2d 50

PEOPLE v. LA FLEUR.

Cr. No. 3397.

District Court of Appeal, Second District, Division 1, California.
Dec. 17, 1940.

1. Homicide 🔑282

In murder prosecution, alleged circumstances of mitigation placed in evidence either by prosecution or by defendant are not necessarily conclusive, but jury has duty to weigh such evidence and determine what credit it deserves, and accord to it the weight to which it is entitled.

2. Homicide 🔑282

Where jury in murder prosecution concludes that circumstances of mitigation have not been satisfactorily established by credible evidence, or that, even if isolated facts have been satisfactorily established, their combined weight has failed to prove an ultimate fact which amounts to legal mitigation of the offense, as a matter of additional prerogative jury may reject the whole of such evidence and thereafter revert to remaining questions relating to the two degrees of murder, together with incidental question of recommendation of punishment should first-degree murder be the verdict.

3. Homicide 🔑282

In reaching a conclusion in murder prosecution whether circumstances of mitigation have been proved to have existed at time of homicide, or whether the killing was the willful, deliberate, and premeditated act of defendant, jury should be guided by rules relating to other defenses generally.

4. Homicide 🔑282

The jury is to say whether evidence is sufficient to lead them to believe, or to entertain a reasonable doubt whether killing was committed under heat of passion, and appellate court should interfere with judgments of conviction only in exceptional cases.

5. Homicide 🔑276, 282

In prosecution for murder allegedly committed by stabbing in dispute after dice game, tried without a jury, evidence *held* to make fact questions for trial court on issues of mitigation or self-defense and degree of the crime.

6. Homicide 🔑254

In prosecution for murder allegedly committed by stabbing in dispute after dice game, evidence *held* to authorize verdict of second-degree murder but not of first-degree murder.

◆

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Joshua La Fleur was convicted of murder of the first degree, and he appeals.

Judgment modified, and cause remanded with directions to enter judgment finding defendant guilty of murder of the second degree.

Walter L. Gordon, Jr., of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

In an information filed by the district attorney of Los Angeles county, appellant was charged with the crime of murder. Upon his arraignment he moved for a dismissal under section 995 of the Penal Code, which motion was denied, whereupon he entered his plea of "not guilty" and personally waived trial by jury. After hearing the evidence, the court found him guilty of murder of the first degree. This appeal is prosecuted from the judgment of conviction, as well as from the order by which his motion for a new trial was denied.

It is here urged that the evidence is insufficient to sustain the judgment for the reasons that:

1. Appellant produced certain evidence to show that the act was committed by him in self-defense, which was neither rebutted nor refuted.

2. The record is absolutely devoid of any evidence which would tend to show that the killing was a wilful, deliberate and premeditated killing with malice aforethought. Under no theory known to the law is the evidence in this case sufficient to support a first degree murder conviction.

About 9 o'clock on Saturday night, May 4, 1940, several men, including appellant, Rufus Eckford (the deceased), T. L. McGowan and Oscar Pugh, were playing a crap game in a welding shed at the rear of Leon's Garage on Central avenue in the city of Los Angeles. Just prior to the altercation which resulted in the fatal stabbing of Rufus Eckford, he was shooting the dice. He hit five straight naturals, five deuce sevens, at $1.05, and when he hit the fourth deuce seven, appellant turned to McGowan and said, "I am going to catch these dice to look at them." By that time Eckford had thrown the fifth deuce seven, whereupon appellant jumped on the table and grabbed the dice, turned them back and forth in his hand and said, "These are not the dice we were shooting before" (referring to a game that had been played earlier in the evening on East Forty-ninth street at which time appellant had lost $3.60 and had marked a set of dice which was then being used). Appellant then turned to Eckford and said, "Come here, I want to talk to you"; and both men walked over to a corner in the west end of the welding shop and began to talk. According to the witness McGowan, the two men conversed in a low tone of voice and could not be heard until Eckford said to appellant, "You talk like a damned fool * * * you can take it out of my hide." McGowan then walked over to them and found appellant "was standing with his back to the wall with his hands in front of him, and Mr. Eckford was standing right here in front of him. * * * I said 'What is the matter?' and LaFleur said, 'Mr. Eckford won my money. * * * I asked him for my money back, and he will not give it back to me,' and I said to Mr. Eckford, * * * 'If he caught you fair, give him his money, don't wake up the rest of the people.' * * * Mr. Eckford said, 'That man talks like a fool,' and * * * LaFleur pulled off his eye glasses and he said (addressing McGowan) 'Hold my eye glasses.'" Appellant then turned to Eckford and said, "If you will put up that knife, I will whip you," to which Eckford replied, "You can get that out of my hide the best way you can."

McGowan's version upon cross-examination of what occurred from that point is as follows:

"When he said that Mr. Eckford made at LaFleur with the knife and I jumped in between * * * I shoved Mr. Eckford back * * * I would say about a foot or a foot and a half. * * *

"Q. And he struck over your shoulder at LeFleur a foot and a half in the rear of you? A. Yes.

"Q. Then what happened? * * * A. When LeFleur broke out from behind me, Mr. Eckford met him on the opposite side.

"Q. LaFleur was down here, and Eckford was north of him, farther away from the door than LaFleur was? A. Mr. Eckford was back in here and Mr. LaFleur was back here and I was between them. * * * LaFleur tried to go around to the right of me and Mr. Eckford cut by him on that side. * * * Mr. Eckford struck at LaFleur with the pocket knife.

"Q. How many times did he strike him? A. When he got out on this side of me he struck at him once.

"Q. That was the only time he did strike at him? A. No, sir, he struck at him over my shoulder the first time.

"Q. Then he struck at him twice? A. Yes.

"Q. And then LaFleur only struck at Eckford twice? A. No, I said Mr. Eckford struck at Mr. LaFleur twice.

"Q. How many times did Mr. LaFleur strike Mr. Eckford? A. To my estimation, four or five times.

"Q. Where was Mr. Eckford standing when he struck at Mr. LaFleur? A. He was right in front of me.

"Q. And Mr. LaFleur was in back of you? A. Yes.

"Q. And Mr. LaFleur also struck over you at Mr. Eckford? A. Yes.

"Q. You were in between these men that were slashing each other with knives? A. Yes.

"Q. How many cuts did you get? A. Only one. * * * They cut at each other four or five times * * * when Mr. Eckford broke around and started around, LaFleur started out behind me to the right, and Mr. Eckford cut him off and LaFleur comes hitting over my shoulder like that, and Mr. Eckford backs up * * * LaFleur reached around and ran from here back here, over here in this place.

"Q. For the purpose of the record, he ran from the north by the partition to the west side of the welding shed over to the northeasterly corner of the welding shed, is that right? A. Yes. * * * And then LaFleur backed out by this man and Mr. Eckford was standing along here with his hand like this, and LaFleur was standing over about here, and I told LaFleur to put his knife away, and LaFleur said, 'I am not going to put my knife down until that man gets out of here and goes out of here,' and Mr. Eckford turned around and faces LaFleur, and Mr. Eckford comes up to the door, and when he gets to the door he fell up against the door, and he walks on out between the cars and leaned up on the fender of the Ford V-8.

"Q. How long would you say that Mr. Eckford and Mr. LaFleur were engaged in this knife fight? A. I would say two or three minutes."

Eckford apparently collapsed near the said Ford V-8 where he was found lying in a pool of blood with his clothing torn and disarranged, and the right front pocket of his trousers turned outside. The autopsy surgeon testified that his examination showed five clean-cut stab wounds: (a) One one and one-half inches long on the left shoulder; (b) one five-eighths inch long which entered the chest wall just below the left arm pit; (c) a cut five-eighths inch long which entered the upper left side of the back over the scapula and penetrated in depth to this bone; (d) a wound which penetrated the lobe of the left ear and could be considered as continuing to create wound (e), a clean cut, five-eighths inch long "entering the neck below and back of the lobe of the left ear, and following a course to the right in a horizontal plane, penetrated two and one-half inches to reach and enter the spine and spinal cord, having passed between the second and third cervical vertebrae. * * * Chemical analysis of the blood showed 0.29 per cent alcohol * * * the prime cause of death was stab wounds of the cervical spine and cord. * * * His death must have been practically instantaneous. * * * a collapse would take place due to motor paralysis, and the hemorrhage in the cord at the base of the brain would lead to unconsciousness or death within a period of a very few minutes."

Appellant took the stand in his own defense and his version of the affray from the time the witness McGowan joined him and decedent was as follows: McGowan "came over and asked me what was the matter, and I explained the matters to him, and in about an instant he (Eckford) cut at me, and cut my sweater on the shoulder, and about that time McGowan was trying to talk to him and tell him about being crooked, and I was up against the wall, and I said to McGowan, 'I am trying to get out of here,' and I kind of gave him a soft punch, that was all I did, and he came back in turn, and about that instant * * * I reached in my pocket and got my knife, and in my own defense, and McGowan said 'He cut me,' and we started to swinging at each other, and all I remember, he put his hand on his neck and about that time he cut at me again, and I ducked out of his way and swung at him again, and the last time I swung at him I got him to stop and he acted like he was crazy or something, and McGowan then said, 'Why don't you stop fighting?' I said, 'I can't stop this fellow from cutting me, why don't you catch and hold him, or do something with him?' He acted like he was crazy and about that instant he stopped and he kept holding his hand on his neck, and I didn't even bother him, and he stood up looking at me, and in the meantime everybody was cleared out of the place, and he went outside and McGowan said, 'Come out here, he is not out here.' I peeked out of the door and I didn't see him, and I went on out, and I called to Violet Shaw (a friend of appellant, whose house faced on the alley near the welding shop)

* * * 'I got into some trouble, and I will call you later.' I went down to the drug store and called the ambulance;" that the next day McGowan told him that Eckford was dead, whereupon appellant gave himself up to the authorities.

Mrs. Arzilia Nelson, a witness for the prosecution, gave an entirely different version of the affray, to the following effect: She testified that she was in the kitchen of her home between the hours of 8 and 9:30 in the evening of May 4, 1940, when she heard loud talking outside; that she looked out of her kitchen window and observed two men close to the alley in the vacant space at the rear of Leon's garage; that they were both talking and moving, one with his hands raised was moving backward toward the alley, and the other man was moving toward him at the same time saying, "Give me the money." When they reached the third window of the Shaw house directly across the alley from the witness' house, "They were both talking and one man kept saying, 'Give me my money,' and the other man says, 'I haven't got your money, I have not got your money, I have not got it, I ain't got your money,' and the other man said, 'You give me my money,' and then I heard the man with his back to the window at that time, he says, 'I ain't got your money,' and then he says, 'Oh, I am stabbed in my heart, somebody stop him,' and at that time this other man said, 'I will kill you about my money,' and then he says * * * the man with his hands up, 'I ain't got your money, I ain't got your money, I ain't got your money.' He said that three times, after he said he was stabbed." In reply to the question, "Did you see the man who was facing the man with his hands up, did you see any motion on his part?" the witness Nelson stated: "I saw one motion just before the man said that he was stabbed. I saw one motion. I didn't see it, which one made it, but there was one motion in the shadows. You see they were in the dark of the house.

"Q. What was that motion? A. It seemed like it was a strike. * * *

"Mr. Wildey: For the purpose of the record, bringing the arm slightly forward and downward.

"Q. Was that with the right or left hand? A. It seemed like it was the right.

"Q. With the right hand? A. Yes."

The witness then testified that she ran from the kitchen window to a window in her living room where she observed one man had backed up against the house with his hands still in the air and the other man "was placing his hands both inside and under the coat" of the first man. The two men then walked back into the vacant lot near some cars that were parked there, and "one of the men turned and went behind the cars, and then the other man stood peeking from those cars behind him. After the man stood in the alley, and he went down in the dark part, and then a car came up, and—— * * * the other man that was standing there, he went down in the dark and then I could not see him." This witness also testified that one of these two men walked down the alley and got in a car; that he later returned and went to the third window of the Shaw house and said, "I have cut a man, and I will let you know where I am."

Officer Broady testified that he arrived at the scene of the homicide at about 9:40 p. m., that he found deceased lying in a pool of blood near a car in the vacant lot; that there was a trail of blood from where deceased lay to a point in the alley under one of the windows of Mrs. Shaw's house; that there was another stream of blood from there back down the alley to the parked cars and then it turned and went just inside the door of the welding shop; that when he examined the deceased, he saw that his right front pocket was turned out about three-fourths of the way.

Appellant contends that the fatal blow was struck in the welding shed and that decedent was the aggressor. Respondent urges that the fatal blow was struck by appellant in the vacant lot where deceased was later found, and that appellant was the aggressor.

[1-4] The "fact that an unlawful killing by the defendant may have been established, and in that connection that assumed 'circumstances of mitigation' have been placed in evidence either by the prosecution or by the defendant, as far as the jury is concerned, they are not necessarily conclusive either as to the proof of the several items of evidence by which such 'circumstances of mitigation' have been sought to be established, or as to the effect of such items taken either separately or as a whole. The jury [or the court sitting without a jury] has the right, and it is its duty, to weigh such evidence and thereupon to determine what credit, if any, it deserves, and thereupon to accord to it the weight to

which it is entitled. And in so doing, should the jury conclude that the 'circumstances of mitigation' either have not been satisfactorily established by credible evidence, or that even if isolated respective facts should have been satisfactorily established, their combined weight have failed to prove an ultimate fact which amounts to legal mitigation of the offense—as a matter of additional prerogative, the jury has the right to reject the whole of such evidence and thereupon and thereafter to revert to the respective remaining questions, if any, which may relate to the two degrees of murder, together with the incidental question of recommendation of punishment, should first degree murder be the verdict. In other words, an issue either as to whether 'circumstances of mitigation' have been proved to have existed at the time when the offense was committed, or whether in the language of section 189, Penal Code, the killing was the 'wilful, deliberate, and premeditated' act of the defendant, depends for its determination primarily upon the evidence that may have been presented in its favor, as well as that which may have been received against it; and in reaching a conclusion with reference to the matter, in the consideration of all the evidence, the jury should be guided by rules that relate to other 'defenses' generally. * * * 'It is left to the jury to say whether the evidence is sufficient to lead them to believe, or to entertain a reasonable doubt whether the offense was committed under heat of passion. * * * The sufficiency of provocation to reduce a homicide from murder to manslaughter, and whether defendant did in fact act under such provocation, are questions of fact for the jury.' * * * 'Sound policy declares that the issue of guilt or innocence is for the jury's determination, and that appellate courts should interfere with judgments of conviction only in exceptional cases.'" People v. Wells, 10 Cal.2d 610, 620 et seq., 76 P.2d 493, 500.

[5] Appellant admitted the killing, consequently, considering the state of the record and the evidence which is hereinbefore narrated, the issue of mitigation or self-defense, as well as the degree of the crime became questions of fact for the determination of the trial court.

[6] The evidence adduced at the trial of the instant cause was absolutely sufficient to justify a verdict of second degree murder, but it was hardly sufficient to support a verdict of murder of the first degree, when reviewed in the light of all the surrounding circumstances shown by the record, and taking into consideration the decisions of the Supreme Court in the cases of People v. Howard, 211 Cal. 322, 295 P. 333, 71 A.L.R. 1385, and People v. Kelley, 208 Cal. 387, 281 P. 609.

The judgment of the lower court of murder of the first degree is modified. The cause is remanded to the trial court with directions to enter a judgment against appellant finding him guilty of murder of the second degree, and to thereupon pronounce judgment against him as prescribed by law.

We concur: DORAN, J.; WHITE, J.

42 Cal.App.2d 33

PEOPLE v. DEAL.

Cr. 3396.

District Court of Appeal, Second District, Division Two. California.

Dec. 16, 1940.

Rehearing Denied Dec. 26, 1940.

Hearing Denied Jan. 15, 1941.

1. Criminal law 🔑453

Lack of aptness in the use of verbiage and obtuseness of expression in assigning reasons for identifying a person do not defeat the honest opinion of a witness in respect to identification.

2. Criminal law 🔑737(1)

Whether witness must give detailed description of person after observation under unusual circumstances, or whether witness' belief as to identity of such person is sufficient, is for jury.

3. Criminal law 🔑1160

The jury's finding of defendant's guilt, when approved by trial judge, meets requirements of law, even though identifying marks or features described by witness identifying defendant are meager in number.

4. Criminal law 🔑1160

The appellate court will not disturb jury's finding of guilt and trial court's approval thereof, unless appellate court can say as a matter of law that there was no evidence to support the conviction.

5. Robbery ⚷=24(3)

Evidence warranted conviction for second degree robbery on ground that victim sufficiently identified defendant as the robber.

6. Criminal law ⚷=829(18)

In robbery prosecution, refusal to instruct that it must appear from the evidence beyond a reasonable doubt that the defendant and not someone else committed the offense charged was not error, where trial court read to jury the statute relating to presumption of innocence and reasonable doubt. Pen.Code, § 1096, 1096a.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Billie E. Deal was convicted for second degree robbery, and he appeals.

Affirmed.

Hearing denied; HOUSER and CARTER, JJ., dissenting.

Frederic H. Vercoe, Public Defender, and William B. Neeley, Deputy Public Defender, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Defendant appeals from a judgment of conviction of the crime of robbery in the second degree with a prior conviction of petty theft. The grounds of appeal are: (1) the insufficiency of the evidence, and (2) error in instructing the jury with respect to the law of reasonable doubt.

On April 29, 1940, about 10:30 o'clock p. m., one Tony Guisto entered the cafe at 511 South Main street, in Los Angeles, seated himself at the counter, and while consuming his food and drink, defendant approached and occupied the chair next to him. The two engaged in conversation in the course of which Guisto purchased a bottle of beer for defendant. They sat and visited together for twenty minutes. Defendant suggested that he would get his own wife for Guisto and another girl for himself. The "wife" at once joined them and about 11 p. m. the trio sauntered forth, walked "three or four doors and finally picked up another girl" who carried a bouquet. The girl with the flowers professed to know of a place to drink and joined defendant in leading the party south to Sixth street, thence east toward Los Angeles street. When they reached a point opposite the Greyhound station, Guisto smelled the flowers and immediately "saw stars". He reposed in slumberland about twenty minutes. On regaining consciousness at 11:20 o'clock, lying on the sidewalk, he discovered that his money, in the sum of $35, his pen and pencil had been removed from his pockets and that "the inside of his jaw was cut through to his teeth". He promptly reported the crime to the police to whom he stated that his assailant had a bandage on his right hand. A week later Guisto found defendant in the same cafe, his hand was bandaged in the same manner as on the night on November 29th but it was his left hand. Guisto promptly caused the arrest of defendant who admitted to the officer he was at the cafe on the evening of the 29th of April but denied he had robbed or even seen Guisto at that place.

[1-5] The foregoing is the substance of Guisto's testimony. It contains no inherent improbabilities or glaring inconsistencies. Guisto was neither eager nor unfriendly. In fact, he had been brought to court pursuant to a bench warrant after he had ignored a subpoena. The jury must have believed that Guisto's convivial communion with defendant and their plans for a party with the two women enabled Guisto to recognize his assailant. Surely the time they spent together, each looking into the face of the other, afforded the victim ample opportunity to gain an impression of the features, frame and figure of his newly-found companion that would last a week. Lack of aptness in the use of verbiage and obtuseness of expression in assigning reasons for identifying a person do not defeat the honest opinion of a witness. Following the assault, he reported that his assailant's right hand was bandaged whereas a week later when arrested his left hand was bandaged. This variance in the observation of Guisto might have been properly by the jury ascribed to the influence of the blow he had suffered just before he made his statement to the police. It is true that Guisto had never seen appellant prior to his first meeting him in the cafe and also he testified that the only way he remembered that appellant was the man was the bandage he had on his hand. But he observed that defendant had the same build and the same height as the man with whom he drank and visited in the cafe on April 29th. The identification of defendant might have been satis-

factorily made by Guisto without his specifying any distinguishing mark on defendant's person. Whether a witness should be required to give a detailed description of a person after an observation under unusual circumstances or whether his belief as to the identity of such person is sufficient, is a matter to be determined by the jury. Even though the identifying marks or features described are meager in number, the finding by the jury, when approved by the trial judge, meets the requirements of the law. "On appeal this court may not disturb such finding and the action of the trial court unless we can say, as a matter of law, that there was no evidence to support the conviction." People v. Farrington, 213 Cal. 459, 2 P.2d 814, 815.

In one reported case, the appellant when first seen in the midst of a holdup held a handkerchief to his face. The witness was sure that appellant was the man he saw, basing his belief upon "one good look" at him when the bandit let the handkerchief drop. The witness could neither describe the handkerchief nor its color nor that of the bandit's overcoat or hat. Another bank employee identified the appellant as a participant in the crime although he had but one scrutiny of appellant's face below the edge of his hat. This evidence was sufficient proof of identity. The court held that "the evidence identifying [the bandit] need not be positive". People v. Radovich, 122 Cal.App. 176, 9 P.2d 542, 543; see People v. Griggs, 114 Cal.App. 133, 299 P. 555; People v. Madsen, 93 Cal.App. 711, 270 P. 237. In People v. Waller, 14 Cal.2d 693, 696, 96 P.2d 344, it was held that a conviction will be sustained although the witness goes no further than to testify that he believes the accused is the one who committed the crime. "Whether his identification was sufficiently convincing was a question of fact for the jury." Commonwealth v. Reid, 123 Pa.Super. 459, 187 A. 263, 266. "Identification may be made through the perception of any of the senses and it is not essential that the witness should himself be free from doubt as to the correctness of his opinion. * * * A witness may testify that it is his belief, opinion or judgment that the accused is the person who committed the crime." Wharton's Criminal Evidence, Vol. 2, 1626, 1776.

A scrutiny of the authorities cited by appellant (Commonwealth v. Reid, supra; People v. O'Hara, 332 Ill. 436, 163 N.E. 804; Mathis v. State, 121 Fla. 232, 163 So. 479), People v. Lamson, 1 Cal.2d 648, 36 P.2d 361, discloses that either the factual basis or involved legal problems alien to the question of identity renders them inapplicable to the facts of this case.

[6] Appellant assigns as error the refusal of the court to give to the jury the following requested instruction: "Before you can convict the defendant in this case, it must appear from the evidence, beyond a reasonable doubt, that the defendant and not someone else committed the offense charged. It is not sufficient that the evidence shows that someone committed the crime, if it does so show, or that the probabilities are that the defendant and not someone else committed the crime. Unless those probabilities are so strong as to remove all reasonable doubt as to the guilt of the defendant your verdict must be not guilty." This claim is readily disposed of by the language of 1096 of the Penal Code which was read to the jury. The following section provides that no further instruction on that subject need be given.

For the reasons given, the judgment and the order denying a new trial are affirmed.

We concur: WOOD, J.; McCOMB, J.

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41 Cal.App.2d Supp. 965

PEOPLE v. THOMPSON.

No. 101304.

Appellate Department, Superior Court,
San Diego County, California.
Nov. 22, 1940.

1. Criminal law ⚷641(1)

A defendant who was asked by the court whether he had counsel or desired to obtain counsel, but who stated that he did not desire counsel, "waived" the right to be represented by counsel, though the court did not tell defendant that counsel would be assigned to him if he were unable to employ an attorney, and did not ask the defendant regarding his ability or inability to employ one.

See Words and Phrases, Permanent Edition, for all other definitions of "Waived".

2. Criminal law 🔑639(6)
Jury 🔑29(6)

The statutory provisions requiring the district attorney to attend all prosecutions for public offenses, and providing for the appointment of an attorney if the district attorney fails to attend, are for the benefit of the people, and any error in relation thereto cannot be urged by a defendant, and hence a defendant in justice court, who was himself willing to waive a jury, could not be deemed to be prejudiced by the failure of a prosecuting attorney to be present or join in such waiver. Const. art. 1, § 7; Pen.Code, §§ 1130, 1435; Pol.Code, § 4153(1).

3. Jury 🔑29(1)

In a waiver of a jury, a defendant and his counsel, if he have one, must concur, but a defendant's right to waive counsel carries with it the implication that if he chooses to have no counsel, he alone may do for himself that which he and his counsel together might do, and he can waive trial by jury.

4. Automobiles 🔑355(4)

Evidence showing that defendant motorist was weaving from one traffic lane to another was insufficient to sustain conviction of motorist under "reckless driving" statute, where, though there was evidence to sustain a finding of negligence that may have been gross, there was nothing to show that motorist was guilty of deliberate, intentional, or wanton conduct with knowledge or appreciation of the fact that danger was likely to result. Vehicle Code, § 505(b), St.1935, p. 175.

◆

Appeal from Justice Court of El Cajon Township, San Diego County; William J. Collard, Justice of Peace.

William Hale Thompson was convicted of reckless driving, and he appeals.

Judgment reversed.

Burch & Ratelle, of San Diego, for appellant.

James B. Abbey, Dist. Atty., and Harold P. Curtis, Deputy Dist. Atty., both of San Diego, for appellee.

PER CURIAM.

The defendant was convicted of a violation of Section 505(b) of the Vehicle Code, St.1935, p. 175, after a trial by the court, and appeals from the judgment of conviction.

[1] The first specification of error is the failure of the court to adequately advise the defendant regarding his right to counsel and that if he was unable to employ counsel the court would assign counsel to defend him. The statement on appeal discloses that at the time of the arraignment the defendant was asked by the court whether or not he had counsel or desired to obtain counsel. Defendant was not told that counsel would be assigned to him if he was unable to employ an attorney, nor was defendant asked regarding his inability to employ one. Defendant stated that he did not desire counsel. In view of this statement of the defendant we know of no statutory or constitutional provision requiring the court to impose counsel upon him. The right to be represented by counsel was one for him to enjoy or waive, as he desired.

The second specification of error is the action of the court in proceeding to trial of the cause without a proper or effective waiver of a trial by jury, as required by Article 1, Section 7 of the Constitution of California, and Sections 1130 and 1435 of the Penal Code. In this connection the statement on appeal shows that the defendant was asked whether he pleaded guilty or not guilty. He then entered his plea of not guilty, whereupon he was asked by the court whether he desired a trial by jury or by the court. His right to a trial by jury was explained to him. He then stated that he was satisfied to be tried by the court and that he waived a jury trial. At no time during the proceedings was there present any public prosecutor or counsel for the people.

Section 7 of Article 1 of the California Constitution provides, inter alia, that "A trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court by defendant and his counsel * * *."

Political Code, Section 4153, in enumerating the duties of the District Attorney, provides, among other things: "The district attorney is the public prosecutor, and must: 1. Attend the courts, and conduct, on behalf of the people, all prosecutions for public offenses. * * *"

Penal Code, Section 1130, provides: "If the district attorney fails to attend at the trial, the court must appoint some attorney at law to perform the duties of the district attorney on such trial."

Penal Code, Section 1435, provides: "A trial by jury may be waived by the consent of both parties expressed in open court and entered in the docket. * * *"

This section is, by Penal Code Part 2, Title XI, made specifically applicable to proceedings in Justice's Courts.

[2] We are of the opinion that under the foregoing provisions of law, in misdemeanor cases at least, the provisions requiring the presence of the District Attorney are for the benefit of the people, and any error in relation thereto cannot be urged by the defendant. It does not seem to us that a defendant, himself willing to waive a jury, can be deemed to be prejudiced by the failure of a prosecuting attorney to be present or join in such waiver.

[3] We have already seen that counsel may be waived by a defendant. In a waiver of a jury he and his counsel, if he have one, must concur. It seems to us, however, that his right to waive counsel carries with it the implication that if he chooses to have none, he alone may do for himself that which he and his counsel together might do. There is nothing in People v. Garcia, 98 Cal.App. 702, 277 P. 747, or in People v. Spinato, 100 Cal.App. 600, 280 P. 691, cited by defendant, which militates against these views. The subject was before this court in People v. Slocum, Superior Court records of San Diego County, No. 95059, and we there reached the same conclusions that we have here expressed. What we have said respecting the second specification of error also disposes of the third, namely, the failure of any public prosecutor to be present during the proceedings.

[4] While, however, for the reasons stated, the contentions embraced in the defendant's first three specifications of error appear to us to be without substance, it is otherwise with the fourth specification, namely, that the evidence is insufficient to sustain the judgment. There is no dispute that passengers in the defendant's car were injured in the accident under investigation. We do not doubt that the defendant's conduct in weaving back and forth while on a grade, from one traffic lane to the other, taken together with the physical facts disclosed in the evidence, particularly the appearance and length of the skid marks on the road, and the place where his automobile came to rest, made out a prima facie case of negligence and possibly of gross negligence on his part. It was open to the defendant, of course, to show that what happened was attributable to mechanical defects in his automobile or other circumstances beyond his control. The explanation which he attempted was met by other testimony which produced a conflict. This conflict the trial court resolved against the defendant. We must, therefore, for the purpose of the present decision, assume that he was guilty of negligence, and may for the sake of the argument assume that it amounted to gross negligence. This, however, is not enough to warrant conviction of the violation of Section 505(b) of the Vehicle Code. It was held in the recent case of People v. McNutt, Cal.Super., 105 P.2d 657, that there is no substantial difference between "wilful misconduct", as used in Section 403 of the Vehicle Code, which renders a driver liable for injuries to his guest, and "reckless driving" as defined in Section 505 of said Code and that decisions construing the term "wilful misconduct" may be applied to the statutory provision prohibiting "reckless driving"; and that negligence, even though gross, is not "wilful misconduct" and falls short of constituting "reckless driving." Without elaborating upon the comprehensive discussion in the opinion in that case, we content ourselves with saying that we agree with the views there expressed.

In the instant case there is nothing to show that the defendant was guilty of "deliberate, intentional, or wanton conduct in doing or omitting to perform acts, with knowledge or appreciation of the fact, on the part of the culpable person, that danger" was "likely to result therefrom" which is the test of the existence or nonexistence of "wilful misconduct" as laid down in Parsons v. Fuller, 8 Cal. 2d 463, 468, 66 P.2d 430, 432. In these circumstances he was not shown to be guilty of "reckless driving."

Judgment reversed.

16 Cal.2d 807

In re KALT'S ESTATE.

KALT et al. v. YOUNGWORTH.

L. A. 16728.

Supreme Court of California.
Dec. 26, 1940.

Amended Dec. 30, 1940.

As Corrected Jan. 14, 1931.

1. Fraudulent conveyances 🔑24(1)

A renunciation by a legatee after the testator's death is in effect a "transfer" by him of title acquired, and hence renunciations admittedly made to defeat judgments were "fraudulent conveyances", since under statute title to property passing by will vests in legatee at date of testator's death subject to possession and control of personal representative during administration and probate. Civ.Code, §§ 3439–3440.5; Probate Code, § 300.

See Words and Phrases, Permanent Edition, for all other definitions of "Fraudulent Conveyances" and "Transfer".

2. Fraudulent conveyances 🔑26(1)

The assignment by a legatee of his legacy under a will during probate is a "fraudulent conveyance", ineffective as against the prior lien of a creditor. Civ.Code, §§ 3439–3440.5; Probate Code, § 300.

3. Wills 🔑717

When a testator dies, legatee obtains a power, in itself a limited right of ownership, to determine ultimate disposition of property regardless of acceptance on his part, and if he makes no renunciation, full title vests in him when he acquires possession and control, but if he chooses to renounce he determines by that action that the title will pass on to some other heir or legatee.

4. Wills 🔑717

A legatee's power to determine the ultimate disposition of property regardless of acceptance on his part is essentially analogous to a general power of appointment under a will within the rule that the donee of such a power cannot exercise it in favor of some third person other than a bona fide purchaser for value where the claim of his creditors would thereby be defeated. Civ.Code, §§ 3439–3440.5.

5. Wills 🔑717

Where bequests are detrimental, courts sanction their renunciation by legatees as a matter of policy, since no injury to creditors is involved.

6. Gifts 🔑47(2)

Under statute, a beneficial gift is presumed to be accepted by the donee even without his knowledge or consent. Civ.Code, § 1059, subd. 2.

7. Wills 🔑717

A legatee is free to renounce even a beneficial bequest so long as the rights of third parties are not involved, but if the claims of his creditors would thereby be defeated he may not exercise the same freedom.

8. Wills 🔑229

A creditor who is legally entitled to set aside a fraudulent conveyance may exercise the debtor's right to contest a will even though the debtor himself does not wish to do so.

9. Wills 🔑717

Where a legatee renounces his bequest in fraud of his creditors, the probate court should give the renunciation no effect in issuing the decree of distribution. Civ.Code, §§ 3439–3440.5.

In Bank.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Proceedings in the matter of the estate of Ella Kalt, deceased, wherein Stanley Kalt filed his final report as executor and petitioned for distribution of the residue of the estate to Earl D. Kalt, one residuary legatee. Leo V. Youngworth, judgment creditor of Stanley Kalt, the other residuary legatee, and Loretta Kalt, his wife, objected to the petition for final distribution and from a decree of distribution, Stanley Kalt, Loretta Kalt, and Earl D. Kalt appeal.

Affirmed.

For prior opinion see 102 P.2d 399.

Wolfson & Swetow, (Burnett Wolfson, Earl I. Swetow, and Herbert Schwab, all of Los Angeles, of counsel), for appellants.

Leo V. Youngworth, and J. Harold Decker, both of Los Angeles, for respondent.

TRAYNOR, Justice.

In 1932 Ella Kalt died leaving a will in which she bequeathed the residue of her estate to her two sons, Earl Kalt and Stanley Kalt, after making certain minor bequests to their wives and to her grandchildren. Stanley Kalt was appointed executor by the probate court pursuant to the terms of the will. Shortly thereafter two actions on promissory notes were commenced against Stanley Kalt, in his individual capacity, and his wife, Loretta, by Leo Youngworth, administrator of the estate of R. F. Goings. Writs of attachment were levied upon the interests of Stanley and Loretta Kalt in the personal property belonging to the estate of Ella Kalt. Youngworth secured judgments of $1,121.38 and $1,239.91 against the Kalts and had the abstracts of the judgments recorded. He secured the issuance of orders for the examination of the judgment debtors under supplementary proceedings; hearings were held but no satisfaction of the judgments was obtained.

Some four years elapsed. Then in 1936 Stanley Kalt in his individual capacity executed a written instrument entitled "Renunciation" as did his wife, Loretta Kalt. Both instruments were filed in the records of the probate proceedings. By these renunciations Stanley and Loretta Kalt renounced any interest which they had in the estate of Ella Kalt as heirs, legatees, or devisees. The findings establish that the Kalts filed the renunciations expressly to defeat the collection of the judgments; they freely admitted that they executed the renunciations "because they realized that any share or interest which they might have in the estate and which would be distributed to them would be taken by the attaching creditor, and as long as they were going to lose it, they preferred to have Earl Kalt receive the share or interest in the estate which they, or either of them, might otherwise have".

In 1937 Stanley Kalt filed his final report as executor of the estate of Ella Kalt and petitioned for distribution of the estate. The report and petition, referring to the renunciations, requested the court to distribute the residue of the estate to Earl Kalt, the remaining residuary legatee. The judgment creditor objected to the petition for such a final distribution. After a regular hearing the probate court issued a decree of distribution which gave no effect to the renunciations filed by Stanley and Loretta Kalt and provided that all personal property bequeathed to either or both of them under the terms of the will should be delivered to the officer making the levy under the writ of attachment secured by Youngworth. From this order Stanley, Loretta and Earl Kalt have appealed.

There is thus presented to this court a question of first instance in this state: whether a legatee under a will may defeat the claims of his creditors by renouncing his legacy. The courts in four states hold that the right of the donee or legatee to renounce is absolute even as against his creditors. Schoonover v. Osborne, 193 Iowa 474, 187 N.W. 20, 27 A.L.R. 465; Lehr v. Switzer, 213 Iowa 658, 239 N.W. 564; Bradford v. Calhoun, 120 Tenn. 53, 109 S.W. 502, 19 L.R.A.,N.S., 595; People v. Flanagin, 331 Ill. 203, 162 N.E. 848, 60 A.L.R. 305; Bradford v. Leake, 124 Tenn. 312, 137 S.W. 96, Ann.Cas.1912D, 1140; In re Meiburg, D.C., 1 F.Supp. 892 at 895; McGarry v. Mathis, 226 Iowa 37, 282 N.W. 786; Gottstein v. Hedges, 210 Iowa 272, 228 N.W. 93, 67 A.L.R. 1218; Carter v. Carter, 63 N.J.Eq. 726, 53 A. 160; see 27 A.L.R. 477; 18 Cal.L.Rev. 298; 37 Mich. L.Rev. 1168; 43 Yale L.Rev. 1030. They derive this rule from the theory that a man cannot be compelled to take property against his will, and the fiction that the renunciation "relates back" to the time the gift was made. (Ibid.) It is far from an absolute rule, however, for the courts have denied to the donee or legatee the right to renounce as against his creditors: (1) Where there has been a long delay before renouncing (Crumpler v. Barfield & Wilson Co., 114 Ga. 570, 40 S.E. 808; Strom v. Wood, 100 Kan. 556, 164 P. 1100; In re Howe's Estate, 112 N.J.Eq. 17, 163 A. 234; (2) Where there has been collusion between the debtor and those benefiting by the disclaimer (Schoonover v. Osborne, supra; Bradford v. Calhoun, supra); (3) Where the donee has caused his creditors to rely upon his apparent acceptance. Daniel v. Frost, 62 Ga. 697; Lehr v. Switzer, supra; Ex Parte Fuller, Fed.Cas.No.5,147, 2 Story 327; see Kearley v. Crawford, 112 Fla. 43, 151 So. 293.

Some courts have subscribed outright to the view that a legatee may not renounce his bequest to defeat his creditors. Estate of Buckius, 4 Pa.Dist.Rep. 775; Daniel v. Frost, 62 Ga. 697; Ex Parte Fuller, Fed. Cas.No.5,147, 2 Story 327.

Under the law of California at the time of the renunciations under consideration, every transfer of property made with intent to hinder, delay or defraud a creditor of the transferor was fraudulent and could be set aside or disregarded by such creditor (Civ. Code, § 3439) provided he had a specific lien on the property or had prosecuted his claim to judgment. Civ.Code, § 3441, now repealed; Moore v. Schneider, 196 Cal. 380, 238 P. 81; Thomas v. Lavery, 126 Cal.App. 787, 14 P.2d 160. Under the Uniform Fraudulent Conveyance Act now in force in this state no judgment or lien is necessary. Civ.Code, §§ 3439–3440.5, repealing Civ.Code, § 3441; Glenn, Fraudulent Conveyances, Revised Ed., § 76. The renunciations in this case were admittedly made to defeat the judgments obtained by respondent. They must therefore be regarded as fraudulent conveyances if they constituted transfers of property within the meaning of the act. See Civ.Code, § 3439.01. It thus becomes necessary to determine whether or not the legatees had an interest in the property which could be transferred.

[1, 2] In California, title to property passing by will vests in the legatee at the date of the death of the testator, subject to the possession and control of the personal representative during the administration and probate of the estate. Prob.Code, § 300; United States Fidelity, etc., Co. v. Mathews, 207 Cal. 556, 279 P. 655. Therefore, a renunciation by the legatee after the death of the testator is in effect a transfer by him of the title he has acquired. By renouncing the legacy he conveys away the property as effectively as if he had assigned his interest to the ultimate recipient. In this state the assignment by a legatee of his legacy under a will during probate is a fraudulent conveyance ineffective as against the prior lien of a creditor. McGee v. Allen, 7 Cal.2d 468, 60 P.2d 1026; Hopkins v. White, 20 Cal.App. 234, 128 P. 780.

[3, 4] Some jurisdictions hold that title to property does not pass by will to a legatee until he accepts. Page, Wills (2d) § 1233. Nevertheless, when a testator dies, the legatee obtains a power, in itself a limited right of ownership (see 51 Harv.L. Rev., 1141 at 1159), to determine the ultimate disposition of the property regardless of acceptance on his part. If he makes no renunciation, the full title will vest in him when he acquires possession and control. If he chooses to renounce, he determines by that action that the title will pass on to some other heir or legatee. This power is essentially analogous to a general power of appointment under a will. It is well established that the donee of a general power of appointment cannot exercise it in favor of some third person, other than a bona fide purchaser for value, when the claim of his creditors would thereby be defeated. A.L.I. Restatement of Property, Tentative Draft No. 7, § 452; Glenn, Fraudulent Conveyances, Revised Ed., § 158; see, also, cases collected and commented on in 22 Ill.L.Rev. 504. If he attempts to do so the creditors may treat the exercise of the power as a fraudulent conveyance, provided the necessary factor of insolvency or intent to defraud is present. (Ibid.) This rule is applied though the debtor is given no interest in the property other than this general power of appointment and though the original donor of the power contemplated that the debtor-donee would probably exercise it in favor of someone other than himself. Glenn, Fraudulent Conveyances, Revised Ed., § 158. The debtor is in effect forced to exercise the power in favor of himself if he exercises it at all, and to accept the property even against his will. The principle that the exercise of a general power of appointment by a debtor may be a fraudulent conveyance as to his creditors clearly supports the rule we adopt in the present case that a renunciation of a bequest by a legatee may likewise be a fraudulent conveyance.

A renunciation cannot serve to defeat the claims of creditors unless it is related back to the date of the testator's death. The fiction of "relation back" is occasionally employed to protect the rights of third parties. It cannot be invoked to destroy rights it was designed to protect without gross distortion. In the present situation its application would deprive the creditor of the renouncing legatees of the only means of satisfying his judgments, merely to yield a windfall to the ultimate recipient of the property.

[5] When bequests are detrimental courts sanction their renunciation by legatees as a matter of policy since no injury to creditors is involved. Healy v. Stevens, 347 Ill. 202, 179 N.E. 535; Elwood Trust Co. v. Fritz, 192 Ind. 58, 135 N.E. 145; Derry Bank v. Webster, 44 N.H. 264; People v. Flanagin, supra; In re Stone's Estate, 132 Iowa 136, 109 N.W. 455, 10 Ann. Cas. 1033; In re Wolfe's Estate, 89 App. Div. 349, 85 N.Y.S. 949. In such cases they need hold only that the legatee can avoid the unwelcome burdens by making the renunciation. They need not advance the needless elaboration that the renunciation

obviates an acceptance which would effectuate the bequest. The renunciation is itself adequate to relieve the legatee of burdensome property and there is no necessity to hold that he never acquired the property because he never accepted it. The doctrine that acceptance is necessary to effectuate a gift has given ready expression to the policy of enabling legatees to avoid detrimental bequests. Its convenience in this regard, however, does not make of it an absolute test for determining when property vests.

[6] "There is no intrinsic difficulty in regarding a conveyance as effective to vest property in the grantee even before the latter has consented to receive it." Tiffany, Real Property, 3rd Ed., § 1055, p. 253; Brown, Personal Property, § 50; 1 Bogert, Trusts and Trustees, § 150, p. 447. This principle is recognized by the majority of the courts, including those in California, when they hold that a beneficial gift is presumed to be accepted by the donee even without his knowledge or consent. See Cal. Civ.Code, § 1059 (2); Neely v. Buster, 50 Cal.App. 695, 195 P. 736; De Levillain v. Evans, 39 Cal. 120; Lehr v. Switzer, supra; Bradford v. Calhoun, supra. A beneficial conveyance to a person incapable of accepting, such as an infant or one who is non compos mentis, is "conclusively presumed" to be accepted in California (Turner v. Turner, 173 Cal. 782, 161 P. 980) and in other jurisdictions. Staggers v. White, 121 Ark. 328, 181 S.W. 139; Egan v. Egan, 301 Ill. 124, 133 N.E. 663; Vaughan v. Godman, 94 Ind. 191; Campbell v. Kuhn, 45 Mich. 513, 8 N.W. 523, 40 Am.Rep. 479; Fenton v. Fenton, 261 Mo. 202, 168 S.W. 1152; Davis v. Garrett, 91 Tenn. 147, 18 S.W. 113. A conveyance in trust is usually held to vest the legal title in the trustee even without acceptance or knowledge on his part. Adams v. Adams, 21 Wall. 185, 186, 22 L. Ed. 504; Devol v. Dye, 123 Ind. 321, 24 N.E. 246, 7 L.R.A. 439; Minot v. Tilton, 64 N.H. 371, 10 A. 682; Gulick v. Gulick, 39 N.J.Eq. 401; Myrover v. French, 73 N. C. 609; Read v. Robinson, Pa., 6 Watts & S. 329; Talbot v. Talbot, 32 R.I. 72, 78 A. 535, Ann.Cas.1912C, 1221; Furman v. Fisher, Tenn., 4 Cold. 626, 94 Am.Dec. 210. A deed of trust vests the equitable interest in the beneficiary without any knowledge or acceptance on his part in California (Civ. Code, § 2251; Booth v. Oakland Bank of Savings, 122 Cal. 19, 54 P. 370; Cahlan v. Bank of Lassen County, 11 Cal.App. 533, 105 P. 765; Sherman v. Hibernia Savings and Loan Soc., 129 Cal.App.Supp. 795, 798, 20 P.2d 138) and elsewhere. Brooks v. Marbury, 11 Wheat. 78, 6 L.Ed. 423; Security Trust & Safe Deposit Co. v. Farrady, 9 Del.Ch. 306, 82 A. 24; Koch v. Streuter, 232 Ill. 594, 83 N.E. 1072; Milholland v. Whalen, 89 Md. 212, 43 A. 43, 44 L.R.A. 205; Boston v. Turner, 201 Mass. 190, 87 N.E. 634; City of Marquette v. Wilkinson, 119 Mich. 414, 78 N.W. 474, 43 L.R.A. 840; Martin v. Funk, 75 N.Y. 134, 31 Am.Rep. 446; Skipwith's Ex'rs v. Cunningham, 8 Leigh, Va., 272, 31 Am.Dec. 642; A.L.I. Restatement Trusts, § 36.

[7, 8] A legatee is free to renounce even a beneficial bequest, so long as the rights of third parties are not involved. If, however, the claims of his creditors would thereby be defeated he cannot exercise the same freedom. His own wishes then become subservient to his obligations. A creditor who is legally entitled to set aside a fraudulent conveyance may exercise the debtor's right to contest a will even though the debtor himself does not wish to do so. Brooks v. Paine's Ex'r, 123 Ky. 271, 90 S. W. 600; In re Langevin's Will, 45 Minn. 429, 47 N.W. 1133; Bloor v. Platt, 78 Ohio St. 46, 84 N.E. 604, 14 Ann.Cas. 332. If the creditor contested the will successfully it would be ironic to leave the debtor free to renounce the ensuing benefits. A debtor may be compelled not only to retain his property for the benefit of his creditors, but to dispose of it for the same purpose. There is a like obligation upon him of which he may acquit himself without hardship, to avail himself of a bequest. The denial to the debtor of the right to renounce as against his creditors in fact benefits his own economic interests as well as those of his creditors. 18 Cal.L.Rev. 298, 302.

[9] We therefore hold that where, as in this case, a legatee renounces his bequest in fraud of his creditors, the probate court should give the renunciation no effect in issuing the decree of distribution.

The order appealed from is affirmed.

We concur: GIBSON, C. J.; CURTIS, J.; CARTER, J.; EDMONDS, J.; SHENK, J.

HOUSER, J., does not participate in the foregoing decision.

16 Cal.2d 788

PACIFIC MUT. LIFE INS. CO. v. CLEVERDON et al.

CLEVERDON v. STREET.

L. A. 16322.

Supreme Court of California.

Dec. 23, 1940.

1. Husband and wife 🔑266

A husband may relinquish to wife the right to her earnings during marriage without any consideration other than their mutual consent, which may be shown by evidence of acts or conduct of the husband indicating that he did not regard the earnings as community property.

2. Interpleader 🔑29

In action to determine right to proceeds of life policy taken out by school teacher before her marriage, evidence did not authorize award of part of proceeds to insured's husband rather than to named beneficiary on theory that premiums paid after marriage were paid out of community property, in view of evidence that premiums were paid from separate property comprising insured's earnings after marriage.

3. Husband and wife 🔑249

If premiums on wife's life policy taken out before marriage were paid out of community property but with husband's knowledge and consent, husband was not subsequently entitled to share in proceeds of life policy to exclusion of named beneficiary. Civ.Code, § 172.

4. Appeal and error 🔑1176(3)

Where admitted facts in interpleader action showed that named beneficiary was entitled to all the proceeds of life policy, reversal of judgment allowing insured's husband to share in proceeds was accompanied with directions to enter judgment for beneficiary.

◆

Action from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by the Pacific Mutual Life Insurance Company against Susannah G. Cleverdon, W. A. Street, and others in interpleader to determine conflicting claims to proceeds of a "Life Income Bond". From a judgment apportioning the proceeds, defendant Susannah G. Cleverdon appeals.

Reversed, with directions to enter judgment for the entire proceeds in favor of defendant Susannah G. Cleverdon.

For prior opinion, see 101 P.2d 558.

Robert L. Faucett, Winterer & Ritchie, and E. Winterer, all of Los Angeles, for appellant.

Wayne R. Millington, of San Francisco, and Leo V. Youngworth, J. Harold Decker, and James P. Brice, all of Los Angeles, for respondent.

PER CURIAM.

The appeal in this case was originally heard by the District Court of Appeal, First Appellate District, Division Two. 101 P.2d 558. Following a decision by that court, a petition for hearing by this court was granted. Consideration of the several points of law that have been presented by the respective parties to the litigation has resulted in a conclusion that the case was correctly decided by the District Court of Appeal. Its opinion rendered therein, which was prepared by Mr. Justice Spence of that court, is therefore adopted by this court as its own. It is as follows:

"This action in interpleader was brought to determine the conflicting claims of defendant Susannah G. Cleverdon and W. A. Street to the proceeds of a 'Life Income Bond' issued by plaintiff. In its judgment, the trial court apportioned the proceeds between said defendants. Defendant Susannah G. Cleverdon appeals from said judgment. Defendant Susannah G. Cleverdon will be hereinafter referred to as appellant and defendant W. A. Street will be hereinafter referred to as respondent.

"Said 'Life Income Bond' was issued in 1926 to Helen Frances Cleverdon, as insured, with appellant named as the beneficiary therein. At that time, the insured was unmarried but in 1930 she married respondent. The insured died in 1936.

"The insured was a school teacher and she continued in her employment after her marriage and up to the time of her death. Respondent was a dentist. Prior to and after the marriage, the insured maintained a separate bank account in her own name and all of her earnings were deposited in that account. All of the premiums paid to plaintiff were paid by the insured out of that account. Respondent also maintained a separate bank account into which most of his earnings were deposited. Respondent testified that he did not deposit all of his earnings in his bank account, stating, 'Well, not always, money that I would take in in cash, I would take home and use as expenditures at home' and 'Sometimes I deposited some of the money that I earned in her account, sometimes.' He further testified, however, that at various times he borrowed money from his wife which he repaid or intended to repay. However, the exact amount of the borrowings and of the repayments does not appear in the record. He testified that he had not repaid all that he had borrowed and it is entirely probable that the deposits in his wife's account were made on account of such repayments. In any event respondent testified that the premiums on the insurance policy in question were paid by his wife out of her earnings.

"Throughout the testimony, respondent referred to the wife's bank account as 'her account' and to the money therein as 'her money'. While he testified that there was no express agreement concerning said money, the only conclusion which can reasonably be drawn from the testimony is that he relinquished all control over said money and treated it as the separate property of his wife. Other witnesses testified to various statements made by respondent to the effect that 'her salary was her own'. While respondent testified, 'No, I never made any statement to that effect, that I gave her anything that was hers,' his testimony in itself implies that respondent deemed said earnings to be the separate property of his wife.

"Appellant alleged in her answer that the claim of respondent was without any right whatsoever; that respondent had not any right, title or interest in the proceeds of the policy; that the policy was the separate property of the insured; that all premiums were paid out of the separate property of the insured; and that appellant, as the named beneficiary, was entitled to all of the proceeds thereof. Respondent merely alleged that all premiums paid subsequent to the marriage were paid out of community funds and he sought judgment for a proportionate share of the proceeds of the policy. The trial court found that all premiums paid subsequent to the marriage were paid out of community funds and it entered judgment awarding to respondent a proportionate share of the proceeds of the policy.

"Appellant contends that the trial court erred in awarding any portion of the proceeds of the policy to respondent. We are of the opinion that this contention must be sustained.

[1, 2] "In support of said contention appellant first claims that the evidence was insufficient to support the finding that the premiums, paid after marriage, were paid out of community property. This claim appears to be well founded. The settled rule is stated in 3 California Jurisprudence Supplement, at page 643, section 129, as follows: 'While the rule is otherwise in some of the community property states, in California the husband may relinquish to the wife the right to her earnings during marriage without any consideration other than their mutual consent, and her earnings thereupon become her separate estate. Such relinquishment and mutual consent may be shown by evidence of the acts or conduct of the husband, indicating that he did not regard the earnings as community property.' (See Wren v. Wren, 100 Cal. 276, 34 P. 775, 38 Am.St.Rep. 287; Kaltschmidt v. Weber, 145 Cal. 596, 79 P. 272; Diefendorff v. Hopkins, 95 Cal. 343, 28 P. 265, 30 P. 549; Gray v. Perlis, 76 Cal.App. 511, 245 P. 221; Smith v. Smith, 47 Cal. App. 650, 191 P. 60; Larson v. Larson, 15 Cal.App. 531, 115 P. 340.) When respondent's testimony is reviewed in the light of these authorities, we see no escape from the conclusion that the earnings of the insured, out of which the premiums were paid, were her separate property as all of the acts and conduct of respondent clearly indicated that he did not regard his wife's earnings as community property and that he had relinquished to his wife the right thereto.

[3] "But appellant makes the further claim that even if the premiums, paid after marriage, were paid out of community property, said premiums were paid with the knowledge and consent of respondent and he was therefore not entitled to share in the proceeds of the policy. We believe that this claim is equally well founded. It is conceded by respondent that the premiums on this policy were paid by his wife with his knowledge and consent. We believe this fact precludes respondent from successfully asserting a claim to any of the proceeds of the policy as against the beneficiary named therein.

"The parties have discussed at some length the authorities in this state dealing with the general subject of the right of a surviving wife as against a named beneficiary to a portion of the proceeds of an insurance policy issued upon the life of the husband where the premiums have been paid by the husband with community funds. The reason underlying the rules established by said authorities is summed up in Travelers' Insurance Co. v. Fancher, 219 Cal. 351, at page 353, 26 P.2d 482, as follows: 'As shown by a number of later cases, among them being Union Mutual Life Ins. Co. v. Broderick, 196 Cal. 497, 238 P. 1034, and Blethen v. Pacific Mutual Life Ins. Co., 198 Cal. 91, 243 P. 431, the doctrine of the New York Life Ins. Co. case, supra, is based on the following legal propositions: First, where premiums of an insurance policy issued on the life of the husband after coverture are paid entirely from community funds, the policy becomes a community asset; second, the designation of a beneficiary in a policy of life insurance initiates in favor of the beneficiary an inchoate gift of the proceeds of the policy, which, if not revoked by the insured prior to his death, vests in the beneficiary at the time of his death; third, the husband may not make a gift of the entire community property without the written consent of the wife; but if he attempt so to do, in contravention of the wife's rights (as in the case of life insurance policy, by naming a third party as beneficiary) the entire gift is not a nullity; it is subject only to the wife's right to have it revoked as to the half to which she would be entitled upon his death; and as to the remaining half, the gift is valid and immune from attack by the surviving wife or by those who under the law of succession would inherit the husband's share in case he made no disposition thereof up to the time of his death. (Spreckels v. Spreckels, 172 Cal. 775, 158 P. 537, and Dargie v. Patterson, 176 Cal. 714, 169 P. 360.)'

"We find none of the above-mentioned authorities in point. It will be noted that each of said cases involved a policy which was issued upon the life of the husband and the premiums for which were paid by the husband out of community funds. The reason for the rules established in such cases is that the husband, who had the right to manage and control the community funds subject to certain limitations (Civ. Code, sec. 172), had acted in contravention of the wife's rights. But the reason for the rule ceases in cases, such as the present one, where the acts of the wife were done with the knowledge and consent of the husband and nothing was done in contravention of any of his rights. We therefore conclude that respondent may not now complain and that he is not entitled to share in the proceeds of the policy.

[4] "In view of the conclusions which we have reached, we deem it unnecessary to discuss certain additional claims made by appellant. We further believe that the admitted facts make this an appropriate case in which to reverse the judgment with directions."

The judgment is reversed with directions to the trial court to enter its judgment awarding the entire proceeds of the policy to defendant Susannah G. Cleverdon.

Mr. Justice HOUSER, does not participate in the foregoing decision.

16 Cal.2d 755

WOODARD v. STATE BAR OF CALIFORNIA.

L. A. 17546.

Supreme Court of California.

Dec. 20, 1940.

1. Attorney and client 🔑52

A procedure which cites an attorney to show cause why he should not be disciplined upon specifically alleged charges, but which ultimately and without any amendment to conform to proof results in a recommendation that he be disciplined on additional charges, is not approved. St.1939, pp. 355, 357, §§ 6068(b, d), 6103, 6105, 6106.

2. Attorney and client 🔑48, 52, 54

The right to practice law is a valuable right which should be suspended or revoked only on charges alleged and proved and as to which full notice and opportunity to defend has been accorded.

3. Attorney and client 🔑58

Evidence that attorney who had filed complaint for damages based on alleged conspiracy by which client claimed to have lost a position, while defendants' demurrer was pending before trial court, filed a self-signed "judgment" purporting to direct clerk to enter judgment against codefendant for amount demanded in complaint, and that attorney, after being served with notice that demurrer was sustained, filed a "notice of entry of default" requesting clerk to enter default of all defendants in their individual capacity, justified suspension from practice for three months. St.1939, pp. 355, 357, §§ 6068(b, d), 6103, 6105, 6106; Code Civ.Proc. § 710.

CARTER and HOUSER, JJ., dissenting.

Proceeding by E. H. Woodard against the State Bar of California to review a recommendation of the Board of Bar Governors that petitioner be suspended from the practice of law for one year.

Petitioner suspended from practice for a period of three months.

Gerard Remington, of Los Angeles, for appellant.

Claude Minard, of San Francisco, for respondent.

PER CURIAM.

Petitioner was cited to appear before a local administrative committee of The State Bar and to show cause why he should not be disciplined for professional misconduct growing out of the alleged violation of his oath and duties as an attorney and the commission of acts involving moral turpitude within the meaning of subdivisions 2 and 5 of section 287 of the Code of Civil Procedure, now sections 6103 and 6106 of the State Bar Act. St.1939, p. 357. At the conclusion of its hearings, at which both oral and documentary evidence was introduced, the committee found that petitioner had violated not only the cited sections of the act, but in addition had violated subdivision 4 of section 287, supra (now section 6105 of the State Bar Act), and subdivisions 2 and 4 of section 282 of the Code of Civil Procedure (now subdivisions b and d of section 6068 of the State Bar Act). The local committee accordingly recommended that petitioner be suspended from the practice of the law for a period of three months and receive a public reprimand. Following its examination of the record, the board of governors adopted the findings of the local committee, but has recommended that petitioner be suspended for a period of one year. By this proceeding the petitioner seeks to have the record reviewed and the recommendation of punishment annulled on the ground that it is excessive and not supported by the evidence. It is suggested that "at the most a private reprimand would be sufficient".

[1] Preliminary to any discussion of the merits, we desire to state that we do not approve of a procedure, such as was here followed, which cites an attorney to show cause why he should not be disciplined upon certain specifically alleged charges but which ultimately, and without any amendment to conform to proof, results in a recommendation that he be disciplined on additional charges. When the evidence upon the hearing brings to light other infractions, rule 19 of the "Rules of Procedure of the State Bar of California" suggests the appropriate procedure to be followed. It is there provided that "The committee, at any time prior to the conclusion of the hearing, or the board, at any time prior to the making of its decision, may allow or require amendments to the notice to show cause or may allow amendments to the answer. The notice to show cause may be amended to conform to proof, or to set forth additional facts, whether occurring before or after the commencement of the hearing. In case such an amendment is made, the respondent shall be given reasonable time to answer the amendment, to procure evidence, and to defend against the misconduct charged thereby." In Irving v. State Bar, 213 Cal. 81, 85, 1 P.2d 2, 3, it is stated that: "Although the committee's examiner, at the conclusion of the hearings, secured leave to amend to conform to proof, no amendments in fact were made, *and the findings must rest on the charges filed.*"

[2] The foregoing is advanced merely in the interest of a more orderly procedure. The right to practice law is a valuable one which should be suspended or revoked only on charges alleged and proved and as to which full notice and opportunity to defend have been accorded. However, what we have said in this connection is not determinative of the present cause, for we are satisfied from our examination of the record that petitioner's conduct was such as to warrant some discipline under the charges actually alleged.

It appears that petitioner filed a complaint for damages in the sum of $500,000 based on an alleged conspiracy by which his client assertedly lost her position as a member of the staff of the Los Angeles City Library. Named as defendants in the complaint were all of the members of the board of library commissioners, certain members of the library staff and five John Does. On the day the complaint was filed, petitioner with his son appeared at the office of John Beardsley, the deputy city attorney who had represented the board throughout the hearings which had led to the dismissal of petitioner's client. Petitioner's son on this occasion, and at the former's request, handed the deputy city attorney a copy of the complaint and summons. A few days later, Beardsley, believing the circumstance a little unusual, telephoned to petitioner and inquired if he had intended serving him as a John Doe defendant, to which he received an affirmative reply. Thereafter and within the statutory time, a demurrer was filed by the city attorney's office on behalf of all defendants including "John Beardsley, Deputy City Attorney, sued herein as John Doe". Four days later petitioner had executed and filed an affidavit of service which purported to describe service upon members of the board and upon Beardsley both as attorney for the board and as an individual. However, he was therein shown to have been served in each instance as "John Doe IV". On the same day petitioner filed a document purportedly amending the complaint so as to state Beardsley's true name. Likewise, on this same day the petitioner filed a document entitled "Judgment", signed by him, in which it is recited that the defendants had appeared in their official capacities but not in their individual capacities "and their failure so to do is, in law, a confession of the whole thereof, and no other proof is required by law * * *. Now Therefore it is decreed and ordered by law * * * that the clerk must immediately * * * enter judgment for the amount demanded in the complaint against * * * John Beardsley alias John Doe IV, for Five Hundred Thousand ($500,000) Dollars with costs and interests * * *."

On the following day, the trial court heard and sustained the demurrer filed by the defendants with leave to the plaintiff to amend. Petitioner, as plaintiff's attorney, was immediately served with notice thereof. Notwithstanding such notice, petitioner filed on the next day a "Notice of Entry of Default", requesting the clerk to enter the default of all the defendants in their "individual capacity" on the ground that they were so served and had failed to answer. Pursuant to this request the clerk entered the default of Beardsley in his individual capacity. Approximately one week later petitioner wrote a letter to the county clerk enclosing a writ of execution and demanding its immediate execution and filing. Within a few days petitioner also mailed to the clerk a "First Amendment to Judgment", also signed by the petitioner, which contained some recitations not included in the first "Judgment", and again purported to "decree and order" judgment against defendants in the sum of $500,000.

Later petitioner's client was defaulted because of her failure to amend the complaint within the time specified in the order sustaining the demurrer thereto. Thereafter notices of motion were filed to set aside Beardsley's default and to dismiss the action. On behalf of his client petitioner filed opposition to both motions. Prior to any action thereon by the trial court, petitioner served a certified copy of the above-mentioned "First Amendment to Judgment" upon the county auditor, together with the affidavit required by section 710 of the Code of Civil Procedure, in an effort to have whatever money was then due from the county to Beardsley, who in the meantime had been elevated to the superior court bench, paid into court in partial satisfaction of the "judgment". Inasmuch as the documents signed and filed by petitioner as "Judgments" had never been entered as such, Beardsley's salary, upon advice of the city attorney, was not withheld by the county treasurer. Ultimately the trial court granted the defendants' motions and thereupon set aside Beardsley's default and dismissed the action. Petitioner noticed an appeal therefrom on behalf of his client.

Petitioner's conduct in the foregoing particulars led to the present disciplinary proceeding against him. At the hearings he explained that his practice of the law had been more or less confined to criminal cases and that he usually consulted with others when involved in civil litigation. In the prosecution of the civil conspiracy action he stated that he consulted with and followed the advice of one who had been associated for many years with a well-known legal research bureau but who was not an attorney. He further testified that he had encountered difficulty with the preparation of the papers in this conspiracy action and as a result had followed the entire procedure upon his consultant's advice after he had satisfied himself from citations furnished that the "course had a legal foundation to it". He admitted, however, that he considered the procedure to be "a distinct departure". It further appears that petitioner, who is now fifty-six years of age, was admitted here in 1924 on motion from North Carolina where he had been admitted in 1916. He testified that "If I am not very much mistaken I think it is true" that in North Carolina, where he had formerly practiced, attorneys were permitted to sign judgments when they were filed. He conceded, however, that he had not previously adopted such a course here and that "Maybe I listened to the wrong advice", but "There was never any intent to be dishonest or resort to trickery."

[3] Petitioner's explanation of his conduct is not convincing. In his testimony he admitted that he considered the procedure pursued by him to be "a distinct departure" and he frankly conceded that in his several years of practice in this state he had not theretofore followed such a course. He has not cited us to the authorities which he testified satisfied him that such "course had a legal foundation to it". Nor is his equivocal testimony as to the practice in North Carolina persuasive. Regardless of the restricted nature of his prior practice, we are of the opinion that even the most inexperienced practitioner, possessing a minimum knowledge of the law, should be cognizant, several years after his admission in this state, of the impropriety involved in the filing and attempted execution of self-signed "judgments", particularly when demurrers of the adversaries theretofore had been sustained and motions to vacate and set aside their purported individual defaults were then under consideration by the court. We can find no substantial excuse for the petitioner's improper conduct which, in our opinion requires disciplinary action. However, under all of the circumstances, we are of the view that a three months' suspension, as recommended in part by the local committee, is adequate.

It is therefore ordered that petitioner be suspended from the practice of the law for a period of three months commencing thirty days after the filing of this decision.

CARTER, Justice (dissenting).

I dissent.

I cannot agree with the conclusion reached in the majority opinion for the reason that if the petitioner committed the acts related therein wilfully and designedly, he should be disbarred or severely disciplined, as such acts clearly constitute a fraud upon the court, and a member of the bar who would knowingly and designedly resort to such practices should be more severely disciplined than being suspended from the practice of law for the period of three months or even for one year. On the other hand, if petitioner committed such acts because of ignorance or incompetence, and without any intention or design to perpetrate a fraud on the court or the parties affected by his conduct, there is no provision of law under which he can be disciplined, as the State Bar Act does not authorize the infliction of discipline upon a member of the bar for ignorance or incompetence.

From my examination of the record in this case, I am forced to the conclusion that petitioner does not possess the legal learning and ability requisite to enable him to successfully continue in the practice of law in this state, but since there is no provision of law under which his license to practice can be revoked for incompetency or inefficiency, there is nothing this court can do to restrict his activity as a member of the bar of this state so long as he complies with the provisions of the State Bar Act and the rules of professional conduct promulgated by the board of governors of The State Bar of California and approved by this court.

I concur: HOUSER, J.

16 Cal.2d 744

DEPARTMENT OF WATER AND POWER OF CITY OF LOS ANGELES et al. v. INYO CHEMICAL CO. et al.

YOUNG v. INYO CHEMICAL CO. et al. (STATE, Intervener).

L. A. 17016.

Supreme Court of California.

Dec. 20, 1940.

Rehearing Denied Jan. 17, 1941.

1. Appeal and error 🔑917(1)

On appeal from a judgment sustaining a demurrer to a complaint in intervention, facts stated in complaint must be taken as true.

2. Judgment 🔑548

The judgments of reviewing courts are as conclusive as those of any other court and the law as decided upon appeal must be applied in subsequent stages of the cause and the judgments are "res judicata" in other cases as to every matter adjudicated.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

3. Garnishment 🔑40

Under statute providing special form of garnishment for benefit of person who holds judgment against defendant "to whom money is owing and unpaid", the fact of liquidation of an uncertain claim and not the manner of liquidation is the decisive factor in determining whether money is "owing and unpaid" so as to be subject to garnishment. Code Civ.Proc. § 710.

See Words and Phrases, Permanent Edition, for all other definitions of "Owing and Unpaid".

4. Garnishment 🔑33, 39, 40

Money is "owing and unpaid" within meaning of statute providing special form of garnishment for benefit of person who holds judgment against defendant "to whom money is owing and unpaid" where there is an existing and unsatisfied legal liability regardless of whether the liability arises in tort or in contract or whether the liability is fixed and established by final judgment or by some other means. Code Civ.Proc. § 710.

5. Garnishment 🔑44

Where city appealed from judgment against it in tort action brought by corporation and Supreme Court approved trial court's findings on all issues and items of damage except that amount awarded for an item of damage was reduced and method was prescribed for computation of another item and judgment was reversed for sole purpose of determining sum to be awarded and for entry of proper judgment on such determination, garnishment levy against city by state which was corporation's judgment creditor made after Supreme Court's ruling and before trial court entered another judgment was effective, since Supreme Court's determination was a "judgment" which was effective to "liquidate" liability of the city at least to the amount fixed and established that there was money "owing and unpaid" within the statute providing special form of garnishment in such case. Code Civ.Proc. § 710.

See Words and Phrases, Permanent Edition, for all other definitions of "Judgment" and "Liquidate".

6. Garnishment 🔑40

Under statute providing special form of garnishment for benefit of person who holds judgment against defendant to whom money is owing and unpaid, the existence or nature of any means of coercing payment is immaterial in determining whether there is an "existing liability" which is subject to garnishment, and if the obligation has become fixed in any other manner than by a final judgment, the money is "owing and unpaid" notwithstanding that a judgment has not yet been obtained as a means of enforcing the liquidated liability. Code Civ.Proc. § 710.

See Words and Phrases, Permanent Edition, for all other definitions of "Existing Liability".

7. Municipal corporations 🔑67(1, 5)

The city of Los Angeles is a charter city and not subject to general state laws as to its purely "municipal affairs", such as the hiring of employees generally by the city to perform labor and services in connection with municipal affairs and the payment of salaries to such employees. Const. art. 11, §§ 6, 8.

See Words and Phrases, Permanent Edition, for all other definitions of "Municipal Affairs".

8. Municipal corporations 🔑69

The liability of the city of Los Angeles for its torts is not a "municipal affair" so as to exempt city from operation of general laws. Const. art. 11, §§ 6, 8.

9. Municipal corporations 🔑72

A state statute which affects a municipal affair only incidentally in the accomplishment of a proper objective of state-wide concern applies to autonomous charter cities notwithstanding that the statute may affect the fiscal policy and management of the city. Const. art. 11, §§ 6, 8.

10. Municipal corporations 🔑72

The state as judgment creditor of a corporation to which money was owing and unpaid by city of Los Angeles was authorized to make a garnishment levy against the city under statute providing special form of garnishment for benefit of person who holds judgment against defendant to whom money is owing and unpaid, since statute relates to a matter of state-wide concern as distinguished from a purely "municipal affair", notwithstanding that it incidentally affects the fiscal policy and management of the charter city. Code Civ.Proc. § 710; Const. art. 11, §§ 6, 8.

11. Municipal corporations ⚷79

Where state as judgment creditor of a corporation to which money was owing and unpaid by charter city made levy against city under statute providing special form of garnishment for benefit of person who holds judgment against defendant to whom money is owing and unpaid, city by virtue of the levy did not owe the money directly to the state which was not required to file claim in accordance with charter provisions, but the levy was merely a demand for the payment in court of moneys owing by the city to the judgment debtor of party making the demand who presumably complied with charter requirements for filing claims in liquidating claim. Code Civ.Proc. § 710.

12. Municipal corporations ⚷742(6)

Where corporation obtained a judgment in tort action against city, it was presumed that the corporation complied with provisions of city charter in perfecting its demand against city, since such compliance was necessary to state a cause of action.

13. Municipal corporations ⚷79

The provisions of the charter of the city of Los Angeles for filing of claims do not apply to persons making levies against city under statute providing special form of garnishment for benefit of person who holds judgment against defendant to whom money is owing and unpaid. Code Civ.Proc. § 710.

* * *

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Interpleader action by the Department of Water and Power of the City of Los Angeles and another against the Inyo Chemical Company and others, wherein E. R. Young filed a cross-complaint and wherein the State of California intervened. From an adverse judgment, the State of California appeals.

Reversed, with directions.

Prior opinion, 100 P.2d 822.

Rehearing denied; GIBSON, C. J., and SHENK and EDMONDS, JJ., dissenting.

Earl Warren, Atty. Gen. (Burdette J. Daniels, Deputy Atty. Gen., and John O. Palstine, of Long Beach, on the brief), for appellant.

E. L. Searle, of Los Angeles, for respondent.

Catlin & Catlin, William E. Woodroof, O'Melveny, Tuller & Myers, and Jackson W. Chance, all of Los Angeles, amici curiae for respondent.

PER CURIAM.

[1] This cause is before us upon appeal by the State of California from a judgment entered after the demurrer of the defendant and respondent to the complaint in intervention of said state had been sustained without leave to amend. Therefore, for the purpose of this appeal the facts must be taken to be as declared in said complaint in intervention, wherein the following declarations form the basis of the alleged cause of action of the state herein.

For several years prior to and during the month of November, 1926, the defendant, Inyo Chemical Company, a corporation, operated a manufacturing plant near the southerly end of Owens Lake, in Inyo County, California, in which it produced calcined trona and a refined soda ash from lands leased from the State of California. The City of Los Angeles and Department of Water and Power of the city of Los Angeles, maintained and operated the so-called Los Angeles aqueduct along a course which passed a short distance westerly of said plant. On or about November 27, 1926, a break occurred in said aqueduct near said plant, and the waters from said aqueduct washed through and over a portion of said premises so leased by said Inyo Chemical Company, and damaged and destroyed large quantities of dry trona and of the trona deposit, and caused damage to certain roads, pipe lines and power lines of said company, and also subjected said company to additional costs of operation during the time certain repairs were made.

On or about November 25, 1927, said Inyo Chemical Company filed an action in the Superior Court of Fresno County against said City of Los Angeles and against the Board of Water and Power Commissioners of the City of Los Angeles, and said Department of Water and Power of the City of Los Angeles to recover for said damages sustained by reason of said break in said aqueduct, upon the ground that said defendants in said action were negligent in the maintenance, care and operation of said aqueduct.

Thereafter said action was tried, and on or about March 9, 1931, the court found that the defendants were negligent in the construction of said aqueduct and in the maintenance, care and operation thereof, and that by reason of the negligence and carelessness of the defendants, and their failure to exercise due or proper care in the construction, maintenance and operation of said aqueduct, plaintiff was damaged in the sum of $236,251.96, which the court found was directly and proximately caused by the negligence and carelessness of the defendants. Said court thereupon made its conclusions of law that the plaintiff was entitled to judgment against defendants in said amount, and judgment was entered accordingly.

Thereafter an appeal was taken from said judgment by the defendants, and the District Court of Appeal of the Fourth Appellate District rendered its decision affirming the determination of the trial court that the damages sustained by the Inyo Chemical Company were caused by the negligence of defendants, but reversing the judgment of the trial court and remanding the cause for a new trial solely upon the issue of the amount of damages, with instructions to the trial court to render judgment in favor of the Inyo Chemical Company for the amount of damages so found upon a determination of that issue.

Subsequently a hearing was granted by this court, which on February 29, 1936, rendered its decision approving the findings and conclusions of the trial court on the issue of negligence and consequent liability of the defendants. However, with respect to the amount of damages, this court affirmed the determination of the trial court as to the item of $53,551.96 for damages to structures and for increased operating expenses pending repairs, except that, in line with the concession of plaintiff and respondent therein, said item was reduced by the sum of $8,702.94, which had been duplicated in arriving at said figure of $53,551.96. So the trial court was ordered to enter judgment accordingly for $44,849.02. As to the remaining item—damage to the 90,000 tons of mineral deposit—this court affirmed the finding of the trial court as to the fact of its destruction. Yet because this court did not approve of the computation of loss of profit running over a period of 36 years, it reversed the judgment of the trial court for the sole purpose of determining the "present value" of the sum found by the trial court as the profit which would have been realized from the sale of the destroyed trona, and directed said trial court to enter judgment upon such determination. Said decision became final on March 29, 1936.

Meanwhile, on or about April 21, 1932, the intervener herein, State of California, had secured a judgment in the Superior Court of Inyo County against the Inyo Chemical Company in the amount of $17,722.15, plus $7 costs. Pursuant to the terms of section 710 of the Code of Civil Procedure, on or about March 31, 1936, said State of California paid to the controller of the City of Los Angeles the sum of one dollar, and filed therewith with said controller an abstract of the aforesaid judgment in its favor and against said Inyo Chemical Company, together with an affidavit stating that the whole of said judgment, together with interest thereon, was owing and unpaid.

Then on October 8, 1937, pursuant to the stipulation of the parties in the action for damages to the leasehold interest of said Inyo Chemical Company, judgment was entered in the Superior Court of Fresno County in favor of said plaintiff company and against the City of Los Angeles and the Department of Water and Power of the City of Los Angeles in the sum of $90,000, without costs to either party.

Immediately thereafter on the same day, said Department of Water and Power and said city filed a complaint in interpleader in the Superior Court of Los Angeles County, by which application was made to the court for its determination of the rights of the respective claimants to said moneys owing to said Inyo Chemical Company. The State of California filed its complaint in intervention in said proceeding, setting forth the foregoing facts and further alleging that said city and said Department of Water and Power had not paid any of the moneys owing to said Inyo Chemical Company, and praying that the court determine that the state, by its levy, had obtained a first and paramount lien thereon and right thereto, and that the court order the controller of said city to pay same to the state to the extent of the aforesaid levy by the state under section 710 of the Code of Civil Procedure. One of the other claimants to said moneys, named also as a defendant in said complaint in intervention, demurred to said complaint, and his demurrer was sustained without leave to amend. This appeal is from the judgment accordingly entered in favor of said defendant and against the State of California.

There are two issues presented for our consideration: First, the question when, for the purpose of a levy under section 710 of the Code of Civil Procedure, may it be said that there are moneys "owing and unpaid" by the municipality; and second, the question whether said section 710 is applicable to cities operating under a freeholders' charter in so far as the moneys sought to be levied upon as "owing and unpaid" are owing on account of the exercise by said city of one of its municipal affairs.

Appellant contends that there was "money due and owing" to the Inyo Chemical Company within the meaning of section 710 of the Code of Civil Procedure, which provides a special form of garnishment for the benefit of any person who holds a judgment against a defendant "to whom money is owing and unpaid" by the public bodies therein enumerated. The pertinent part of that section relevant to that question reads as follows: "Whenever a judgment for the payment of money is rendered by any court of this State against a defendant to whom money is owing and unpaid by * * * any * * * city or municipality * * *, the judgment creditor may file a duly authenticated abstract or transcript of such judgment together with an affidavit stating the exact amount then due, owing and unpaid thereon and that he desires to avail himself of the provisions of this section * * *."

Appellant concedes that unless there was a definite sum owing and unpaid by the municipality to the judgment debtor, there can be nothing upon which levy can be made. Respondent contends that the directions contained in the opinion of this court rendered on the appeal in the case of Inyo Chemical Company v. City of Los Angeles, 5 Cal.2d 525, 55 P.2d 850, 859, require that a final judgment be entered by the trial court for a complete determination and liquidation of the amount of money due and owing from the City of Los Angeles to the Inyo Chemical Company. The conclusion of said opinion reads as follows:

"The findings and conclusions of the court below on all issues, including all items of damage found, are approved in all respects except as follows: (1) The amount shall be reduced in the sum of $8,702.94, in accordance with the concession of plaintiff; and (2) the damage to plaintiff's leasehold shall be computed by determining the present value of the sum found by the court below as the profit which would have been realized from the sale of the destroyed trona, in accordance with the views hereinbefore expressed.

"The judgment is reversed for the sole purpose of determining this sum, and the trial court is directed to enter judgment for the plaintiff upon such determination, each party to pay its own costs on appeal."

[2] It is respondent's argument that because such judgment had not been entered and had not yet become final when the levy under section 710 of the Code of Civil Procedure was made by the State of California, there was no sum of money due and owing from the City of Los Angeles, and such levy was ineffectual for any purpose. But this contention is without merit and is not supported by the facts. By the decision of this court in said case of Inyo Chemical Company v. City of Los Angeles, both the existence of liability and the amount thereof to the extent of $44,849.02 were fixed and determined beyond the possibility of further dispute. In 2 Freeman on Judgments, 5th Ed., p. 1345, § 639, it is said: "The judgments of appellate courts are as conclusive as those of any other court. They not only establish the facts, but also settle the law, so that the law as decided upon any appeal must be applied in the subsequent stages of the cause, and they are res adjudicata in other cases as to every matter adjudicated."

The cases of Pacific Gas & Electric Co. v. Nakano, 12 Cal.2d 711, 87 P.2d 700, 121 A.L.R. 417, and Arp v. Blake, 63 Cal.App. 362, 218 P. 773, are strongly relied upon by respondent and amici curiae to support their contention that a final judgment is necessary to liquidate a tort liability. But in both these cases the court was considering the nature of a tort judgment "pending" an appeal therefrom, and consequently it was held therein that claims for damages in tort are not subject to garnishment while the very existence of any liability remains open to dispute and no amount of liability has been liquidated. Both these cases stand merely for the proposition that as a prerequisite for garnishment, the tort claim should be reduced to a fixed sum.

[3] It is the fact of liquidation of the uncertain claim, and not the manner of liquidation, which is the decisive factor in determining whether the liability is sub-

ject to garnishment. The case of Brainard v. Rogers, 74 Cal.App. 247, 239 P. 1095, is particularly pertinent here. In that case the question of whether or not the proceeds of a fire insurance policy were subject to garnishment at the instance of the creditor of the insured subsequent to a fire loss but prior to an adjustment of that loss between the insurer and the insured was decided in the affirmative. The court declared the rule to be that where liability already exists and the policy furnishes the required standard by which the amount of the liability can be ascertained and fixed, then such liability is a debt "owing" to the insured within the meaning of the attachment sections of the Code of Civil Procedure (i. e., secs. 542–545). The fact that that case arose under a contract rather than in tort does not affect its applicability in so far as the question of when a liability is liquidated is concerned.

[4] Let us here consider the significance of the wording of section 710 of the Code of Civil Procedure providing a special form of levy of execution for the benefit of any person who holds a judgment against a defendant "to whom money is owing and unpaid". Certainly there is nothing in the clear and unequivocal language of this garnishment provision to indicate its application should be limited to contractual obligations, or that it applies to tort liability of the city only if such liability has been fixed by final judgment. Rather it seems to us that the correct interpretation of said section 710 is that money is "owing and unpaid" within the meaning thereof if there is an existing and unsatisfied legal liability, without regard to whether such liability arises in tort or in contract, and without regard to whether such liability is fixed and established by final judgment or by some other means.

[5] By the decision of this court in Inyo Chemical Company v. City of Los Angeles both the existence of liability of the City of Los Angeles as tort-feasor and the amount of that liability to the extent of at least $44,849.02 were fixed beyond further dispute. Furthermore, this court stated the specific rules to be followed in awarding the additional amount of damages as directed in its said opinion. This determination has become final and is the law of this case, and certainly it cannot be denied that its effect is to "liquidate" the liability of said tort-feasor, at least to the amount so fixed. In light of this reasoning, it seems to us that to say that there was no money "owing and unpaid" within the meaning of the terms of section 710 of the Code of Civil Procedure, is a mere play upon words. While it is held in the case of Cowdery v. London & San Francisco Bank, 139 Cal. 298, 73 P. 196, 96 Am.St.Rep. 115, cited by respondent and amici curiæ, that when a judgment is reversed on appeal, said judgment is no longer of any validity, this general statement should be qualified when considered in connection with the unusually definite wording contained in the above-quoted portion of the opinion of this court, which in effect is a "reversal" with directions to enter the particular judgment therein outlined, rather than a reversal with orders for a new trial.

It is at this point that we disagree with the major premise of respondent and amici curiæ that a tort claim cannot be liquidated except by reduction to final judgment, and that since at the time of the levy involved here, the judgment had been "reversed", so that there was no final judgment, there was no money "owing and unpaid" from the City of Los Angeles to the Inyo Chemical Company within the meaning of the terms of said section 710.

[6] At the time the levy was made by the State of California, said Inyo Chemical Company had a liquidated claim against the City of Los Angeles in an amount far in excess of the amount for which the levy was made by the State of California, in so far as such "liquidation" might be required by the provisions of said section 710 of the Code of Civil Procedure. Here again the case of Brainard v. Rogers, supra, is important in that it demonstrates clearly that the existence or nature of any means of coercing payment is immaterial in connection with the quesion of whether there is an existing liability which is subject to garnishment. If the obligation has become fixed and certain in any other manner than by way of a final judgment, the money is, nevertheless, "owing and unpaid", irrespective of the fact that a judgment has not yet been obtained as a means of enforcing the liquidated liability. The only added effect of such final judgment by the trial court would be to make available to the Inyo Chemical Company certain statutory means of coercing payment of the liability as liquidated.

In light of the foregoing discussion, it appears to us that at the time of the levy of the State of California, there was money "owing and unpaid" by the City of Los Angeles to the Inyo Chemical Company, the judgment debtor of the state, within the meaning of section 710 of the Code of Civil Procedure.

This brings us to a consideration of the other issue involved on this appeal, i. e., the applicability of said section 710 of the Code of Civil Procedure to charter cities.

The City of Los Angeles has taken advantage of the privilege of legislative autonomy extended by the provisions of sections 6 and 8 of article XI of the California Constitution. However, appellant takes the position that the provisions of section 710 of the Code of Civil Procedure apply to the City of Los Angeles despite the fact that it has so taken advantage of said sections of the Constitution and exempted itself from all state legislative control of its municipal affairs.

[7, 8] Of course, it is recognized that since the City of Los Angeles is a charter city, it is not subject to or controlled by any enactment of the state legislature as to its purely municipal affairs. So, for example, the hiring of employees generally by the city to perform labor and services in connection with its municipal affairs and the payment of salaries to such employees as compensation for said services are not subject to or controlled by general laws. Storke v. City of Santa Barbara, 76 Cal. App. 40, 244 P. 158. But the money which the state claims to have reached by its levy was and is "owed" on account of the city's liability for its negligent action, which is recognized to be a matter of general state concern. It is undisputed that the matter of the liability of and payment by a city for its tort is not a municipal affair. Douglass v. City of Los Angeles, 5 Cal.2d 123, 128, 53 P.2d 353.

[9] Though it is true that the payment of funds of a municipal corporation is a municipal affair because it affects its fiscal policy and management, this does not mean that a state statute concerning a matter of general state concern is not applicable to a charter city. The controlling feature here is the manner in which the state statute affects the municipal affair. If the state statute affects a municipal affair only incidentally in the accomplishment of a proper objective of statewide concern, then the state law applies even as to "autonomous" charter cities. City of Pasadena v. Charleville, 215 Cal. 384, 10 P.2d 745.

[10] Section 710 of the Code of Civil Procedure is a statute dealing with the subject of the enforcement of civil judgments by levy upon persons "owing money" to the judgment debtor, and as such it is a statute which clearly relates to a matter of statewide concern as distinguished from a purely municipal affair. Therefore, said section applies as against the City of Los Angeles and its Department of Water and Power notwithstanding the application of said section would incidentally affect the fiscal policy and management of said charter city. Certainly it would be an anomalous situation if a city could, by adopting a freeholders' charter, exclude itself from the operation of a general law of the state relative to the payment of obligations for damages caused by the negligence of the city, on the theory that such city is independent of general laws in municipal affairs.

[11-13] By virtue of the levy made under section 710 of the Code of Civil Procedure, it is not to be assumed that the city owes money directly to the state. Rather it is merely a demand as authorized by the statute, for the payment in court, of moneys owing by the city to the judgment debtor of the person making the demand. The person to whom the money is "owing and unpaid"—i. e., the Inyo Chemical Company—is the one who must have complied with the provisions of the city charter in perfecting its demand as against the city; and it must be presumed that said Inyo Chemical Company did so comply in order to have stated a cause of action in the first instance against the City of Los Angeles. But the provisions of the city charter relating to proof and presentment of claims manifestly would not apply to persons making levies as authorized by the state statute. Sec. 710, Code Civ. Proc.

In conclusion, then, it is our opinion that section 710 of the Code of Civil Procedure applies as against the City of Los Angeles, and that at the time the State of California made its levy against said city there was money "owing and unpaid" by said city to the Inyo Chemical Company, judgment debtor of the state, at least to the extent of $44,849.02, which was more than twice the amount of the state execution—approximately $22,000. Said section 710 by its authorization of a levy when there is "money * * * owing and unpaid", only requires a fixed liability in a fixed amount. The liability of the City of Los Angeles was liquidated at least to the aforesaid extent.

when the decision of this court determining that liability in said amount existed became final and so constituted the law of the case. The levy of the state was subsequent to this point of finality and hence reached the moneys determined to be "owing and unpaid" by the city to the judgment debtor of the state.

Judgment reversed, with directions to the trial court to overrule said demurrer and to permit the demurring defendant to answer, if he so elect.

* * *

16 Cal.2d 793

In re WATKINS' ESTATE.

WATKINS et al. v. KEELE.

L. A. 17331.

Supreme Court of California.

Dec. 24, 1940.

Rehearing Denied Jan. 23, 1941.

See 109 P.2d 1.

1. Husband and wife 🔑264

In proceeding to determine heirship, evidence showed as a matter of law that property in estate of deceased was "community property" of decedent and a previously deceased spouse, within meaning of statute providing for descent of community property upon death of survivor of owners in community. Probate Code, §§ 228, 1080.

See Words and Phrases, Permanent Edition, for all other definitions of "Community Property".

2. Husband and wife 🔑266

If husband and wife by execution of joint tenancy instruments and receipt of joint tenancy deeds intended to and did change status of their community property to that of "joint tenancy property", a declaration in subsequently executed joint and mutual will that all property disposed of was community property of husband and wife expressed their intention that all such property should have the status of "community property".

3. Husband and wife 🔑266

A husband and wife may agree with respect to character of property which they hold and may transmute their property from one status to another by agreement which ordinarily need not be executed with any particular formality.

4. Wills 🔑92

A single written instrument may constitute both a will and a contract.

5. Wills 🔑92

A declaration in husband and wife's joint and mutual will that all property therein disposed of was their "community property" fixed the character of the property as between the spouses and also for purpose of determining descent thereof under statute upon death of survivor, because, if such declaration be deemed only a "recital", then under express statutory provisions the truth thereof was "conclusively presumed" as between parties and their successors in interest by a subsequent title. Probate Code, § 228; Code Civ.Proc. § 1962, subd. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Recital".

6. Husband and wife 🔑264

Where uncontradicted evidence on material issues in proceeding to determine heirship showed as matter of law that property of estate was community property of decedent and previously deceased husband, and that, under statute providing for descent of community property, relatives of husband were entitled to share therein, a judgment awarding the property to sole heir of deceased was unauthorized. Probate Code, § 228.

7. Appeal and error 🔑1072

Where a judgment in proceeding to determine heirship was reversed and remanded with directions to enter judgment granting appellants the relief prayed for, trial court's error, if any, in denying appellants' motion for a jury trial in the proceeding was not prejudicial.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Proceeding in the matter of the estate of Jean Watkins, deceased, wherein William Elmer Watkins and others filed their petition to share in the distribution of the residuary estate of deceased, and Laurence Keele filed his petition claiming the whole of the residuary estate of deceased. From the judgment, William Elmer Watkins and others appeal.

Reversed with directions to the court to amend its findings and conclusions and to enter its judgment to conform to views expressed in the opinion.

For prior opinion, see 104 P.2d 389.

Simpson & Simpson, of Los Angeles, for appellants.

Faries & McDowell, of Los Angeles, amici curiae for appellant.

Stimson & Edwards, Noel Edwards, and Louis Thomsen, all of Los Angeles, for respondent.

Salisbury, Robinson & Himrod, Freston & Files, Bailie, Turner & Lake, Frank P. Doherty, Gerald E. Kerrin, Frank J. Barry, Girard F. Baker, Macfarlane, Schaefer, Haun & Mulford, John E. McCall, Howard C. Velpmen, and Schell & Delamer, all of Los Angeles, DeLancey C. Smith and George K. Ford, both of San Francisco (Charles A. Loring and Gordon L. Files, both of Los Angeles, of counsel), amici curiae for respondent.

SPENCE, Justice pro tem.

This is an appeal from a decree determining heirship in proceedings instituted under section 1080 of the Probate Code.

The rival claimants are the appellants, who are the relatives of Henry G. Watkins, deceased, and the respondent, who is a relative of Jean Watkins, deceased. Henry G. Watkins and Jean Watkins were husband and wife, having married in 1899. Henry G. Watkins died in 1926 and Jean Watkins died in 1936. During the marriage the parties had accumulated a substantial amount of real and personal property which was appraised in the probate of the husband's estate at a sum in excess of $300,000.

Shortly before the death of Henry G. Watkins, he and his wife executed a joint and mutual will, the instrument being entitled "Last Wills and Testaments of Harry G. and Jean Watkins". It was stated therein that "These are the last wills of Henry G. Watkins and Jean Watkins, husband and wife. * * *" It was further stated that: "We declare that the property here disposed of was accumulated and acquired during our marriage and is community property." Each of the spouses willed all to the other in the event of predeceasing the other, and then there were included extensive provisions for the disposition of all of their properties: "In the event that both of us shall die at the same time or from the same accident or from illness of both at at the same time or from any other causes or before this will shall have been probated. * * *"

In the proceedings had for the purpose of determining the inheritance tax during the probate of the husband's estate, the wife filed her affidavit stating "that all of the property of which the said Henry G. Watkins died possessed either in his own rights or as tenant in common with affiant, or as joint tenant with the right of survivorship with affiant was as to each and every item and parcel thereof the community property of this affiant and said Henry G. Watkins". Upon the hearing, the wife so testified and the court so found. In the present proceeding to determine heirship in the estate of the wife, appellants claimed that the property was the community property of the husband and wife and they therefore claimed the right to share in the distribution thereof under the provisions of section 228 of the Probate Code.

While said section 228 has been since amended, it read as follows at the time of the death of the wife in 1936: "If the decedent leaves no issue, and the estate or any portion thereof was community property of the decedent and a previously deceased spouse, such property goes in equal shares [to designated relatives of each]." The determinative question on this appeal is whether the property was the community property of Jean Watkins and Henry Watkins within the meaning of said section 228.

It was stipulated upon the trial that all of the real and personal property accumulated by the spouses was originally the "community property" of the spouses. Respondent claimed, however, that the execution of certain instruments changed the character of the property to property held in joint tenancy by the spouses and that thereafter it was not their "community property" within the meaning of said section 228. Said instruments consisted of (1) a safe deposit box rental agreement executed by the spouses; (2) a bank account signature card executed by the spouses; and (3) a conveyance of the real property of the spouses to third persons and the immediate reconveyance of said real property to the spouses by a deed conveying the property to them as joint tenants.

Appellants answered respondent's claims in several ways but the trial court found and concluded in this proceeding in the estate of the wife that "all of the property in the above entitled estate was prior to the death of Henry G. Watkins, the joint tenancy property of Henry G. Watkins and Jean Watkins, and came to Jean Watkins as the surviving joint tenant. * * * That upon the death of Jean Watkins, she left no property which was the community property of Henry G. Watkins and Jean Watkins. * * * That none of the property of the estate of Jean Watkins, at the time of her death, came to Jean Watkins from Henry G. Watkins by gift, devise, or bequest. * * * That all of the property of the estate of Jean Watkins at the time of her death was separate property, and that as such, under the laws of succession of the State of California, became vested in Laurence Keele, as the grandnephew and sole heir of decedent, Jean Watkins."

It is thus apparent that if the property in the estate of Jean Watkins was the "community property" of Henry G. Watkins and Jean Watkins within the meaning of said section 228, the court erred in its findings and conclusions above set forth as appellants, being the relatives of Henry G. Watkins, should have been held to be entitled to share in the distribution thereof.

[1, 2] We deem it unnecessary to discuss all of appellants' contentions on this appeal for we are of the opinion that under the uncontradicted evidence it must be held as a matter of law that the property in the estate of Jean Watkins was the "community property" of Henry Watkins and Jean Watkins within the meaning of said section 228. We have reached this conclusion without regard to the claim of appellants that the evidence showed that the spouses never intended at any time to change the status of any of their community property to joint tenancy property. Even if it be assumed that they did have such intention at the time of the execution of the so-called joint tenancy instruments above mentioned and that the execution of said instruments had the effect of carrying out such intention, it seems entirely clear that subsequently and at the time of the execution of the joint and mutual will, they jointly expressed their intention in writing that all of said property should have the status of community property.

[3-5] It is well settled that a husband and wife may agree with respect to the character of the property which they hold and that they may transmute their property from one status to another by an agreement which ordinarily need not be executed with any particular formality. Kenney v. Kenney, 220 Cal. 134, 30 P.2d 398; Estate of Kelpsch, 203 Cal. 613, 265 P. 214; Title Ins. & Trust Co. v. Ingersoll, 153 Cal. 1, 94 P. 94; Collins v. Sword, 4 Cal. App.2d 437, 41 P.2d 170; Estate of Sill, 121 Cal.App. 202, 9 P.2d 243; Estate of Wahlefield, 105 Cal.App. 770, 288 P. 870; Vieux v. Vieux, 80 Cal.App. 222, 251 P. 640; Martin v. Pritchard, 52 Cal.App. 720, 199 P. 846. A single written instrument may constitute both a will and a contract (Security-First Nat. Bank v. Stack, 32 Cal.App.2d 586, 90 P.2d 337; Norton v. Estate of Norton, 41 Cal.App. 614, 183 P. 214), and we believe that the declarations contained in the joint and mutual will must be held to have constituted an agreement between the spouses fixing the status of their property as community property. But even if the declaration found in the joint and mutual will be treated merely as a recital in the written instrument executed by the spouses, the same result must follow as there is a conclusive presumption of "The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; * * *." Code Civ.Proc. sec. 1962, subd. 2.

While the case of Security-First Nat. Bank v. Stack, supra [32 Cal.App.2d 586, 90 P.2d 338], did not involve a joint and mutual will, it did involve the will of a husband and the written consent by his wife. The will there stated: "I declare that all of the property in which at the date hereof I have any interest, or which at this date stands in my name or in the name of myself and my wife, is our community property * * *." The wife's written election and waiver was attached to and made a part of the will, and she thereby consented thereto. After the death of the husband, the wife claimed title, as the alleged surviving joint tenant, to certain securities found in a safe deposit held in their joint names and purchased with funds from their joint bank account. The court there held that the declaration in the will and the wife's consent thereto terminated the joint tenancies and fixed the character of the property as community property. The court said at page 592 of 32 Cal.App.2d, at page 340 of 90 P.2d, referring to said declaration in the will, "This statement acquiesced in and agreed to by the defendant, regardless of the manner of the prior ownership of property or in whose name or names it stood, constituted for the purposes of disposition under the will the community estate of the respective parties. * * * From the foregoing the conclusion is inevitable that as a matter of law no joint tenancies existed in the property of the parties upon the death of the husband." See, also, Flanagan v. Capital Nat. Bank, 213 Cal. 664, 3 P.2d 307; Estate of Whitney, 171 Cal. 750, 154 P. 855; Estate of Wyss, 112 Cal. App. 487, 297 P. 100.

In the present case, we conclude as a matter of law that the declaration of the spouses in their joint and mutual will likewise fixed the character of the properties as between the spouses for the purpose of the disposition under the husband's will and also as between their successors for the purpose of this proceeding.

Respondent cites and relies upon Estate of Fritz, 130 Cal.App. 725, 20 P.2d 361, and other similar cases but we find none of them in point. In Estate of Fritz, supra, it was properly held that a declaration in a will by a single testator that the money in a joint tenancy bank account "is all my own" could not serve to contradict the terms of a written agreement between the testator and another which admittedly created a joint tenancy.

[6, 7] As the evidence on the material issues was uncontradicted and as that evidence showed as a matter of law that appellants were entitled to share in the distribution of said estate under the provisions of said section 228, it follows that the judgment should be reversed with direction. It therefore becomes unnecessary to discuss appellants' further contention that the court committed prejudicial error in denying their motion for a jury trial in these proceedings. The error, if any, in such denial could not be held to be prejudicial under the circumstances.

The judgment is reversed with directions to the court below to amend its findings and conclusions and to enter its judgment to conform to the views herein expressed. Appellants will recover their costs on this appeal.

We concur: SHENK, J.; TRAYNOR, J.; CARTER, J; EDMONDS, J.

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16 Cal.2d 761

CARROLL v. CARROLL et al.

L. A. Nos. 16427, 16471.

Supreme Court of California.

Dec. 21, 1940.

Rehearing Denied Jan. 20, 1941.

1. Insane persons 🔑7, 26

Insanity proceedings under Political Code are summary proceedings for a particular purpose, and insanity or incapacity is not "judicially determined" within terms of statute by commitment in such proceedings so as to invalidate conveyance or contract by person committed. Pol.Code, § 2167b; Civ.Code, § 40.

See Words and Phrases, Permanent Edition, for all other definitions of "Judicially Determined".

2. Insane persons 🔑26

Insanity proceedings under Political Code did not establish incapacity of allegedly insane person under statute governing conveyance or contract by person of unsound mind before incapacity has been judicially determined, in absence of allegation or proof that such person was in fact of unsound mind at time of execution of instruments. Pol.Code, § 2167b; Civ.Code, § 39.

3. Insane persons 🔑29

In proceeding in probate court for restoration to competency, statute governing probate proceedings, authorizing mere signature and filing of orders and decrees, was applicable rather than statutes requiring entry of decree in judgment book before decree should become effectual, and hence conveyance executed by incompetent after filing of decree but before its entry was valid. Code Civ.Proc. §§ 22, 23, 30, 664, 668, 1704, 1766.

4. Insane persons 🔑29

A proceeding for restoration to competency is not a "civil action" but a "special proceeding", as respects applicability of statutes governing entry of orders and decrees. Code Civ.Proc. §§ 22, 23, 30, 664, 668, 1704, 1766.

See Words and Phrases, Permanent Edition, for all other definitions of "Civil Action" and "Special Proceeding".

5. Judgment 🔑270

There is no distinction between a "judgment" and a "decree" of a probate court, as respects necessity of entry in minute book or judgment book, but the words are used interchangeably in statutes governing probate proceedings. Code Civ.Proc. §§ 664, 668, 1704.

See Words and Phrases, Permanent Edition, for all other definitions of "Decree" and "Judgment".

6. Judgment ⇨270

In statute governing recitals in and entry and filing of "orders and decrees" of probate court, the quoted phrase was intended to cover all decisions of the probate court in probate proceedings whether technically referred to as orders, decrees or judgments. Code Civ.Proc. § 1704.

See Words and Phrases, Permanent Edition, for all other definitions of "Orders and Decrees"

7. Judgment ⇨270

Under statute providing that except as otherwise provided in title governing probate proceedings, statutes governing civil actions should be applicable to probate proceedings, the manner of entering or of the equivalent signing and filing of probate decrees was "otherwise provided" by specific statute, and hence was not subject to general statutes governing civil actions. Code Civ.Proc. §§ 664, 668, 1704, 1713.

See Words and Phrases, Permanent Edition, for all other definitions of "Otherwise Provided".

8. Contracts ⇨269

A wife who allegedly executed note and deed of trust because of husband's fraud, duress or undue influence could not rescind such instruments as against persons not participating in or knowing of husband's acts. Civ.Code, § 1689.

9. Appeal and error ⇨1138

Where reviewing court held that deed of trust attacked by plaintiff was valid, and hence that plaintiff had no right, title or interest in parcel sold upon foreclosure thereunder, plaintiff could not benefit by reversal of order appointing receiver, and such order would be affirmed.

HOUSER, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke and Emmet Wilson, Judges.

Action by Catherine M. Carroll against Raymond A. Carroll and others, to cancel note and trust deed and to recover money judgment against named defendant. From adverse portions of the judgment, and from an order appointing a receiver, plaintiff appeals.

Affirmed.

For prior opinion, see 103 P.2d 233.

Rehearing denied; HOUSER, J., dissenting.

C. C. Caswell and Charles E. McGinnis, both of Los Angeles, for appellant.

Arch. H. Vernon, George W. Adams, John Q. Adams, and Baldwin Robertson, all of Los Angeles, for respondent.

SPENCE, Justice pro tem.

This action was brought by plaintiff against her husband and several other defendants, the prayer of the complaint containing fourteen paragraphs asking various forms of relief. As to the husband, it sought among other things cancellation of a deed, a declaration of trust as to all property described in the complaint, an accounting, a decree quieting title and a money judgment. As to the other defendants, it sought an injunction restraining the foreclosure of a certain deed of trust and a decree cancelling said deed of trust. The trial of the action resulted in a judgment in favor of plaintiff and against her husband quieting her title to the several parcels of property described in the complaint and awarding her a money judgment in the sum of $432,297.05. No appeal was taken from those portions of the judgment. Said judgment also provided that plaintiff take nothing against the remaining defendants and that parcel one of the property was subject to the above-mentioned deed of trust which was given to secure a note in the principal sum of $20,000. The appeal numbered L. A. 16427 is taken by plaintiff from the last-mentioned portions of said judgment.

No restraining order or injunction was issued by the trial court, and, during the pendency of the action, said deed of trust was foreclosed and the property was sold for $23,000 to defendant the Prudential Insurance Company of America, the beneficiary named in said deed of trust. Thereafter a dispute arose concerning the right to the rentals from said property and the tenant, being uncertain as to who was entitled thereto, refused to pay said rentals to either plaintiff or the defendant purchaser. Upon motion of said defendant, the trial court appointed a receiver to collect said rentals and to hold the same subject to the further order of the court. The appeal numbered L. A. 16471 is taken by plaintiff from the order appointing the receiver.

It appears that the main controversy involved in the action was the controversy between plaintiff and her husband arising out of the actions of the husband in dealing with a large amount of real and personal property of plaintiff. The trial court found in favor of plaintiff on practically all of the issues involved in this main controversy and neither plaintiff nor her husband has appealed from the portions of the judgment relating solely to them. Suffice it to state with respect to said controversy that the trial court found that for many years prior to the filing of the action "the defendant Raymond A. Carroll, did and has followed towards the plaintiff a constant course of intimidation, menace, threats, physical restraint and duress for the purpose of defrauding the plaintiff of her property and coercing the plaintiff to part with her property for the benefit of the defendant Raymond A. Carroll and in furtherance of his interests" and that the husband had "by persuasion, threats and misrepresentations" induced plaintiff to sign various instruments.

The controversy which was incidental to the main controversy and which was the only controversy in which the remaining defendants were concerned involved solely the claim of plaintiff that a certain note and deed of trust were invalid. Said note and deed of trust, which covered only parcel one of the property described in the complaint were admittedly executed by plaintiff on August 23, 1929, and the proceeds thereof were admittedly paid to plaintiff's husband pursuant to plaintiff's written order. Plaintiff's claim of invalidity was based upon the alleged pendency of certain proceedings relating to her competency at the time of the execution of said instruments. In this connection, it should be stated that there was no allegation or proof that plaintiff was in fact incompetent at the time of the execution of said instruments, the claim being that said note and deed of trust were invalid as a matter of law by reason of the alleged pendency of the above-mentioned proceedings. We will therefore direct our attention to the facts concerning said proceedings.

On April 17, 1929, an affidavit was filed in the superior court alleging that plaintiff was insane. Upon the hearing it was found that plaintiff was "mentally sick and bordering on insanity, but not dangerously insane" and plaintiff was thereupon committed to the custody of the psychopathic probation officer under the provisions of section 2167b of the Political Code and was placed in Casa del Mar Sanitarium. On May 29, 1929, in an incompetency proceeding filed in the probate court under the provisions of the Code of Civil Procedure (sections 1763–1767), plaintiff was adjudged to be incompetent. On August 8, 1929, plaintiff was released from the sanitarium and was permitted to return to her home. On August 15, 1929, plaintiff signed and filed a petition in the incompetency proceedings in the probate court seeking a decree judicially restoring her to competency. Code Civ.Proc., § 1766. The hearing on said petition was had on August 22, 1929, and the court found and decreed "that said Catherine M. Carroll is now fully restored to mental competency and was restored to mental competency at the time her petition for restoration to competency was verified and filed herein". This decree was signed by the judge of the probate court and was filed on August 22, 1929. The note and deed of trust in question were signed by plaintiff on the following day. Thereafter and on September 5, 1929, the clerk entered in the judgment book said decree restoring plaintiff to competency. It does not appear that any further steps were taken in the proceeding brought under the sections of the Political Code until October 24, 1929, when the court dismissed said proceeding upon the recommendation of the psychopathic probation officer.

The foregoing facts with respect to said proceedings are undisputed and plaintiff contends that the trial court erred in admitting in evidence said note and deed of trust, executed on August 23, 1929, and in finding that said instruments were valid and in decreeing that parcel one of the property was subject to said deed of trust. In our opinion, this contention is without merit.

Plaintiff relies upon section 40 of the Civil Code which provides in part, "After his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract, nor delegate any power or waive any right, until his restoration to capacity." Plaintiff apparently takes the position that her incapacity was judicially determined in the so-called insanity proceeding brought under the provisions of the Political Code and also in the incompetency proceeding brought in the probate court under the provisions of the Code of Civil Procedure and that the note and deed of trust were executed prior to her "restoration to capacity".

[1, 2] We may first dispose of the so-called insanity proceeding. It appears well settled that such proceedings are summary proceedings instituted for a particular purpose and that "insanity or incapacity is not 'judicially determined' within the meaning of section 40 of the Civil Code" by a commitment in such proceedings instituted under the sections of the Political Code. Guardianship of Carniglia, 139 Cal.App. 629, 631, 34 P.2d 752; see, also, Hitch v. Superior Court, 2 Cal.App.2d 406, 38 P.2d 190; Fetterley v. Randall, 92 Cal.App. 411, 268 P. 434. In her reply brief, plaintiff suggests that the "psychopathic record placed the plaintiff, to say the least, under the provisions of section 39" of the Civil Code, which section relates to conveyances or contracts "of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined". It is a sufficient answer to this suggestion to point out again that plaintiff did not allege or prove that she was in fact of unsound mind at the time of the execution of the instruments in question. She merely alleged and proved the fact that said proceedings were had under the provisions of the Political Code and relied upon such allegations and proof to establish her incapacity as a matter of law. But the fact that said proceedings were had did not, under the authorities cited, have the effect of establishing her incapacity as a matter of law.

This brings up to a consideration of the so-called incompetency proceedings brought in the probate court under the provisions of the Code of Civil Procedure (sections 1763–1767). In Hellman Commercial T. & S. Bank v. Alden, 206 Cal. 592, at page 604, 275 P. 794, at page 799, the court said, "When, however, a court has regularly adjudged one to be incompetent, he thereby becomes incapable of making a valid contract, and it is deemed to be void, not because he is unable, unassisted, to properly care for his property, or lacked understanding of the nature and effect of the particular transaction, but because the decree of incompetency is notice to the world of his incapacity to make a valid contract. * * * No further evidence of mental incapacity is required under our statute while such a decree remains in full force and effect." See, also, O'Brien v. United Bank, etc., Co., 100 Cal.App. 325, 279 P. 1048. It is therefore clear that if the note and deed of trust had been executed by plaintiff while the decree of May 29, 1929, adjudging her to be an incompetent, was in force and effect, she could rely on said decree alone to establish her incapacity as a matter of law. But plaintiff executed said note and deed of trust on August 23, 1929, which was the day following the signing and filing of the decree of the probate court restoring her to competency.

Plaintiff takes the position that while this decree was so signed and filed on August 22, 1929, and prior to the time that she executed said note and deed of trust on August 23, 1929, she was still incompetent as a matter of law until September 5, 1929, when the clerk entered said decree in the "judgment book". She cites and relies upon section 668 of the Code of Civil Procedure which then provided: "The clerk must keep, with the records of the court, a book to be called the 'judgment-book,' in which judgments must be entered" and section 664 of the same code which then provided in part, "In no case is a judgment effectual for any purpose until so entered." In other words, plaintiff claims that said sections of the Code of Civil Procedure were applicable and that the decree signed and filed on August 22, 1929, was ineffectual for any purpose until entered in the "judgment book" on September 5, 1929, and therefore she was incompetent as a matter of law on August 23, 1929, when she executed the note and deed of trust.

[3, 4] We cannot agree with plaintiff that sections 664 and 668 of the Code of Civil Procedure were applicable and that entry in the "judgment book" of the decree of the probate court restoring plaintiff to competency was necessary before said decree became effectual. Said sections 664 and 668 are found in title VIII of part II of the Code of Civil Procedure which is entitled "Trial and Judgment in Civil Actions". A "civil action" is "* * * an ordinary proceeding in a court of justice by which one party prosecutes another * *". Code Civ.Proc., §§ 22 and 30. A proceeding for restoration to competency is not a "civil action" but is a "special proceeding". Code Civ.Proc., § 23. The proceeding to restore plaintiff to competency was brought under the then section 1766 of the Code of Civil Procedure which was then found in

part III of said code entitled "Special Proceedings Of A Civil Nature" and in title XI thereof entitled "Proceedings in Probate Courts". Under the last-mentioned title, was then found section 1704 of the Code of Civil Procedure. Said section 1704 provided in part "All orders and decrees of the court or the judge must be entered at length in the minute book of the court, or must be signed by the judge and filed; but decrees of distribution must always be so entered at length." We are of the view that the manner of entering or of signing and filing the decree restoring plaintiff to competency was governed by said section 1704 and not by sections 664 and 668 of the Code of Civil Procedure.

Plaintiff has cited numerous authorities but none holding that sections 664 and 668 of the Code of Civil Procedure are the sections governing the manner of entering a decree of a probate court. On the other hand, it was held in Re Estate of Blythe, 110 Cal. 226, 42 P. 641, that the manner of entering a decree in a proceeding to determine heirship was governed by section 1704 and not by section 668 of the Code of Civil Procedure; that such decree was properly entered in the minute-book as provided in said section 1704; and that it was not necessary to enter such decree in the "judgment book" provided for by said section 668. There are many other authorities holding or assuming that sections 664 and 668 of the Code of Civil Procedure have no application to decrees in probate proceedings. In re Estate of Blythe, 110 Cal. 229, 42 P. 642; In re Estate of Sheid, 122 Cal. 528, 55 P. 328; In re Estate of Purcell, 164 Cal. 300, 128 P. 932; In re Estate of Burnett, 11 Cal.2d 259, 79 P.2d 89; In re Estate of Olsen, 9 Cal.App.2d 374, 50 P.2d 70; In re Estate of Vizelich, 123 Cal. App. 651, 11 P.2d 870; Andrews v. Metzner, 83 Cal.App. 764, 257 P. 203. And it is said in 14 California Jurisprudence, at pages 922 and 923 with reference to decrees in probate proceedings, "They are not judgments within the meaning of the code requirement that judgments be entered in the judgment book." There may be some lack of clarity in some decisions as to whether a particular entry referred to was an entry in the "minute-book" or an entry in the "judgment-book" but we find no decision holding that a decree of a probate court must be entered in the judgment-book referred to in said section 668. In Re Estate of Purcell, 164 Cal. 300 at page 312, 128 P. 932, at page 937, the court said, "On January 12th this formal judgment was filed and entered in the judgment book. The record so designates this book, but it was evidently intended to refer to the 'minute book' in which probate orders and decrees are required to be entered. Code Civ.Proc. § 1704." The procedure provided for in said section 1704 is a "procedure which is peculiar to probate" (In re Estate of Exterstein, 2 Cal.2d 13, 16, 38 P. 2d 151, 153), and it seems clear that since the amendment of said section in 1921, the signing and filing of a decree of a probate court, other than a decree of distribution, is the equivalent of the entry of such decree in the minute book. As was said in Re Estate of Janota, 124 Cal.App. 238, 240, 12 P.2d 163, 164, "Such signing and filing in accordance with section 1704, Code of Civil Procedure, was the full equivalent of the ordinary entry of a decree or judgment." See, also, In re Estate of Backesto, 63 Cal. App. 265, 272, 218 P. 597.

[5, 6] Plaintiff attempts to draw a distinction between a "judgment" of a probate court and a "decree" of a probate court but we know of no such distinction. The word "judgment" and the word "decree" appear to be used interchangeably in our code sections relating to probate proceedings and in the practice under such sections. It has been said that "A decree is the judgment of a court of equity, court of probate, or court of admiralty" (Kindig v. Palos Verdes Home Ass'n, 33 Cal.App.2d 349, 355, 91 P.2d 645, 648), and that the word "decree" is employed "not as a designation of something different from a judgment, but rather a judgment of a particular character". McGarrahan v. Maxwell, 28 Cal. 75; see, also, Coleman v. County of Los Angeles, 180 Cal. 714, 182 P. 440. We are of the opinion that said section 1704, referring to "orders and decrees", was intended to cover all decisions of the probate court in probate proceedings whether such decisions might be technically referred to as orders, decrees, or judgments, and said section appears to have been so construed in the authorities above cited.

[7] Plaintiff also places reliance upon section 1713 of the Code of Civil Procedure which then provided, "Except as otherwise provided in this title, the provisions of part two of this code are applicable to and constitute the rules of practice in the proceedings mentioned in this title." But the ob-

vious answer is that the manner of entering or of the equivalent signing and filing of decrees in probate proceedings was provided for in said section 1704 which was part of the same title as was said section 1713. It was therefore "otherwise provided" in said title and said sections 664 and 668 were not made applicable to such decrees in probate proceedings by the provisions of said section 1713. See San Francisco Protestant Orphan Asylum v. Superior Court, 116 Cal. 443, 450, 48 P. 379; In re Sanderson, 74 Cal. 199, 205, 15 P. 753. In this connection, it is significant to note that said section 1713 was in effect at the time of the decision in Re Estate of Blythe, 110 Cal. 226, 42 P. 641, but it was there held that it was unnecessary to enter a probate decree in the "judgment book" provided for in section 668 of the Code of Civil Procedure.

[8] Plaintiff apparently makes the further contention that under the findings of the trial court, she was entitled to rescind and did rescind the note and deed of trust. A reading of the findings relating to the alleged right to rescind and the act of rescission by plaintiff show that these findings relate solely to the issues between plaintiff and her husband. We find no evidence and no findings showing that plaintiff had a right to rescind as against the remaining defendants. Section 1689 of the Civil Code permits a party to rescind if his consent was obtained "* * * through duress, menace, fraud, or undue influence, *exercised by or with the connivance of the party as to whom he rescinds* * * *." (Italics ours.) There is no evidence and no finding connecting the remaining defendants in any way with any duress, menace, fraud or undue influence exercised by plaintiff's husband. On the contrary, it appeared and the trial court found and concluded that the note and deed of trust were executed by plaintiff for a valuable consideration and without the remaining defendants "participating in or having any knowledge or notice" of any of the acts of plaintiff's husband of which plaintiff complained. It thus appears that there was no duress, menace, fraud or undue influence "exercised by or with the connivance of" the remaining defendants and any attempted rescission by plaintiff was ineffectual as against the remaining defendants.

[9] We therefore conclude that the portions of the judgment from which appeal numbered L. A. 16427 was taken should be affirmed and we do not believe that any useful purpose would be served by a discussion of the points raised on appeal numbered L. A. 16471, which was the appeal taken by plaintiff from the order appointing the receiver. It having been determined that the deed of trust was valid and it appearing that parcel one of the property was sold upon foreclosure pursuant to the terms of said deed of trust, it follows that plaintiff had no right, title or interest in said parcel one at any time after said sale upon foreclosure. If we assume, without deciding, that said order appointing the receiver was erroneous, plaintiff could not benefit by a reversal thereof and the order should therefore be affirmed. Davies v. Ramsdell, 40 Cal.App. 432, 183 P. 702.

The portions of the judgment from which appeal numbered L. A. 16427 was taken are affirmed and the order appointing the receiver from which appeal numbered L. A. 16471 was taken is also affirmed.

We concur: SHENK, J.; CARTER, J.; TRAYNOR, J.; EDMONDS, J.

HOUSER, Justice, dissenting.
I dissent. § 664, Code Civ.Proc.

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16 Cal.2d 815

WARD v. CITY OF MONROVIA et al.

L. A. 16494.

Supreme Court of California.
Dec. 26, 1940.

1. Waters and water courses 🔑152(6)

In action to quiet title to water rights, where evidence supported defendant city's right to divert all of the waters, burden was on plaintiff to prove his right to use any part of waters seeping through city's diversion and pipe line system and claimed to have been abandoned by city.

2. Waters and water courses 🔑152(8)

In action involving water rights, where evidence supported defendant city's right to divert all of the waters, evidence failed to show a seepage of water from city's diversion and pipe line system which continued uninterruptedly for period of time sufficient to establish a prescriptive right in plaintiff, who had actually appropriated such escaping waters.

3. Waters and water courses ⚿156(9)

Where city which had easement in 10 and 20 foot strips of plaintiff's land for location of water pipe line renewed its pipe line on plaintiff's land by installing a new pipe about five feet from old pipe, and city was within prescribed limits when it reconstructed pipe system, there was no such substantial "deviation" in place or alteration in its use as to forfeit city's easement.

See Words and Phrases, Permanent Edition, for all other definitions of "Deviation".

4. Easements ⚿41, 42, 47, 54

The nature of the enjoyment measures extent of rights under a general grant or a prescriptive easement, and precludes a subsequent alteration in or deviation from place, mode or manner of its enjoyment.

5. Easements ⚿31

To destroy an existing easement, a change in place, mode or manner of its enjoyment must be material either in nature or extent of the servitude imposed.

6. Easements ⚿53

An express or implied grant of an easement carries with it certain secondary easements essential to its enjoyment, such as right to make repairs, renewals, and replacements, and such incidental easements may be exercised so long as owner thereof uses reasonable care and does not increase burden on or go beyond boundaries of servient tenement, or make any material changes therein.

7. Tenancy in common ⚿13, 15(10)

The possession of one tenant in common is deemed to be possession of all the tenants in common and is presumed not to be adverse or hostile unless actual notice of hostile and adverse possession is brought home to other tenants.

8. Waters and water courses ⚿152(8)

Evidence established that defendants' diversion of all waters of canyon was adverse to plaintiff and his predecessors in interest and that plaintiff and predecessors had actual knowledge that such use was hostile, so as to cut off plaintiff's claim to an interest in the waters as a cotenant.

9. Waters and water courses ⚿130, 138

In action involving water rights, where it appeared that defendant city, which had right to divert all of waters, delivered a portion of waters to individual defendants at a point below land of plaintiff under a contract, the appropriative rights of individual defendants were "adverse" to riparian rights of plaintiff and his predecessors, though individual defendants were lower appropriators, so that individual defendants could obtain a prescriptive right superior to right of plaintiff.

See Words and Phrases, Permanent Edition, for all other definitions of "Adverse".

10. Waters and water courses ⚿152(10)

The rule requiring court, in action involving water rights, to declare quantity of water to which each party was entitled, was not applicable where defendants were entitled to all the disputed waters, since a more specific finding was unnecessary.

11. Waters and water courses ⚿152(8)

In action involving water rights, where evidence supported finding that defendants' rights of appropriation were superior to rights of plaintiff, evidence supported finding that all water diverted by defendants was devoted to beneficial uses and that all thereof was reasonably necessary for such uses, so that plaintiff was not entitled to water on ground that there was an excess over amount necessary for reasonable beneficial uses by persons having prior water rights. Const. art. 14, § 3.

In Bank.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Consolidated actions by Harrison R. Ward against the City of Monrovia and others, to quiet title to waters which were allegedly riparian to plaintiff's land and to quiet title to a one-fourth interest in waters flowing or developed in a certain tract of land belonging to defendant city, and which adjoined plaintiff's land. From judgments for defendants, the plaintiff appeals.

Affirmed.

Prior opinion, 100 P.2d 836.

Alvan M. Palmer, Laurence B. Martin, Earl G. Read, Hewitt & Anderson, all of Los Angeles (Samuel Reisman, of Los Angeles, of counsel), for appellant.

W. H. Anderson and A. G. Ritter, both of Los Angeles, and Paul F. Garber, City

Atty., of Monrovia, for respondent City of Monrovia.

Walter F. Dunn, of Monrovia, for respondents L. L. Bradbury & Co. and Bradbury Estate Co.

PER CURIAM.

The plaintiff brought an action against the City of Monrovia and others to quiet title to waters which he alleged were riparian to his lands but which were wrongfully diverted by the defendants within five years prior to the filing of the complaint. By a separate action against the same defendants the plaintiff sought to quiet title to a one-fourth interest or share in waters flowing or developed in a certain tract of land belonging to the City of Monrovia, and which adjoins the plaintiff's land. The defendants, City of Monrovia, L. L. Bradbury & Co., and Bradbury Estate Company, answered in each action setting forth certain claims adverse to those of the plaintiff. The actions were consolidated for trial, which resulted in findings and judgment for the defendants. The plaintiff appealed from the judgments and the appeals are presented on a single record.

The plaintiff is the owner of the N. E. quarter of section 13, township 1 North, Range 11 West S.B.M. The waters claimed to be riparian to the plaintiff's land arise in section 7, which is northeast of the plaintiff's property, and which is owned by the City of Monrovia. Those waters flow through what is known as Sawpit canyon. That canyon traverses the north and northwest portion of the plaintiff's property and continues into and through other property of the city to the west of the plaintiff's land. The waters as to which the plaintiff claimed a one-fourth interest were developed in Maple canyon on land north of the plaintiff's land, and join the waters of Sawpit canyon a short distance south of the plaintiff's north boundary line. The waters from both sources are conducted through a pipe line and reservoir system constructed by the city to a point on its property west of the plaintiff's land, known as the Five Point Weir. At this point ten elevenths of one fifth of the waters are diverted by each of the Bradbury interests, and the balance by the city for domestic and other municipal uses. The water taken by the Bradbury defendants is conducted for beneficial uses on 666 acres of land located about two miles from the Five Point Weir.

The plaintiff acquired his quarter section in 1914. At that time the city's so-called mountain water system was in existence, whereby all the waters flowing in Sawpit and Maple canyons, with the exception of the overflow in the rainy seasons, was diverted. That part of the system which includes Sawpit canyon had been in existence since about 1890, when the city acquired the rights and easements pertaining thereto, including the rights and easements over the plaintiff's land. The plaintiff's testimony indicates that he had personal knowledge of the existence of the system and the diversion and utilization through it of all the waters of Maple and Sawpit canyons at least as early as 1922; that in 1925 or 1927 he went over some of the ground with and was informed of the extent of the system by the city engineer of the City of Monrovia, and that he then learned that the rights and easements had existed for many years prior thereto. The plaintiff testified that the only available water for his use in any season of the year prior to the construction by the city of a flood control dam at the western boundary of his property, was water which he obtained from the city's hydrants with its permission.

In 1932 the plaintiff received a quit-claim deed to a one-fourth interest in and to the waters of Maple canyon. He testified that he had visited the Maple canyon property previously when he went over the ground with the city engineer, and that before he acquired the quit-claim deed he was informed of the city's use of the waters of Maple canyon since about the year 1895.

The country through which the waters of Maple and Sawpit canyons are collected is mountainous, rough and not easily traversed. The city over a long period of years has developed trails for use in making repairs to the system. The system existing before 1930 developed such a state of disrepair, however, that in that year it was reconstructed and new pipe was laid to replace the old. The record shows that after reconstruction of the system the old and new pipe lines were four or five feet apart in a few places and that in one such instance the change was due to the fact that the plaintiff built a roadway paralleling the line of the old pipe, which necessitated a shift of five feet in the location in order to obtain a footing for the new pipe. The new pipe on the plaintiff's land was of the same size and capacity as the old, but in some parts of the line concrete pipe was replaced by riveted steel pipe.

The plaintiff filed his complaints in these actions in November, 1933. The trial court found that not more than ten acres of the plaintiff's land riparian to Sawpit canyon was suitable for residence purposes, or for cultivation, or was capable of irrigation from the waters of that canyon. It found adversely to the claims of the plaintiff based on his alleged use of the waters of Sawpit canyon, claimed to have been abandoned for more than five years prior to the filing of the complaint by reason of the state of disrepair of the city's mountain system. It also found that the entry of the city on the plaintiff's land for the construction of pipe line had been pursuant to legal rights acquired many years prior to the plaintiff's acquisition of his quarter section. The court found that for more than forty years prior to the filing of the complaint, by means of tunnels, pipe lines, and other works, constructed pursuant to such legal rights, all the waters were taken and extracted by the city from Sawpit canyon and were conveyed by it in such manner and to such extent that from and after the construction of the diversion works none of the waters of the stream flowed or now flow in the natural channel of the stream upon the lands of the plaintiff, with the exception that during rainy seasons some of the waters have flowed in the channel in excess of the intake capacity of the diversion system and have been unappropriated and unused by the city. The court did not decide the rights of ownership in such so-called surplus waters, but it did find that the rights of the city to divert all the waters to the capacity of its system was not lost nor diminished by any act of non-use alleged by the plaintiff, and that the plaintiff had no right to any of the waters of the stream, with the possible exception of the surplus waters, as to which the court made no adjudication.

It was also found that each of the defendants, L. L. Bradbury & Co. and Bradbury Estate Company, was entitled to the use of ten elevenths of one fifth of the waters diverted through the city's diversion system, and that the City of Monrovia was entitled to the use of all the remainder of such waters; that the proportion of the waters diverted and used by the Bradbury interests was founded upon a claim of right existing for more than fifty years prior to the commencement of the action.

The court also found that the city was entitled to a perpetual easement and right of way in certain strips of land for trial purposes to permit access to its entire pipe line system on the plaintiff's land, and which had been used by it under prescriptive right for more than forty years; that this right of way existed on the land at the time the plaintiff acquired his title, and "is a thoroughly well-established and known right of way and is thoroughly well known to the plaintiff". The court found the location of the easements over the plaintiff's land by a particular description of the courses and distances of the center line of three strips, each ten feet wide, and one strip twenty feet wide, and adjudged that the edges of the pipe line or lines and trails should at no place extend beyond the limits of the described strips of land.

In the action brought by the plaintiff to quiet his alleged title to one-fourth of the waters of Maple canyon, the court found that the city was the owner of the land through which the Maple canyon waters mainly flowed, and that it was the owner of and entitled by prescriptive right to divert and use all the waters flowing or developed in said canyon to the capacity of its pipe line system with the exception that each of said Bradbury interests was entitled to the possession and use of ten-elevenths of one-fifth of said waters. It refrained from adjudicating any rights in the surplus waters, which it defined as the waters in excess of the intake capacity of the city's system.

The plaintiff contends that the findings are not supported by the evidence in several particulars.

[1, 2] (1) He claims that the evidence shows that the city had lost its prescriptive rights to the use of all the waters of Sawpit and Maple canyons by a non-user for a period of over five years of a portion of said waters, and by a change in the location of the pipe line. The plaintiff bases his claim of nonuser by the city on the state of disrepair of the system prior to its reconstruction and replacement by reason of which it is claimed that some of the waters leaked through the pipe lines and flowed down the natural channel to the plaintiff's land. The evidence is sufficient to support the city's right to divert all of the waters. By the use herein of the term

"all of the waters", no inclusion of the surplus waters as defined by the trial court is intended. The burden was on the plaintiff to prove his right to the use of any part of the waters seeping through the system and claimed to have been abandoned by the city. Lema v. Ferrari, 27 Cal.App.2d 65, 73, 80 P.2d 157. There is no evidence of nonuser to the extent that it may be said the city's prescriptive right to divert all such waters had been lost by abandonment. On the contrary, the evidence shows that the city had been diligent in making repairs, and that only when the state of the system indicated that repairs would no longer be an economic method of maintaining it, replacement and reconstruction of the system was undertaken. The facts, therefore, are not such as to call forth the application of the doctrine successfully invoked in the case of Dannenbrink v. Burger, 23 Cal.App. 587, 138 P. 751. Here there was no seepage of water from the city's diversion and pipe line system which continued uninterruptedly for a period of time sufficient to establish a prescriptive title in one who had actually appropriated or used such escaping waters.

[3-6] It is also contended that the change in the place of location of the pipe line in a few places forfeited the city's prescriptive easement to maintain the pipe line on the plaintiff's land. There was not such a substantial deviation in the place or alteration in the use and enjoyment of the easement as would call for the application of the cases relied on by the plaintiff. Such cases as Allen v. San Jose Land & Water Co., 92 Cal. 138, 28 P. 215, 15 L.R.A. 93; Joseph v. Ager, 108 Cal. 517, 41 P. 422; North Fork Water Co. v. Edwards, 121 Cal. 662, 54 P. 69; Vestal v. Young, 147 Cal. 715, 82 P. 381; Winslow v. City of Vallejo, 148 Cal. 723, 84 P. 191, 5 L.R.A.,N.S., 851, 113 Am.St.Rep. 349, 7 Ann. Cas. 851; Felsenthal v. Warring, 40 Cal. App. 119, 180 P. 67, are to the effect that the nature of the enjoyment measures the extent of the rights under a general grant or a prescriptive easement, and precludes a subsequent alteration in or deviation from the place, mode or manner of its enjoyment. See, also, 1 Wiel on Water Rights, 3d Ed., § 581; Scott v. Fruit Growers Supply Co., 202 Cal. 47, 258 P. 1095; Anderson v. Southern California Edison Co., 77 Cal.App. 328, 335, 246 P. 559. The same cases, however, affirm that the change must be material either in the nature or the extent of the servitude imposed. Those cases (see, also, Ware v. Walker, 70 Cal. 591, 12 P. 475; Jones on Easements, §§ 811, 826, 828, 830) likewise state the well-recognized rule that an express or implied grant of an easement carries with it certain secondary easements essential to its enjoyment, such as the right to make repairs, renewals, and replacements. Such incidental easements may be exercised so long as the owner thereof uses reasonable care and does not increase the burden on or go beyond the boundaries of the servient tenement, or make any material changes therein. In such cases it has been recognized that an insubstantial change in the location of the means of diversion will not destroy the easement. In this case, wherever the location was shifted, it is not shown that the pipe line was placed on land over which the defendant had no right whatever. The trial court found on substantial evidence that the defendant city was entitled to the use of said ten and twenty foot strips in the enjoyment of its easements for the location and maintenance of its pipe line, and limited the city's right to lay pipe within the confines of such strips. The defendant was within the prescribed limits when it reconstructed the pipe system. The evidence shows that it has not appropriated any land of the plaintiff different from that to which its easements attached within the meaning of the holding in the cases of Vestal v. Young and Felsenthal v. Warring, supra. The city, therefore, has not occupied any property to which it was not entitled.

[7, 8] (2) The plaintiff contends that the court should have awarded him under his quitclaim deed a one-fourth interest in the waters of Maple canyon. He bases this claim on the rule that the possession of one tenant in common is deemed to be the possession of all the tenants in common and is presumed not to be adverse or hostile unless actual notice of hostile and adverse possession is brought home to the other tenants, relying on Johns v. Scobie, 12 Cal.2d 618, 86 P.2d 820. He contends further that the evidence is that the possession and the diversion by the defendants of all the waters of Maple canyon to the extent that use of such waters was not available to a cotenant except from the city's system and by its consent, was not adverse or hostile to the plaintiff or his predecessors. There is no merit in the contention. It cannot be questioned that the trial court was justified in concluding that the defendants' diversion of all the

waters of Maple canyon was adverse to the plaintiff and his predecessors in interest and that they had actual knowledge that such use was hostile and was intended to exclude the exercise of their rights to the use of such waters. In the case cited it was held that the evidence was sufficient to show knowledge in the other cotenants of the plaintiff's prescriptive claim or right. The evidence in the present case indicates that the same result must follow.

[9] (3) It is urged that as to the plaintiff the Bradburys were lower appropriators and that their use of the waters taken at the Five Point weir did not invade the rights of the plaintiff as an upper riparian owner; that the agreement between them and the city amounted to a relinquishment of a portion of the city's rights, which was beyond its powers to do; therefore, that the plaintiff is entitled to the proportion of the waters diverted by the Bradbury interests to nonriparian lands. The evidence, however, fully supports the trial court's findings and conclusions that the right of the Bradburys as appropriators of some of the waters involved originated ten years prior to the acquisition of any usufructuary rights acquired by the city, and that the agreement for division of the waters at the Five Point weir was merely in recognition of the Bradburys' superior rights as appropriators of those waters; that the Bradburys' rights were also based on prescriptive rights adverse to the riparian rights of the plaintiff's predecessors. It is a reasonable conclusion from the evidence that the basis of appropriative or prescriptive rights of the Bradburys was an invasion of and adverse to the riparian rights of the plaintiff's predecessors. The doctrine invoked by the plaintiff and stated in Pabst v. Finmand, 190 Cal. 124, at page 128, 211 P. 11, is therefore unavailing: The plaintiff's predecessors had lost any rights which at one time might have been deemed superior to the Bradburys' claim of right, and the plaintiff has acquired no more than his predecessors had. This condition of the record is a complete answer to the plaintiff's contentions on this question.

[10] (4) The plaintiff also contends that the court should have apportioned the waters in proportion to each party's right thereto. It is doubtful that the court could have settled the dispute more specifically. The requirement referred to, namely, that the court should have declared the quantity of water to which each party was entitled (see Riverside Water Co. v. Sargent, 112 Cal. 230, 44 P. 560; Willits Water Co. v. Landrum, 38 Cal.App. 164, 175 P. 697), is not applicable where, as here, the defendants were entitled to all the disputed waters. Since the plaintiff, therefore, was not entitled to any part of the waters, a more specific finding was unnecessary.

[11] There is no merit in the contention that the case of Bazet v. Nugget Bar Placers, Inc., 211 Cal. 607, 296 P. 616, has a controlling force favorable to the plaintiff. There was no showing herein that the appropriators were wasting the waters diverted by them. On the contrary, the record supports the conclusion that all the water diverted by the city and the Bradbury interests has been and is devoted to beneficial uses, and that all thereof was and is reasonably necessary for such uses. The judgment of the court is in conformity with the precepts of the 1928 amendment adding section 3 to article XIV of the Constitution, and with the interpretation and application thereof as declared in the recent cases of Gin S. Chow v. City of Santa Barbara, 217 Cal. 673, 22 P.2d 5, and Peabody v. City of Vallejo, 2 Cal.2d 351, 40 P.2d 486.

The judgment is affirmed.

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16 Cal.2d 779

LOS ANGELES RY. CORPORATION v. CITY OF LOS ANGELES et al.

L. A. 17460.

Supreme Court of California.

Dec. 23, 1940.

1. Street railroads 🔑72

In action to have declared unconstitutional and to enjoin enforcement of initiative ordinance requiring two-man operation of all street cars in city of Los Angeles, decision of Railroad Commission, which had exclusive control and supervision over the operation of the railway system and which permitted one-man operation of cars, was conclusive upon court with respect to question of comparative safety of one-man or two-man operation. St.1915, p. 115.

2. Street railroads ⇨72

The regulation and operation of street cars in city of Los Angeles was a matter of general public concern and not a "municipal affair" within constitutional grant to chartered municipal corporations of complete autonomy with respect to municipal affairs, and hence initiative ordinance requiring two-man operation of street cars, even if considered as a police regulation, was ineffective as against conflicting order, permitting one-man operation, of Railroad Commission which had paramount power in the matter and whose order acquired force of law. St. 1915, p. 115; Const. art. 11, § 8; art. 12, § 23.

See Words and Phrases, Permanent Edition, for all other definitions of "Municipal Affair".

◆

In Bank.

Appeal from Superior Court of Los Angeles County; Hartley Shaw, Edward T. Bishop, and B. Rey Schauer, Judges.

Action by the Los Angeles Railway Corporation against the City of Los Angeles, etc., and others, to have declared unconstitutional a city ordinance requiring crews of at least two persons on all street cars in the City of Los Angeles, and to enjoin enforcement of the ordinance. From judgment for plaintiff, defendants appeal.

Affirmed.

Ray L. Chesebro, City Atty., and Frederick von Schrader, Asst. City Atty., both of Los Angeles, for appellants.

Gibson, Dunn & Crutcher and H. F. Prince, all of Los Angeles, for respondent.

PER CURIAM.

The city of Los Angeles adopted an initiative ordinance requiring crews of at least two persons on all street cars in the city of Los Angeles. The Los Angeles Railway Corporation, pursuant to an order of the railroad commission granting it permission so to do, had theretofore purchased new specified equipment and converted and standardized its existing equipment for the operation of one-man street cars, and had been so operating them. It filed an action against the city by which it sought to have the ordinance declared unconstitutional and void and the officers of the defendant enjoined from attempting to enforce it. The cause was submitted upon a written stipulation of facts. The court found for the plaintiff and entered its judgment granting the relief sought. The defendant appealed from the judgment.

It appears from the stipulated facts that for many years, under the jurisdiction of the railroad commission, the plaintiff had been and is operating a unified public utility street railway and motor coach transportation system rendering service for the transportation of passengers in and between the cities of Los Angeles, Inglewood, Hawthorne, Huntington Park, Vernon, Maywood, South Gate, Culver City and Bell, and in certain unincorporated areas of the county of Los Angeles. The service is rendered by means of twenty-five street railway lines, seventeen of which are operated within the city of Los Angeles and the remaining eight in the city of Los Angeles and in the outlying incorporated and unincorporated areas. Six shuttle lines also serve the outlying unincorporated and various incorporated areas. A transfer system is in effect which provides for exchange of passengers between the plaintiff's railway system and a coach system in which it owns a one-half interest, and between the plaintiff's lines and the Pacific Electric Railway Company's interurban transportation system.

The city of Los Angeles is the center of the metropolitan area. In the year 1938 the plaintiff's railway lines transported within and without the city nearly 254,000,000 passengers.

In 1934 the city complained to the railroad commission of the obsolescent character of the railway company's equipment. The commission suggested that the parties reach an agreement. Thereupon, with the approval of the commission, an agreement was executed by which the company entered into a program of equipment renewal, modernization and conversion of existing equipment into one-man two-man safety cars. The agreement specified that the program of expenditure was predicated on the gradual introduction of one-man operation without displacing present employees. The agreement was approved by the city council in February, 1935. In April, 1935, the city initiated an investigation by the railroad commission into all phases of the operation of the plaintiff, but especially the question of one-man operation of street cars. As a result of that investigation and study the commission found that that form of economy in operation had been successfully placed in effect on the majority of street car systems in the United States; that as a general proposition one-man operation of street cars is sound, if proper equipment is available; that the new equipment program of the Los Angeles Railway Corporation was predicated on one-man operation and in its opinion such one-man operation was entirely practicable with such equipment.

In December, 1935, pursuant to instructions from the city council, the board of public utilities and transportation of the city of Los Angeles instituted an independent investigation into the matter of one-man operation of street cars in the city. On November 14, 1936, as a result of that investigation and after hearings, the board published a resolution and order adopting regulations to promote the safety and convenience of public utility companies operating street cars in the city of Los Angeles. The regulation required that every street car be operated by a crew of not less than two men except that approval of the board might be obtained for one-man operation upon compliance with certain conditions as to equipment, route, hours of operation and adequacy of service.

Pursuant to the agreement with the city and the conditions of the foregoing order of the board, the plaintiff has expended or incurred obligations to the extent of more than $1,600,000 for new one-man street cars which are now in service in the city of Los Angeles and surrounding cities and unincorporated areas served by it. In addition it has expended nearly $1,000,000 in reconstruction, remodeling and modernization of existing equipment which is now in operation under one-man crews, and it has expended other sums in the program set up by the agreement.

Upon application of the railway company to, and after public hearing by, the railroad commission, the latter issued its order on March 27, 1939, permitting one-man operation of its street cars over certain lines of its system within and without the city. It is conceded that the one-man cars are equipped with all the devices, appliances and fixtures which are required by the above mentioned order of the board of public utilities and transportation, and that the operation of one-man cars has been put into effect without the laying off or discharging of any employees of the plaintiff. It is also conceded that the lines of such operation are located upon streets and highways, some of which are established as primary and others as secondary state highways.

On May 2, 1939, the electors of the city adopted the initiative ordinance hereinabove referred to, which required operation of each street car over the lines of the plaintiff in the city of Los Angeles by two men, designated as a motor man and a conductor, and providing punishment for the violation of the ordinance by fine or imprisonment or both.

It was also stipulated that competent, credible expert witnesses for the plaintiff would testify that the type of street cars operated by the plaintiff and designed for one-man operation could be operated more safely by one man than by two men, and that the one-man operation of said street cars as authorized by the railroad commission is more expeditious and affords greater convenience to the public than the operation by two men as required by the ordinance; and that equally competent and credible expert witnesses for the defendant would testify to the contrary, namely, that operation by two men was safer, more expeditious and convenient than operation by one man.

The court found that the matters which were the subject of the ordinance requiring two-man operation and of the railroad commission's order permitting one-man operation were not matters solely of local or municipal concern to the city of Los Angeles, but were of general public concern, and that the railroad commission had the paramount jurisdiction over the operation of the plaintiff's railway system, including the equipment of its street cars and its operating personnel requirements.

The case presents a conflict between an ordinance of the city of Los Angeles and an order of the railroad commission. The question is as to which is controlling. The conflict may be resolved by a consideration of the question whether the trial court correctly concluded on the stipulated facts that the operation of the street cars of the plaintiff over the territory designated by one man or two men was a question of general interest and not a matter of strictly local concern and, therefore, not a municipal affair. The stipulated facts considered in the light of recent decisions in this state leaves little room for debate.

[1] It is not necessary to review the history of the chartered organization of the city of Los Angeles in connection with the various amendments of section 8, article XI, or section 23, article XII, of the Constitution. The Constitution grants to chartered municipal corporations complete autonomy in respect to municipal affairs. But the question here is disposed of by our conclusion that the facts disclose that the one-man or two-man operation of cars over the plaintiff's railway system is not a matter exclusively of municipal concern and is, therefore, not a municipal affair within the meaning of said sections of the Constitution; and that the question of such operation does not relate merely to the power to make and enforce local, police, sanitary or other regulations covering the plaintiff which it may be assumed has vested in the city of Los Angeles, pursuant to the provisions of said section 23; or, if it may be said to be a police regulation, that it relates to a matter which is not strictly a local affair and, therefore, has not been included in the reserved power. It, therefore, becomes unnecessary to discuss the evidence as to the comparative safety of one-man or two-man operation of street cars in the city of Los Angeles. If the matter is one which is under the exclusive control and supervision of the railroad commission, the commission's decision in that respect is binding and conclusive in this proceeding.

The line of decisions in this state which supports a conclusion in favor of the plaintiff begins with the case of Civic Center Association v. Railroad Commission, 175 Cal. 441, 166 P. 351. In that case this court granted an application for a writ of mandate directed to the railroad commission to entertain jurisdiction of complaints filed with it by several railroads relating to the contemplated abolition of grade crossings in the city of Los Angeles and the establishment of a union depot within the city. This court had theretofore in the case of City of Los Angeles v. Central Trust Co., 173 Cal. 323, 159 P. 1169, 1170, upheld the right of the city of Los Angeles to condemn a strip of land owned by the Southern Pacific Company used as part of its right of way, for the purpose of opening and improving Arlington street in said city. The latter decision was based on the recognition that "the opening, laying out, and improving of streets within a city, and the regulation of the manner of their use, are matters of much greater concern to its inhabitants than to the people of the state at large, and they are clearly municipal affairs, the control of which has always been deemed within the proper scope of municipal powers" (citing cases). The concurring opinion in that case pointed out that in the case of a railroad utility whose operations are not strictly confined within the boundaries of a city, the welfare of all concerned would be best conserved by placing the entire control under the jurisdiction of the railroad commission, which would be empowered to adjust all questions arising in the light of all interests entitled to consideration. In the Civic Center case this court, while it recognized the paramount authority of the city in respect to the laying out, opening and improving of its streets, concluded that the establishment of a viaduct or subway at railroad crossings in a city might be a matter of more than merely municipal concern. It held in that case that the establishment of the improvements sought to be made were matters of general state concern, were not properly municipal affairs, and were to be controlled and regulated within as well as without the particular municipality by general state authority. It was said in that case [174 Cal. 441, 166 P. 355.]: "As such railroads serve the people of the entire state as means of communication and transportation, it is apparent that it would not be to the interest of the state to leave them subject to the exclusive and unlimited control of every city through which they may pass, with respect to the construction, maintenance, and operation of the lines lying within such city * * *." It was concluded that the legislative declarations embodied in the Public Utilities Act, adopted pursuant to article XII of the Constitution, were therefore paramount to the provisions of the city charter. It was also contended in that case that the power to regulate was nevertheless vested in the city pursuant to the provisions of section 23 of article XII, by which it retained power of local police regulation over public utilities except rate fixing. The court noted that under the law then in force police regulation of affairs not municipal in character were subject to and controlled by general laws. It distinguished the law in force at the time the case of City of Los Angeles v. Central Trust Co. was decided, pointing out that in the latter case there was involved only the power of the city to open streets, and not the power of the railroad commission under the Public

Utilities Act to regulate or compel a change in the mode of crossings at intersections with railroad rights of way. The holding of the Civic Center case was applied to somewhat similar facts in City of San Bernardino v. Railroad Commission, 190 Cal. 562, 213 P. 980. See, also, Atchison, Topeka & Santa Fe Railway Co. v. Railroad Commission, 209 Cal. 460, 288 P. 775; City of San Mateo v. Railroad Commission, 9 Cal.2d 1, 68 P.2d 713.

Subsequent to the decision in the Civic Center case, and in Ex parte Daniels, 183 Cal. 636, 192 P. 442, 444, 21 A.L.R. 1172, this court held that by the adoption of the Motor Vehicle Act in 1917 the regulation of speed of motor vehicles in chartered cities had ceased to be a strictly municipal affair. It was said: "While it is true that the regulation of traffic upon a public street is of special interest to the people of a municipality, it does not follow that such regulation is a municipal affair, and if there is a doubt as to whether or not such regulation is a municipal affair, that doubt must be resolved in favor of the legislative authority of the state." See, also, In re Murphy, 190 Cal. 286, 212 P. 30; Atlas Mixed Mortar Co. v. City of Burbank, 202 Cal. 660, 262 P. 334; Morel v. Railroad Commission, 11 Cal.2d 488, 81 P.2d 144; Sincerney v. City of Los Angeles, 53 Cal. App. 440, 200 P. 380.

In Gadd v. McGuire, 69 Cal.App. 347, 231 P. 754, a writ of mandamus was issued directing the board of public works of the city of Los Angeles to proceed under a contract executed pursuant to the City Boundary Line Act (Stats.1911, p. 1018, as amended Stats.1923, p. 633), looking to the improvement of streets extending partly in the city and partly in other cities or contiguous unincorporated territory, or both. The court refused to hold that the subject of the contract was a municipal affair over which the city of Los Angeles had exclusive control unaffected by the provisions of the act. The conclusion in that case was followed in County of Los Angeles v. Hunt, 198 Cal. 753, 774, 247 P. 897, wherein the scope of the proposed public improvement covered territory both within and without the city of Los Angeles and contemplated proceedings pursuant to the Acquisition and Improvement Act of 1925. (Stats.1925, p. 849.)

In Key System Transit Co. v. City of Oakland, 124 Cal.App. 733, 13 P.2d 979, 983, the trial court had rendered judgment enjoining the enforcement of an ordinance which required the operation of streetcars by two men. In February, 1914, and prior to the 1914 amendment of section 23, article XII, of the Constitution, the city had voted not to retain control of public utilities. The plaintiff operated street railway lines within the city and elsewhere in the counties of Alameda and Contra Costa. It applied to the railroad commission for and was granted permission to continue operation of one-man cars on certain lines. A prosecution had been instituted against the plaintiff and one of its employees charging a violation of the ordinance by the operation of a one-man streetcar on the Twenty-third avenue line, which was wholly within the city. On the appeal it was held that the subject of regulation was not a municipal affair. Among other cases, it relied on the decisions hereinabove cited. It said: "Here the line over which the one-man street car was operated is wholly within the city of Oakland; but this fact is not decisive, as regulations respecting the number of men to be employed in the operation of such cars as well as those governing the speed, or prescribing other precautions to avoid accidents, are essentially regulations controlling travel and traffic on public streets; and, in accordance with the rulings in the above cases, are not matters of purely local concern. Furthermore, the power to so regulate is manifestly 'cognate and germane to the subject of regulation and control of public utilities'," citing East Bay, etc., Dist. v. Railroad Commission, 194 Cal. 603, 299 P. 949. See, also, Connecticut Co. v. City of New Haven, 103 Conn. 197, 130 A. 169, 171. In the last-cited case it was said: "The one-man car ordinance is not the regulation of an exclusively local condition. This is plain in the case of a railway operating * * * over a wide area and through many communities. * * * Regulations of great businesses affected with a public interest touching every institution, every activity, every home, and every person in the state must be uniform, and must be free from the local judgment and prejudice. Then, too, many of these utilities reached into other communities, and uniformity of regulation by all of these communities would be an unlooked for result. * * * None of these great interests would be served if each community retained the power of making such police regulations as each might deem proper. * * * Neither the public nor the service corporation could tolerate as many standards and policies as there were towns, cities, or boroughs through which they operated. * * * Over certain matters of public power, wholly local, the state has left with the municipality either original or concurrent jurisdiction. Over regulations not exclusively local, those affecting the business as a whole, or affecting the public as a whole, and those which the nature of the business and the character of the regulation require should be under the single agency of the state, are by our act committed to the exclusive jurisdiction of the Public Utilities Commission. The subject-matter of this ordinance clearly falls within the exclusive jurisdiction of the commission."

[2] A consideration of the stipulated facts, in the light of the foregoing decisions, leads to the conclusion that the trial court correctly found that the regulation and operation of the street cars of the plaintiff over the territory involved is not a matter solely of local concern and is not, therefore, a municipal affair. Whether the operation of the cars should be by a crew of one man or two men is a question which is of concern to all the patrons of the system, those who reside outside as well as those who reside within the city of Los Angeles. The stipulated facts indicate that the questions of economy of operation, greater efficiency in the service, both from the standpoints of quality and frequency, the cost of equipment, and other related matters may be and undoubtedly are directly affected by the mode of operation, whether by crews of one man or two men, and consequently affect the benefits to be derived by the public from the service.

The regulation is clearly within the power vested in the railroad commission by the Constitution and the Public Utilities Act, St.1915, p. 115. The trial court, therefore, correctly concluded that the order and regulation of the railroad commission, duly adopted pursuant to such power, acquired the force of law (Pacific Telephone & Telegraph Co. v. Eshleman, 166 Cal. 640, 137 P. 1119, 50 L.R.A.,N.S., 652, Ann.Cas.1915C, 822; Morris v. Sierra, etc., Power Co., 57 Cal.App. 281, 207 P. 262), and that the provisions of the ordinance, being in conflict with the order of the commission, were ineffective.

The judgment is affirmed.

Mr. Justice HOUSER does not participate in the foregoing decision.

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16 Cal.2d 772

BAY CITIES TRANSIT CO. v. CITY OF LOS ANGELES et al.

L. A. 17195.

Supreme Court of California.

Dec. 23, 1940.

1. Automobiles ⚷62

Under statute authorizing the railroad commission to grant certificates of public convenience and necessity to passenger stage corporations notwithstanding provisions of any city ordinance or permit and providing that a regulation of the commission shall prevail over any conflicting ordinance or permit, the legislature intended to vest in the commission exclusive jurisdiction over the regulation of passenger stage corporations not operating wholly within the corporate limits of a single city. Gen.Laws 1937, Act 6386, § 50¼; Const. art. 12, § 23.

2. Municipal corporations ⚷56

The term "vested" as used in proviso that constitutional provision relating to the power of the railroad commission over public utilities shall not affect powers of control over public utilities relating to the making and enforcement of regulations "vested" in any city which the city shall vote to retain is limited to those powers possessed by a chartered city relating solely to the regulation and control of municipal affairs. Const. art. 12, § 23.

See Words and Phrases, Permanent Edition, for all other definitions of "Vested".

3. Automobiles ⚷62

The right to designate the route to be taken by passenger buses in Los Angeles is not a "municipal affair" within constitutional provision relating to the power of the railroad commission over public utilities and leaving unaffected the powers of a chartered city, relating to the regulation of municipal affairs, since the right of control over street traffic is an exercise of a part of the sovereign power of the state. Const. art. 12, § 23.

See Words and Phrases, Permanent Edition, for all other definitions of "Municipal Affair".

4. Municipal corporations ⚷703(1)

The streets of a city belong to the people of the state, and every citizen of the state has a right to the use thereof subject to legislative control.

5. Automobiles ⚷62

Though the regulation of traffic on a public street is of special interest to the people of the municipality, it does not follow that such regulation is a "municipal affair", and if there is a doubt on question whether such regulation is a municipal affair, that doubt must be resolved in favor of the legislative authority of the state.

6. Automobiles ⚷9

Whenever the state sees fit to adopt a general scheme for the regulation and control of motor vehicles on the public highways of the state, the entire control over whatever phases of the subject are covered by state legislation ceases in so far as municipal or local regulation is concerned.

7. Automobiles ⚷62

The statutory provisions giving the railroad commission exclusive jurisdiction over the regulation of passenger stage corporations not operating wholly within the corporate limits of a single city constitute a general scheme for the regulation and control of motor vehicles on the public highways of the state and supersede the authority of Los Angeles under an ordinance to designate the route to be followed by such a corporation operating buses between fixed termini or over a regular route not exclusively within the corporate limits of Los Angeles. Gen.Laws 1937, Act 6386, §§ 2¼, 50¼; Const. art. 12, § 23.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by the Bay Cities Transit Company against the City of Los Angeles, etc., and others to prevent the Board of Public Utilities and Transportation of the City of Los Angeles from interfering with the operation of the plaintiff's bus lines on the speedway in the Venice district of the city. From a judgment of dismissal, plaintiff appeals.

Judgment reversed with directions.

Prior opinion, 102 P.2d 429.

Hector P. Baida, of Santa Monica, for appellant.

Heller, Ehrman, White & McAuliffe, of San Francisco, Donahue, Richards & Hamlin, of Oakland, Sloss & Turner, H. C. Lucas, John L. McNab, and Hugh K. McKevitt, all of San Francisco, Chandler & Wright, of Los Angeles, and Samuel W. Gardiner, of San Rafael, as President of Marvelous Marin, Inc., amici curiae for appellant.

Ray L. Chesebro, City Attorney, and F. Von Schrader, Asst. City Atty., both of Los Angeles, for respondent.

John J. O'Toole, City Atty., and Albert F. Skelly, Deputy City Atty., both of San Francisco, on behalf of City and County of San Francisco, amici curiae for respondent.

PER CURIAM.

The question for determination in this case is controlled by our decision this day filed in the case of Los Angeles Railway Corporation v. City of Los Angeles, 108 P.2d 430. The opinion of the District Court of Appeal, Second District, Division Two, to which the appeal herein was originally taken, contains a statement of the facts and a determination of the controversy in conformity with the views of this court expressed in its opinion in Los Angeles Railway Corporation v. City of Los Angeles, supra. We, therefore, adopt the per curiam opinion of the District Court of Appeal as the opinion of this court. It is as follows:

"Plaintiff commenced this action to prevent the board of public utilities and transportation of the city of Los Angeles from interfering with the operation of plaintiff's bus line on the speedway in the Venice district of said city. Plaintiff contends that Ordinance No. 58198, under the terms of which the city claims the right to divert the plaintiff's busses from the speedway, is ineffective for this purpose, since the subject matter of the ordinance is under the control of the Railroad Commission of the state of California. A general demurrer to the petition was sustained and, plaintiff declining to amend, a judgment of dismissal was entered from which this appeal is prosecuted.

"Plaintiff operates a passenger bus line along a route lying partially within the city of Los Angeles and partially within the city of Santa Monica. In the year 1935 upon plaintiff's application for a certificate of public convenience and necessity, the Railroad Commission of the state of California made an order designating the route to be followed by plaintiff in operating such bus line and restricting operations to that route only. In compliance with the requirements of Ordinance No. 58198 of the city of Los Angeles, plaintiff applied for and obtained a permit from the board of public utilities and transportation of such city to operate its bus line over those portions of the route designated by the Railroad Commission which were situated within the corporate limits of the city of Los Angeles. The only portion of such operation with which we are here concerned is the portion lying within the Venice district of the city of Los Angeles. Commencing in May, 1938, a series of hearings were held by the board of public utilities and transportation for the purpose of determining the convenience and necessity of the operation of plaintiff's busses over that portion of the designated route lying within the Venice district. As a result of these hearings the board found that the operation of busses over the portion of the designated route in question was extremely hazardous, and concluded that the portion of the operation lying within the Venice district should be rerouted in the interests of safety. Accordingly the board made its order that plaintiff's permit 'be canceled, effective at 12:01 a. m., March 5, 1939, and the Company be notified that this Board will, upon receipt of proper application, grant a new permit for the operation of said bus line over the Speedway from the Los Angeles-Santa Monica City Boundary to Navy Street', one-half of the traffic to be over the old route and the other half over a newly designated route.

"Ordinance No. 58198 of the city of Los Angeles grants to the board of public utilities and transportation the power to issue permits for the operation of motor busses upon the public streets of the city, whether the operation is wholly or partly within the city limits, if it be found that public convenience and necessity so require. The ordinance further authorizes the board to revoke any license or permit granted by it. Section 50¼ of the Public Utilities Act (Act 6386, Deering's Gen. Laws, 1937) provides that no passenger stage corporation shall operate its stages over any public highway without first obtaining from the Railroad Commission a certificate of public convenience and necessity. By section 2¼ of the Public Utilities Act a 'passenger stage corporation' is defined as one which operates passenger stages over any public highway in this state between fixed termini or over a regular route which is not exclusively within the limits of a single incorporated city. The conflict between the legislative enactment and the ordinance, in so far as the latter purports to regulate operations only partly within the city limits, is at once apparent. We are called upon to determine whether the state or the city has the paramount authority and power to designate the route to be followed by a passenger stage corporation which operates motor busses between fixed termini or over a regular route not exclusively within the corporate limits of such city.

[1] "Section 50¼ of the Public Utilities Act provides: '* * * The railroad commission, in the exercise of the jurisdiction conferred upon it by the constitution of this state and by this act, shall have power and authority to grant certificates of public convenience and necessity and make decisions and orders and to prescribe rules and regulations affecting passenger stage corporations, notwithstanding the provisions of any ordinance or permit of any incorporated city * * * and in case of conflict between any such order, rule or regulation, and any such ordinance or permit, the certificate, decision, order, rule or regulation of the railroad commission shall in each instance prevail.' It is manifest that in enacting section 50¼ it was the intention of the legislature to vest in the Railroad Commission exclusive jurisdiction in the matter of the regulation of passenger stage corporations not operating wholly within the corporate limits of a single city. The power of the legislature to grant to the Railroad Commission such exclusive jurisdiction appears to be settled by that portion of section 23, article XII of the state Constitution, which provides: '* * * The railroad commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution. From and after the passage by the Legislature of laws conferring powers upon the Railroad Commission respecting public utilities, all powers respecting such public utilities vested in boards of supervisors, or municipal councils, or other governing bodies of the several counties, cities and counties, cities and towns, in this

State, or in any commission created by law and existing at the time of the passage of such laws, shall cease so far as such powers shall conflict with the powers so conferred upon the Railroad Commission * * *.'

"On behalf of defendants it is contended, however, that by virtue of other provisions of this same section of the Constitution, added by the amendments of 1911 and 1914, the asserted vested right of the city to enact and enforce the ordinance in question in the manner in which it is sought to be enforced is reserved to the city to the exclusion of any legislative control. These provisions of the amendments to section 23 are: '* * * provided, however, that this section shall not affect such powers of control over public utilities as relate to the making and enforcement of local, police, sanitary and other regulations, other than the fixing of rates, vested in any city and county or incorporated city or town as, at an election to be held pursuant to law, a majority of the qualified electors of such city and county, or incorporated city or town, voting thereon, shall vote to retain, and until such election such powers shall continue unimpaired * * * and provided, further, that this section shall not affect the right of any city and county or incorporated city or town to grant franchises for public utilities upon the terms and conditions and in the manner prescribed by law. * * *' Since the charter of the city of Los Angeles was amended in 1913, St.1913, p. 1629, so as to grant to the city the power to supervise, control and regulate all public utilities in the city, defendants contend that the city had a vested right to pass the ordinance in question and to enforce it in the manner in which it is sought to be enforced in this case, upon the theory that it was merely the making and enforcing of a local, police, sanitary or other regulation. It does not appear that the power which the charter amendment purports to vest in the city has ever been surrendered by vote of the city.

[2-7] "It is settled that the term 'vested' as used in section 23, article XII of the Constitution is limited to those powers possessed by a chartered city relating solely to the regulation and control of municipal affairs. City of San Mateo v. Railroad Commission, 9 Cal.2d 1 [68 P.2d 713]. That the right to designate the route to be taken by plaintiff's busses is not a municipal affair is evident from the language used in Ex parte Daniels, 183 Cal. 636, 639 [192 P. 442, 444, 21 A.L.R. 1172]: 'The streets of a city belong to the people of the state, and every citizen of the state has a right to the use thereof, subject to legislative control. People v. County of Marin, 103 Cal. 223, 232, 37 P. 203, 26 L.R.A. 659; Elliott on Roads and Streets [3d Ed.], §§ 25, 505, 543, 544, 1112, 1115; Dillon on Mun. Corp. (5th Ed.) vol. 3, § 1122. The right of control over street traffic is an exercise of a part of the sovereign power of the state. Elliott on Roads and Streets, sections cited supra. While it is true that the regulation of traffic upon a public street is of special interest to the people of a municipality, it does not follow that such regulation is a municipal affair, and if there is a doubt as to whether or not such regulation is a municipal affair, that doubt must be resolved in favor of the legislative authority of the state. The rule is that—"any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied."' The question whether or not the regulation of the use of city streets for commercial purposes is a matter for legislative or municipal control has been decided by the Supreme Court in Morel v. Railroad Commission, 11 Cal.2d 488, at page 500 [81 P.2d 144, 150] where it is held that: '* * * whenever the state of California sees fit to adopt a general scheme for the regulation and control of motor vehicles upon the public highways of the state, the entire control over whatever phases of the subject are covered by state legislation ceases in so far as municipal or local legislation is concerned.' That the provisions of the Public Utilities Act here under consideration constitute a general scheme for the regulation and control of motor vehicles upon the public highways of the state cannot be doubted.

"The conclusion at which we have arrived is in harmony with the decision of the appellate department of the superior court of Los Angeles county in People v. Willert [37 Cal.App.2d Supp. 729, 93 P.2d 872], wherein it was held that the criminal provisions of the ordinance in question were inoperative. In the Willert case an employee of the Bay Cities Transit Company was prosecuted for driving one of the company's busses in the Venice district in the absence of a permit for such operation. The order of the trial court dismissing the action was affirmed by said appellate department in a well-reasoned opinion in which the ordinance was held to be ineffectual as being in conflict with the superior authority vested in the Railroad Commission.

"Defendants contend that the right is reserved to the city to create franchises for public utilities and that under such right the city can control the operation of plaintiff's busses. It is unnecessary to pass upon this contention since there is no merit in defendants' claim that plaintiff's canceled permit was in fact a franchise. When the canceled permit is considered in the light of the charter provisions and ordinances relating to the granting of franchises, it is apparent that the permit was not a franchise granted 'upon the terms and conditions and in the manner prescribed by law' as required by the Constitution. In this respect it is sufficient to note that many of the terms and conditions required by the charter and ordinances relating to the granting of franchises to be included in all franchises are omitted from the permit which was granted to plaintiff."

The question is not controlled by the cases relied on by the defendants, such as Wright v. Los Angeles Railway Corp., 14 Cal.2d 168, 93 P.2d 135; Schulthiess v. Los Angeles Railway Corporation, 11 Cal.App.2d 525, 54 P.2d 49, and Switzler v. Atchison, etc., Ry. Co., 104 Cal.App. 138, 285 P. 918, wherein it was held that the power to enact certain police regulations governing public utilities was properly exercised by the municipality. In those cases, as pointed out in the Switzler case, there had been no action by the Railroad Commission with reference to the regulation of the public utility; there was no conflict between the action taken by the municipality and any order of the Railroad Commission; and there was no showing that the action taken by the municipality was in contravention of any act of the legislature or of any rule or regulation of the Railroad Commission.

The judgment is reversed with directions to the trial court to overrule the demurrer.

HOUSER, J., does not participate in the foregoing decision.

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16 Cal.2d 800

PACIFIC COAST JOINT STOCK LAND BANK OF SAN FRANCISCO v. ROBERTS et al.

Sac. 5273.

Supreme Court of California.

Dec. 26, 1940.

1. Waters and water courses ⚷231

Mortgagee of land sold to irrigation district for delinquent assessments has right to redeem under statute authorizing redemption within three years from sale by payment in lawful money of United States of amount for which property was sold, plus specified penalties. St.1935, p. 482, § 47.

2. Waters and water courses ⚷231

Mortgagee of lands sold to irrigation district for delinquent assessments is not an "owner" within special emergency statutes enacted to defer dispossession of landowners by extending time for redemption of delinquent lands from assessments, notwithstanding the statutes indicate a two-fold purpose of relieving distressed landowners and of returning delinquent property to tax rolls. St. 1929, pp. 162, 1170, §§ 42, 43; St.1933, p. 532, § 52a; St.1934, Ex.Sess., p. 25, as amended by St.1935, p. 486; St.1933, p. 2191 et seq., and pp. 2191, 2192, §§ 1, 2, 4.

See Words and Phrases, Permanent Edition, for all other definitions of "Owner".

3. Constitutional law ⚷70(1)

It is the function of courts to construe and apply the law as it is enacted and not to add thereto nor detract therefrom.

4. Statutes ⚷199

Though term "owner" is generic and, being of general application, is frequently applied to one having an interest in, or claim on, property less than an absolute and unqualified title, the precise meaning of the word and of the word "own", in a statute when not modified by other words indicating either qualified or absolute ownership, depends on the subject matter and surrounding circumstances.

See Words and Phrases, Permanent Edition, for all other definitions of "Own".

In Bank.

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

Action by the Pacific Coast Joint Stock Land Bank of San Francisco against David L. Roberts and others to quiet title to land of which defendants were in possession under contracts of sale, involving the effectiveness of plaintiff's attempt to redeem the land after sale to an irrigation district for delinquent assessments. From an adverse judgment, plaintiff appeals.

Affirmed.

Everett Clay McKeage and Richard M. Leonard, both of San Francisco, for appellant.

A. L. Cowell, of Stockton, Hankins & Hankins, of San Francisco, Harry W. Horton, of El Centro, Thos. C. Boone, of Modesto, and C. F. Metteer, of Sacramento, amici curiæ for appellant.

Arvin B. Shaw, Jr., of Los Angeles, for Irrigation Dists. Ass'n of California.

Pugh & Pugh, of Red Bluff, for respondents.

SHENK, Justice.

This is an appeal by the Pacific Coast Joint Stock Land Bank of San Francisco from a judgment entered in an action brought by it to quiet title to four parcels of land in Tehama county. The defendants were four individuals who were in possession of the land under contracts of sale. The controversy turned upon the effectiveness of an attempt by the plaintiff to redeem the property after sale to the El Camino Irrigation District for delinquent assessments.

In 1927, California Tehama Land Corporation owned a tract of 832 acres within the boundaries of said irrigation district, subject to a recorded mortgage in favor of the plaintiff. During that year and in 1930 the land corporation entered into contracts to sell small parcels of the tract to the defendants, who took possession of the land. The contracts were not recorded. Subsequently and prior to April 1, 1933, the entire tract, including the parcels under contract with the defendants, was sold to the district for delinquent bond and maintenance assessments pursuant to sections 42 and 43 of the California Irrigation District Act (Stats. 1897, p. 254, as amended, St.1929, pp. 162, 1170). Certificates of sale were duly recorded.

In November, 1933, Pacific Coast Joint Stock Land Bank, plaintiff herein, commenced an action against California Tehama Land Corporation to foreclose the mortgage hereinabove referred to. The defendants herein were not parties to that action. While the foreclosure suit was pending, the plaintiff mortgagee commenced making payments to the district to redeem the land covered by the mortgage. Redemption payments were made at various times—in February, 1934, under former section 52a of the California Irrigation District Act (added by Stats.1933, p. 532; repealed Stats.1935, p. 1767); under Statutes of 1933, page 2191, referred to as the Four Year Act; and during and after 1935 under Extra Sessions 1934, Statutes 1935, page 25, as amended by Statutes 1935, pages 486, 487, referred to as the Ten Year Act. The plaintiff as mortgagee recovered judgment in the foreclosure action in May, 1934, the property was sold to it under foreclosure sale in September, 1935, and a deed executed to it in September, 1936. The defendants herein remained in possession of the parcels under their contracts of sale, and the present action was brought in March, 1937, to quiet title in the plaintiff as against them. The trial court found that the plaintiff had failed to prove title in itself because it had not shown redemption of the four parcels involved.

The defendants contend that the judgment of the court is sustainable on the ground that the plaintiff, being a mortgagee, could not avail itself of the redemption statutes pursuant to which it purported to redeem the land.

It appears without question that the plaintiff did not effect nor attempt to effect redemption pursuant to sections 47 and 47a of the Irrigation District Act.

By section 1 of the Statutes of 1933, page 2191, the Four Year Act, the owner of land which had been sold to an irrigation district prior to April 1, 1933, as to which the district still held the certificate of sale, was permitted to redeem in four equal annual installments with interest at 7 per cent, and (by sec. 2) if not so redeemed the land must be redeemed as otherwise provided by law. Section 4 declared the existence of an emergency requiring the exercise of the police power of the state in order to conserve the public welfare. The statement of facts constituting the emergency was included and read in part as follows: "Due to the agricultural depression which has existed for the past several years, many landowners in irrigation districts in the State have been unable to meet their annual taxes and assessments with the result that their land has been sold to the district. The heavy penalties necessary to be paid * * * makes it impossible for the landowner to redeem his land and thousands of landowners are now threatened with the loss of their land. If the land is not redeemed * * * it then becomes nonassessable for district purposes, and the burden becomes all the heavier on the other landowners in the district, causing more delinquency and loss. The Legislature hereby declares that the welfare of the State requires that the landowner in these districts be not dispossessed of his land, and that the land be redeemed so as to thenceforth bear its just proportion of taxation."

By the Ten Year Act the legislature enacted similar provisions permitting the owner of land sold for delinquent irrigation district assessments prior to September 30, 1934, to redeem by payment of assessments due in ten equal annual installments with 7 per cent interest.

Section 52a, added to the California Irrigation District Act (Stats.1933, p. 532), provided that "notwithstanding any of the other provisions of this act any owner of land within the district who is the holder of any matured bond or interest coupon issued by the district, which * * * remains unpaid by reason of insufficiency of money in the * * * fund * * * is authorized to apply the credit represented by such unpaid bond or coupon as a medium of exchange in the payment of assessments levied against the lands of such person * * *". The collector was authorized to accept the credit memorandum in lieu of lawful money in payment of the assessment levied on the lands of the holder of such bonds or coupons. This section was, on April 25, 1935, held unconstitutional in Shouse v. Quinley, 3 Cal.2d 357, 37 P.2d 89, 45 P.2d 701.

The purported redemption payment made by the plaintiff in February, 1934, pursuant to the Four Year Act and said section 52a, consisted of matured interest coupons aggregating about $6,000. Subsequent payments were made by it in cash purportedly representing installments under the Ten Year Act. The plaintiff contends that, assuming the invalidity of the payment of February, 1934, under the decision in Shouse v. Quinley, supra, it had nevertheless at the time of the commencement of this action made sufficient payments in cash under the Ten Year Act to entitle it to prevail as against the defendants. In this connection it is to be noted that payments so made and upon which the plaintiff depends to establish its title were made by it not as owner of the land but as mortgagee under the mortgage foreclosed and before proceedings culminated in a sale and deed to it. Without passing upon the contention that sufficient cash payments had been made under the Ten Year Plan, the controversy is determined by our conclusion on the question whether the plaintiff was one who could take advantage of the emergency redemption statutes.

[1, 2] The plaintiff relies on cases holding that a mortgagee has a sufficient interest to redeem mortgaged property from a tax sale under statutes permitting the owner to redeem, citing Dubois v. Hepburn, 10 Pet. 1, 35 U.S. 1, 9 L.Ed. 325; Windett v. Union Mutual Life Ins. Co., 144 U.S. 581, 12 S.Ct. 751, 36 L.Ed. 551; Bates v. Pabst, 223 Iowa 534, 273 N.W. 151; State ex rel. Eaton v. Hirst, 53 Wyo. 163, 79 P.2d 489; 4 Cooley on Taxation, 4th Ed., § 1565. But such authorities are not controlling under the statutes here involved. It must be remembered that section 47 of the California Irrigation District Act, St.1935, p. 482, which was not repealed or modified by the emergency acts, provided the ordinary method of redeeming land sold to an irrigation district. It provided: "A redemption of the property sold may be made within three (3) years from the date of sale, or at any time thereafter before a deed has been made and delivered, by payment in lawful money of the United States to the collector * * * of the amount for which the property was sold" plus specified penalties. Unquestionably the mortgagee was entitled to redeem under that section. Unquestionably it still has the right to redeem, either under that section, or under any applicable emergency acts, except as against any purchasers of parcels who have received deeds from the district (three of the defendants herein held quit claim deeds from the district). Inasmuch as the plaintiff, as to the time when it was mortgagee, had the right to redeem under said section 47 of the California Irrigation District Act, it is not appropriate to read into the emergency statutes any more than their language clearly implies.

[3] It is true that the emergency statutes indicated a two-fold purpose, namely, to relieve distressed landowners, and to re-

turn delinquent property to the tax rolls. But it is not inconsistent with the second objective to confine the operation of the statute in accordance with the plain language employed by the legislature. That the word "owner" as used in such statutes was restricted to the owner of the land is distinctly discernible from the provisions of section 1 of both acts, and from the statement of the facts constituting the emergency contained in the 1933 act. It is the function of the courts to construe and apply the law as it is enacted and not to add thereto nor detract therefrom. Unquestionably the statute here involved was of an emergency character having for its purpose, like moratoria statutes, the extension of relief to distressed landowners. The declaration of the legislative policy indicates a definite desire that the "landowner in these districts be not dispossessed of his land". If the legislature had not intended to restrict the operation of the statutes to redemptions by owners of the land, it could easily have omitted the word "landowner" therefrom and provided for such special redemption in language comparable to that employed in section 47 of the California Irrigation District Act. Under such general statute effect could well be given to a redemption by a mortgagee, for then there would be no express restriction to redemption by owners.

[4] The term "owner" is generic and being of general application is therefore frequently applied to one having an interest in or claim upon property less than the absolute and unqualified title. Prudential Ins. Co. v. Kraschel, 222 Iowa 128, 266 N.W. 550. The term frequently depends for its signification upon the connection in which it is used and may concededly include one not holding the legal title. RCA Photophone, Inc. v. Huffman, 5 Cal.App.2d 401, 42 P.2d 1059. While it has been held that a mortgagee is an "owner" within a tax redemption statute (Blaine County Bank v. Noble, 55 Okl. 361, 155 P. 532, 534), the converse also has been held. Mixon v. Stanley, 100 Ga. 372, 28 S.E. 440, 441. A mortgagee has been held to be an owner within the meaning of eminent domain or condemnation statutes. Houston Ry. Co. v. Tyrrell, 128 Tex. 248, 98 S.W.2d 786, 793, 108 A.L.R. 1508; National Assn. v. Arroyo, etc., Dist., Tex.Civ. App., 110 S.W.2d 150. But a mortgagee has been held not to be an owner within the meaning of a mechanic's lien law and therefore not entitled to notice of suit upon a lien claim. Cornell v. Conine-Eaton Lumber Co., 9 Colo.App. 225, 47 P. 912. Other illustrations could be cited, but sufficient has been said to establish that the precise meaning of the word "own" or "owner", when not modified by other words indicating either qualified or absolute ownership, depends upon the subject-matter and the circumstances surrounding the subject-matter and the parties. RCA Photophone, Inc. v. Huffman, supra; Prudential Ins. Co. v. Kraschel, supra; Bare v. Cole, 220 Iowa 338, 260 N.W. 338. Thus while in the state of Iowa it has been held that a mortgagee is an "owner" under the ordinary tax redemption statute (Lane v. Wright, 121 Iowa 376, 96 N.W. 902, 100 Am.St.Rep. 362), it has also been held that a junior mortgagee, who had foreclosed and obtained a sheriff's deed and reserved a deficiency judgment prior to foreclosure by a senior mortgagee, was not entitled to an extension of the period of redemption from the sale under the senior mortgage, since such junior mortgagee was not an "owner" within the meaning of emergency legislation relating to the extension of the redemption period from sale under a mortgage on application of the owner of the land. Equitable Life Assur. Soc. v. Kramer, 218 Iowa 80, 253 N.W. 809. The court declared in the case last cited that "The undoubted objective of the legislation is to extend grace to the owner or debtor as between him and his creditor and to protect as far as possible the status quo between the parties and to defer for a brief time the debtor's ejection from the premises". The effect of the foregoing cases is, therefore, that a mortgagee may be an owner within the meaning of redemption statutes generally, but he is not such an owner as may benefit by emergency legislation enacted specifically to defer the dispossession of landowners by extending the owners' time for redemption. This must likewise be the result in the present controversy. That is, while the plaintiff as mortgagee may be entitled to redeem under the general and unrestricted language of section 47 of the California Irrigation District Act, it may not be recognized as an owner within the meaning of special emergency legislation which purports to extend exclusively to landowners certain privileges and moratoria in the matter of redemption of their delinquent lands. An interpretation of the emergency statutes by giving effect to the language actually em-

ployed without interpolation is in accordance with the declared legislative objective. The mortgagee, on the other hand, was not deprived of the right open to it to redeem under the general statute, section 47, of the Irrigation District Act.

The judgment is affirmed.

We concur: GIBSON, C. J.; EDMONDS, J.; CARTER, J.; CURTIS, J.

Mr. Justice HOUSER does not participate in the foregoing decision.

16 Cal.2d 726

BRILL et al. v. LOS ANGELES COUNTY et al., and four other cases.

L. A. 15991–15995.

Supreme Court of California.

Dec. 19, 1940.

As Modified Jan. 4, 1941.

Rehearing Denied Jan. 18, 1941.

1. Municipal corporations 🔑977

Where city by charter provisions transferred taxing function to county, any charter requirement for the filing of a claim, with city before suit to recover taxes paid which might have application were city itself assessing, collecting, and refunding its taxes, was suspended under those provisions during continuation of transfer or consolidation of taxing function to the extent that such suspension was necessary or convenient and was set forth by ordinance. St.1925, pp. 1028, 1132, 1141, §§ 2, 342, 376; Pol.Code, §§ 3804, 3819; Const. art. 11, § 6.

2. Municipal corporations 🔑977

Where city transferred taxing function to county, adoption by city of ordinance authorizing refunds of city taxes where refunds of county taxes would be appropriate under statutes containing no requirement for filing of a claim before suit, and requiring only written protest and commencement of suit within six months after payment, indicated suspension by city of charter provision requiring filing of claim before suit during continuation of transfer, even if that provision would be applicable to tax refunds if city itself were directly exercising that function. St.1925, pp. 1028, 1132, 1141, §§ 2, 342, 376; Pol.Code, §§ 3804, 3819; Const. art. 11, § 6.

3. Statutes 🔑225½

A special statute dealing expressly with a particular subject controls and takes priority over a general statute.

4. Action 🔑3, 10

Where a statute provides a special remedy for use in specified cases, a party seeking the remedy may look to the special statute for a definition of his rights, and a condition not named in the statute need not be satisfied.

5. Municipal corporations 🔑977

Where city transferred taxing function to county and adopted provisions of special statute dealing specifically with refund and recovery of taxes paid under an asserted excessive assessment and affording a remedy conditioned solely on payment of taxes under written protest and commencement of suit within six months thereafter, city could not alter or enlarge the provisions of that statute by interpolating therein its charter provision dealing with claims generally and requiring the filing of a claim before suit. St. 1925, pp. 1028, 1132, 1141, §§ 2, 342, 376; Pol.Code, §§ 3804, 3819; Const. art. 11, § 6.

6. Taxation 🔑543(2)

The special statute providing court remedy for refund and recovery of taxes paid requiring no claim to be filed before suit, and requiring only that tax be paid under protest and that suit be brought within six months after payment, prevails over statute providing generally for the presentation of claims and demands to county boards of supervisors. Pol.Code, §§ 3819, 4075.

7. Action 🔑35

The fact that the administrative remedy for the refund and recovery of taxes paid expressly requires the filing of a verified claim and the judicial remedy does not require the filing of claim is indicative of a legislative intent to afford a distinct and cumulative remedy for the recovery of a tax without filing a prior claim by making payment under protest and bringing suit within six months thereafter. Pol.Code, §§ 3804, 3819.

8. Taxation 🔑543(2)

That special statute providing judicial remedy for recovery of taxes paid without filing prior claim was amended after decision holding that general provision for pres-

entation of demands to county boards did not apply in an action brought under that statute and after amendment of general provision without attempting to bring it into line with or subordinate to general provision, and that the legislature repealed that statute and another dealing with the recovery of taxes and included their counterparts in new revenue and taxation code, indicated legislative intention that in actions to recover taxes the special remedy should be free of any requirement contained in general provision for the prior filing of a claim. Pol. Code, §§ 3819, 4075; St.1939, pp. 1370–1373, §§ 5096–5102, 5136–5140.

CURTIS, J., GIBSON, C. J., and SHENK, J., dissenting.

In Bank.

Appeals from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Consolidated actions by Mary H. Brill and others, by Eugene W. Britt, by Daniel M. Hunsaker, by Mary H. Brill, and by Rose H. Steehler and others, against the County of Los Angeles, the City of Los Angeles, and others, to recover taxes based on alleged excessive assessments for the year 1932. From judgments on the pleadings in favor of defendant City of Los Angeles, plaintiffs appeal.

Judgments reversed with directions to proceed with the trials of the several causes.

For prior opinion, see 86 P.2d 869.

Rehearing denied; GIBSON, C. J., and SHENK and CURTIS, JJ., dissenting.

Daniel M. Hunsaker, of Alhambra, and Lloyd E. Keiser and Don M. Kitzmiller, both of Los Angeles, for appellant.

Pillsbury, Madison & Sutro, Alfred Sutro, and Francis N. Marshall, all of San Francisco, and Holbrook & Tarr, and W. Sumner Holbrook, Jr., all of Los Angeles, amici curiae for appellant.

Everett W. Mattoon, Co. Counsel, Ray L. Chesebro, City Atty., Leon T. David, John W. Holmes, and Henry C. Ramsey, Asst. City Attys., J. H. O'Connor, Co. Counsel, S. V. O. Prichard, Asst. Co. Counsel and A. Curtis Smith, Deputy Co. Counsel, all of Los Angeles (Percy C. Heckendorf, Dist. Atty., of Santa Barbara, and James B. Abbey, Dist. Atty., and Carroll H. Smith, Deputy Dist. Atty., both of San Diego, of counsel), for respondent.

CARTER, Justice.

These several causes for the recovery of taxes based on alleged excessive assessments for the year 1932 have been consolidated and are before us on appeals from judgments on the pleadings in favor of the defendant city.

In each cause the tax sought to be recovered had been assessed and collected by the defendant county for and on behalf of the defendant city. So far as pertinent here, section 6 of article XI of the Constitution provides that "Cities and towns * * * may, by charter provision or amendment, provide for the performance by county officers of certain of their municipal functions." Accordingly, the charter of the defendant city, adopted in 1925, St.1925, p. 1024, provided in section 2 thereof that the city "shall have the right and power, subject to the restrictions in this charter contained * * * to transfer or consolidate functions of the city government to or with appropriate functions of the state or county government * * *". The transfer by the city to the county of the taxing function was contained in section 342 of the charter which, in part, declared that: "Until otherwise provided by ordinance the city shall continue to use, for purposes of municipal taxation, the county system of assessment and tax collection. * * *" The city has never "otherwise provided by ordinance" but, on the contrary, and in furtherance of its transfer of the taxing function to the county, has provided by ordinance that "Any taxes, together with any penalties thereon heretofore or hereafter paid for the use of or on behalf of the City of Los Angeles may be refunded by the County Auditor in all cases where a refund of county taxes and penalties thereon is provided for under the provisions of Part III, Title IX of the Political Code of the State of California." Ordinance 40302, adopted May 13, 1920, as amended by ordinance 45027, approved November 14, 1922. Sections 3804 and 3819 of the Political Code, which prescribe distinct and under certain circumstances cumulative methods or remedies for the refund and recovery of taxes (Stewart Law & Collection Co. v. County of Alameda, 142 Cal. 660, 76 P. 481), are found in the title and part of the Political Code designated in the ordinance.

In view of the above-mentioned transfer or consolidation of the taxing function, the respective plaintiffs in the several causes now before us, paid the city taxes here sought to be recovered to the county tax collector. Conformably with the provisions of section 3819, supra, the payments were made under written protest and these consolidated actions to recover the same were respectively commenced within six months thereafter. In order to preclude any uncertainty in the matter, it is well to here state that inasmuch as the alleged illegality in the taxes sought to be recovered arose out of asserted excessive assessments, the several taxpayers prior to suit unsuccessfully had taken the required preliminary precaution of challenging the same before the board of supervisors sitting as a board of equalization.

As stated, these several actions were commenced under section 3819, supra. No claim or demand for payment (other than the objection before the board of equalization and the written protest at the time of payment) was filed by any of the plaintiffs prior to suit. Undoubtedly, because section 3819, which authorizes an action to recover a tax based on an excessive assessment, contains no requirement for the filing of a claim prior to suit. After answer filed, the defendant city moved for and procured judgment on the pleadings in each cause on the ground that section 376 of its charter required the filing and rejection of a demand for payment as a prerequisite to suit "on any claim for money or damages". These consolidated appeals followed. While the several causes are at issue as to the defendant county, the trials thereof are awaiting disposition of these appeals in order to avoid the possibility of duplicate trials.

[1, 2] In support of the judgments in its favor, the city urges, among other things, that while the provisions of section 342 of the charter and the above-mentioned ordinance have generally adopted and committed it to the system of county taxation and refund, nevertheless, under the provisions of section 2 of the charter, supra, its "right and power * * * to transfer or consolidate functions of the city government to or with appropriate functions of the * * * county government" was at all times "subject to the restrictions in this charter contained". Hence, it is argued that the transfer or consolidation of the taxing function, which necessarily includes the refund procedure (Hellman v. City of Los Angeles, 147 Cal. 653, 655, 82 P. 313; Keyes v. San Francisco, 177 Cal. 313, 323, 173 P. 475), was limited by and subject to the restriction contained in section 376 of the charter as to the necessity of filing a claim with the city prior to suit for refund. This argument entirely disregards the further and definitely more pertinent provision of section 2 of the charter to the effect that "in the case of any such transfer or consolidation, the provisions of this charter providing for the function of the city government so transferred or consolidated shall be deemed suspended during the continuation of such transfer or consolidation, to the extent that such suspension is made necessary or convenient by said transfer or consolidation and is set forth in the ordinance establishing such transfer or consolidation * * *." The only practical construction of this provision appropriate to our inquiry is the one that suggests the conclusion that any requirement such as is contained in section 376 of the charter for the filing of a claim with the city prior to suit, which might have application were the city itself assessing, collecting and refunding its taxes, is "suspended" during the continuation of the transfer or consolidation of these functions to the extent that such "suspension" is necessary or convenient and is set forth by ordinance. Here, as already shown, the city by ordinance, supra, had authorized refunds of city taxes where refunds of county taxes would be appropriate under the provisions of part III, title IX, of the Political Code wherein, as stated above, are found sections 3804 and 3819, the latter of which contained no requirement for the filing of a claim prior to suit and whose provisions as to written protest and commencement of action within six months after payment of the challenged tax were strictly followed by the plaintiffs herein. In our opinion, as to tax refunds the foregoing definitely indicates a suspension by the city of the claim provision of section 376 of the charter during the continuation of the transfer and consolidation of the taxing and incidental refund function, even if we assume, a point not necessary to here decide, that such general claim provision would be applicable to tax refunds if the city itself were directly exercising such function. Moreover, section 376 appears in that part of the charter entitled "Disbursements and Liabilities" and containing sections 360–376, inclusive. Examination of those several charter sections discloses that they contain many requirements obviously bearing no relation to the refund of taxes assessed and collected by the

county for the city, again assuming that they would otherwise apply. In this connection see Birch v. County of Orange, 186 Cal. 736, 742, 200 P. 647, wherein it was held that the general claims provisions of sections 4075 et seq. of the Political Code (analogous to sections 360–376 of the charter) contained and prescribed requirements peculiar to the handling of general claims against a county and were therefore inapplicable to the refund of county taxes. We shall have more to say about the Birch case at a later point in this opinion.

In support of its contention that the filing of a claim with it prior to suit was indispensable, the city places great reliance on the case of Farmers, etc., Bank v. City of Los Angeles, 151 Cal. 655, 91 P. 795, 797. That case is factually distinguishable from the present one and does not require a conclusion herein that the filing of a claim with the city was an indispensable prerequisite to the commencement of these actions. There, as distinguished from the present case, the city itself had directly provided a complete scheme for the assessment and collection (which, as shown, includes refund) of taxes by *city officers* though, pursuant to charter provision, such scheme was to be "substantially" the same "as the mode and manner" for the collection of state and county taxes. Though patterned after the county plan, the city had there set up its *own* complete taxing system and four of the justices thereupon concluded that under such circumstances the refunding procedure of such city system was subject to and controlled by the charter provision as to the necessity for filing a claim prior to suit to recover money. In so concluding, the majority opinion declared that under the circumstances there prevailing it was "doubtful whether section 3819, Pol.Code, relating to the recovery by suit of taxes paid under protest, is applicable to the city of Los Angeles". True, the decision went on to assume applicability of the section and stated that if applicable it would have to be construed "subject to the provisions of the charter as to claims and demands against the city". This latter holding was unnecessary to the determination of the case then before the court and was dissented to by three of the justices. The cited case has been frequently distinguished. Keyes v. San Francisco, 177 Cal. 313, 318, 322, 173 P. 475; Birch v. County of Orange, 186 Cal. 736, 743, 200 P. 647. Moreover, it was decided prior to the adoption of the present city charter and before the city contracted with the county for the latter to collect its taxes. Here, as already stated, we have not a situation where, as in the cited case, the city itself has directly established its taxing system, though patterned after another, but, rather, a situation where it has *adopted* such other system and has transferred or consolidated its function to or with the county function. Under such circumstances, and by reason of the charter (secs. 2 and 342) and ordinance provisions, supra, it must be held to have adopted the refund procedure of the county taxing system unimpaired by the general claim provision of its charter.

[3-5] Additional support for this conclusion is found in the established principle of statutory construction to the effect that a special statute dealing expressly with a particular subject controls and takes priority over a general statute. Where a statute provides a special remedy for use in specified cases, a party seeking the remedy is entitled to look to the special statute for a definition of his rights, and a condition not named in the statute need not be satisfied. Section 3819, under which these actions were brought, deals expressly and specifically with the refund and recovery of taxes paid under an asserted excessive assessment. The remedy there afforded is conditioned solely and only upon payment of the tax under written protest and commencement of action within six months thereafter. No requirement is therein contained for the filing of a claim prior to suit and the city having adopted the provisions of this special statute should not, under all the circumstances here present, be permitted to alter or enlarge them by interpolating therein the requirement of its charter provision having to do with claims generally. If a taxpayer, after paying his taxes, must prepare and file a claim and wait for it to be considered and rejected before he can sue, obviously he is not accorded the full right given by section 3819 of bringing suit at any time within six months after payment.

The principle now under discussion was given application in Birch v. County of Orange, 186 Cal. 736, 743, 200 P. 647, 650, where, as already indicated, in an action brought under section 3819 to recover county taxes based on an alleged excessive assessment and paid under written protest, without prior claim, it was held that section 4075 of the same code, providing generally for the presentation of claims and demands to boards of supervisors, was without application. Among other things, it was there declared that:

> "Section 3819, providing for the recovery of taxes paid under protest, under which this action is brought, makes no reference directly or indirectly to any demand upon the board of supervisors, but provides that after the disputed taxes have become payable, and are paid under written protest, the protesting taxpayer may at any time within six months after such payment bring his action against the county. * * *
>
> "If he must first present his claim to the board of supervisors it is plain that he is precluded from bringing suit at 'any time' after payment, and that he could not have the full 6 months after such payment in which to commence his action.
>
> "It was held in Clear Lake W. W. Co. v. Lake County, 45 Cal. 90, under a special statute for recovering damages from a county for property destroyed by a mob, that the limitation of the time to bring action to 6 months negatived any presumption that the Legislature meant to require the claim to be presented to the board of supervisors before suit was begun. * * *
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> "In Western Ranches v. Custer County, (C.C.) 89 F. 577, it was held, under an enactment in Montana similar to section 3819 of our Code, that the statute provided a special remedy as to taxes paid under protest, and that a condition to bringing suit, not named in the statute, was not required, and that therefore the claim did not require presentment before suit."

In supplemental briefs filed pursuant to this court's suggestion, it is urged that as a result of an amendment to section 4075 in 1931 the county procedure now contemplates in all instances that a claim be filed as a condition precedent to the maintenance of a suit against a county, including suits under section 3819 for the refund of taxes whether collected for the county or on behalf of a municipality. In other words, it is contended that by reason of such amendment of section 4075 (the general claims provision applicable to counties) the earlier decision in the Birch case has lost much of its virility. Without attempting to here state the many and divergent arguments advanced upon this proposition, we are satisfied after a thorough consideration of the problem that the 1931 amendment of section 4075 may not be given the effect contended therefor. Examination of the cases decided prior to 1931 discloses that everything contained in the 1931 amendment, so far as is here pertinent, was the law at the time the Birch case was decided and that, in effect, the 1931 amendment merely served to place in the statute expressly what had theretofore existed by reason of judicial interpretation. Thus, long before 1931 it was held quite uniformly that under section 4075 as it then read, and under other similar statutes, the filing of a claim was a condition precedent to bringing suit on all claims, unless by virtue of some special statute, such as section 3819, the general section did not apply. McCann v. Sierra County, 7 Cal. 121; People v. Supervisors, 28 Cal. 429, 430; Alden v. County of Alameda, 43 Cal. 270; Rhoda v. Alameda County, 52 Cal. 350; Arbios v. County of San Bernardino, 110 Cal. 553, 42 P. 1080; City of Los Angeles v. Los Angeles County, 9 Cal.2d 624, 628, 72 P.2d 138, 113 A.L.R. 370; sec. 4075, supra, before the 1931 amendment. We cannot, therefore, accede to the proposition that the 1931 amendment of section 4075 abrogated the rule of the Birch case. As matter of fact, as we shall presently show, the reasons which led to the decision in the Birch case are equally compelling since the 1931 amendment of section 4075.

[6] As stated earlier in this opinion, the legislature (prior to a 1939 amendment hereinafter discussed) had provided two distinct and cumulative methods or remedies for the refund and recovery of taxes. One of these (sec. 3804, Pol.Code) has been frequently referred to as an administrative remedy by which, *after the filing of a verified claim,* the appropriate authorities may, without court sanction, direct and pay a refund of taxes. The second distinct and cumulative remedy was that provided by section 3819 of the same code (under which these actions were brought) and may be referred to as the judicial or court remedy. Under the latter remedy it was only necessary to pay the tax *under protest* and sue within *six months* to recover the same. No claim was required to be filed and under the established principles mentioned earlier in this opinion this special statute must be held to prevail over a general claims statute such as 4075. Particularly, when it is noted that the tax collection and refund provisions appeared in part 3, title 9 of the Political Code entitled "Revenue" which

presented a complete scheme of property tax administration, covering every detail of assessment, equalization, levy, collection and remedies both of the taxpayer and the taxing body—while section 4075 appears in part 4, title 2, having to do with claims generally against a county and makes no express mention of tax claims elsewhere completely covered. Moreover, much of the language of sections 4074–4076, inclusive, is inappropriate and inapplicable to tax claims.

[7] Recurring to our statement that the reasons underlying the Birch decision are as potent since the 1931 amendment of section 4075, we need only briefly set them forth as follows: (1) The taxation procedure (collection and refund) set out elsewhere than in section 4075 completely and adequately covered the subject, including the filing of a claim when appropriate (sec. 3804); (2) the provisions of section 4075 as to itemization, etc., of claims are not particular which would seem to relate to tax claims; (3) if the taxpayer, proceeding under section 3819 (which required no claim), must file a claim under section 4075 and await action thereon, he is denied the full right given him by section 3819 of suing *at any time within six months after payment;* (4) the filing of a claim is an idle act when the assessment already has been challenged before the board of supervisors sitting as a board of equalization and the tax has been paid under protest—these steps adequately serving the only purpose of a claim, viz., to notify the governmental entity of the challenge to the tax; and (5) the fact that the remedy provided by section 3804 expressly required a prior claim, while section 3819 contained no such requirement, is indicative of a legislative intent to afford a distinct and cumulative remedy for the recovery of a tax without filing a prior claim therefor—the only essentials being payment under protest and suit within six months thereafter. As stated, these five reasons or grounds advanced in the Birch decision in 1921 are equally persuasive today and together with the fact that section 3819 is special in character and should therefore under settled principles govern a general statute such as section 4075, point indisputably to the conclusion that the latter section is without application to these several causes.

[8] This conclusion finds further support in the fact that section 3819 was amended in 1937, subsequent to both the Birch decision and the amendment of section 4075, but no attempt was then made to bring it into line with or to subordinate it to the latter section. Moreover, in 1939 the legislature repealed the two special statutes (secs. 3804 and 3819) having to do with the recovery of taxes and included their counterparts in the new Revenue and Taxation Code (Stats. 1939, p. 1274, secs. 5096–5102 and 5136–5140), again without any requirement for a claim prior to suit in the counterpart of the former section 3819. This is strongly indicative of a legislative intention that in cases of this character the *special* remedy for the recovery of taxes is to be free of any requirement contained in section 4075 for the prior filing of a claim. Any other conclusion would deprive the taxpayer of his right to rely exclusively on the provisions of the statute affording him his remedy and would necessitate a search of all other statutes and codes for possible pitfalls with respect to such remedy.

In our disposition of these causes we have examined the many briefs of the parties and those of amici curiae. While we may not have specifically referred herein to all of the arguments advanced, we have carefully considered them and are satisfied that what we have said adequately disposes of the causes.

The judgments are and each of them is reversed with directions to the trial court to proceed with the trials of the several causes.

We concur: EDMONDS, J.; PETERS, Justice pro tem.; PULLEN, Justice pro tem.

CURTIS, Justice (dissenting).

I dissent.

The county tax refund procedure, as mentioned in the majority opinion, was prescribed by the general law at the time these actions were commenced and provided two distinct, and in certain instances cumulative, remedies for the refund and recovery of taxes, sections 3804 and 3819 of the Political Code. With the remedy afforded by section 3804, which in express terms calls for the filing of a verified claim, we are not here concerned. Plaintiffs elected to seek relief in the manner specified in section 3819, paying the tax under protest and thereafter filing the present actions for its recovery. Concededly they filed no claim or demand for refund with either the city council or the board of supervisors. Although this procedure satisfied the express demands stated in section 3819, it failed to take note of the further requirement found in section 4075 of the Political Code for presentation of a claim to the board of supervisors before the bringing of any action thereon. The question, therefore, is whether compliance with the claim requirement of section 4075 is a condition precedent to maintenance of an action for tax refund grounded upon section 3819.

In the case of Birch v. County of Orange, 186 Cal. 736, 200 P. 647, decided in 1921, it was contended by the county, but without success, that under the general county system no suit for refund based upon section 3819 could be maintained unless a claim had been filed. The county relied upon section 4075 of the Political Code as then in force, but at that time said section did not require the filing of a claim with the board of supervisors as a prerequisite to institution of an action against the county. In 1931, however, which was after the decision in the Birch case and prior to the filing of the present actions, section 4075 was amended in such a manner as to expressly provide that all claims against the county must be filed with the board of supervisors before suit may be instituted thereon. The Birch case was properly decided under the law as it then stood, but it cannot control the decisions in the present actions, which were commenced subsequent to the change in the statute.

There is no escape from the conclusion that at all times since the amendment of section 4075 the filing of a claim has been a prerequisite to maintenance of an action under section 3819. This pronouncement could be supported by tracing the history and effect of claims statutes in force in this state, and by reviewing the numerous cases construing such statutes. See, for example, McCann v. Sierra County, 7 Cal. 121; People v. Supervisors, 28 Cal. 429, 430; Alden v. County of Alameda, 43 Cal. 270; Rhoda v. Alameda County, 52 Cal. 350; Arbios v. County of San Bernardino, 110 Cal. 553, 42 P. 1080; Bancroft v. City of San Diego, 120 Cal. 432, 52 P. 712; Farmers, etc., Bank v. City of Los Angeles, supra; Keyes v. San Francisco, 177 Cal. 313, 173 P. 475; Western Salt Co. v. City of San Diego, 181 Cal. 696, 186 P. 345; Birch v. County of Orange, supra; City of Los Angeles v. County of Los Angeles, 9 Cal.2d 624, 72 P.2d 138, 113 A.L.R. 370; 7 Cal.Jur. p. 549; Thiel D. Co. v. Tuolumne County, 37 Cal.App. 423, 173 P. 1120; Rhoda v. County of Alameda, 134 Cal.App. 726, 26 P.2d 691; Johnson v. City of Glendale, 12 Cal.App.2d 389, 55 P.2d 580.

A digest of these authorities would serve no purpose but to add to the length of this dissent. My conclusion herein as to the effect of the amendment to section 4075 may be based upon what I regard as the clear and unambiguous meaning of the wording thereof. Regardless of the proper construction and application of the statute prior to this amendment, or the extent to which the amendment may have been intended to alter the former rule, its plain language admits of but one interpretation, and that is that the filing of a claim is a condition precedent to maintenance of suit thereon.

As stated in the amendment, which comprises a separate paragraph appended to the former section: "All claims against any county or against any public officer in his official capacity payable out of any public fund under the control of the board of supervisors, whether such claim be founded upon contract, express or implied, or upon any act or omission of the county or any officer or employee thereof, or of any district or public entity the funds of which are controlled by the board of supervisors, or of any officer or employee of any such district or public entity, shall be presented to the board of supervisors as herein provided before any suit may be brought on any such claim, and no suit shall be brought on any such claim until said claim has been presented as herein provided and rejected in whole or in part. In presenting any claim not founded upon contract full details as to the nature of the claim * * * shall be stated * * * and in all other respects such claims shall be presented and acted upon in the same manner as claims founded upon contracts."

The statute expressly provides in clear and unambiguous terms that "no suit shall be brought on any such claim [that is, a claim against the county] until said claim has been presented as herein provided". A court could not, under the guise of judicial construction, limit such language by holding that certain classes of suits might be filed without the prior filing of a claim, even though that might appear from a judicial viewpoint to be the more reasonable mode of procedure. It would be difficult to conceive how the legislature could possibly have made a broader provision with reference to the necessity of filing a claim prior to the institution of any action against the county.

The argument that section 3819 is a special statute dealing only with the recovery of taxes illegally paid while section 4075 is a general statute applying generally to claims against the county, and therefore the special statute prevails over the general statute, is effectively answered by the decision of this court in the case of Farmers, etc., Bank v. City of Los Angeles, supra. In that case it appears that the city by its charter provided that the mode and manner of collecting municipal taxes and enforcing tax liens should be substantially the same as that prescribed by law for the collection of state and county taxes. In rendering its opinion this court assumed that section 3819 was applicable to the city of Los Angeles. Section 4075 did not then require the presentation of a claim to the board of supervisors as a prerequisite to the institution of an action on such claim. But the charter of the city did provide that all claims and demands against the city, except for principal and interest on bonds, should be presented to the city council, and that no suit should be brought upon any such claim until it had been presented "as herein provided and rejected in whole or in part".

This court held that in an action to recover taxes paid under protest under the provisions of section 3819, a complaint that failed to state that a claim had been presented to the city council as provided by the charter of said city did not state facts sufficient to constitute a cause of action, and affirmed the judgment of the trial court holding the complaint fatally deficient for that reason. That case, in respect to the applicability of the law requiring presentation of a claim before suit, is the exact counterpart of the present action. There it was held that the general provisions of the charter, requiring all demands to be presented to the city council before suit, applied to actions brought under section 3819 of the Political Code for the recovery of taxes paid under protest. This is the precise question we have before us in the present action. The decision in that case has never been overruled directly or by implication. It has stood for over thirty years, and must now be regarded as the settled law of this state.

The reason for requiring the presentation of a claim before suit has been well stated by this court in the following language: "While it is true, so far as we have discovered, that the question has never been discussed in connection with a claim for the recovery of taxes paid under protest, we can perceive no material difference between such a claim and claims of the character considered in some of the decisions above cited. Such claims are often settled and paid when presented, and the presumption is that they always will be so paid, if they are just. The policy of the law applies as well to them as to other demands against a city, and the reasons for the rule when applied to such a claim are as cogent as when applied to any other claim. We find in the law no method by which the city can voluntarily refund taxes illegally collected, without the presentation of a claim therefor, and if these provisions of the charter are not applicable, it would follow that the city must in every case be subjected to the costs of a suit, even though the proper officers consider the claim a just and legal one, and are willing to pay the same." Farmers, etc., Bank v. City of Los Angeles, supra, 151 Cal. at page 658, 91 P. at page 796.

I find nothing decided in the Birch case which is inconsistent with this rule when applied to actions brought under section 3819 of the Political Code. There may be certain language in said decision which would give that impression, but a reading of the entire opinion shows conclusively that such is not the case. On the other hand, in the Birch case, the court held that Birch was not required to present his claim to the board of supervisors of the county for the reason that there was no statute or section of the code making the presentation of such a claim a prerequisite to bringing suit thereon. This is apparent from the following statement appearing on page 743 of the opinion in 186 Cal., on page 650 of 200 P., in that case: "Farmers' & Merchants' Bank v. Los Angeles, 151 Cal. 655, 91 P. 795, cited by respondent, was an action brought to recover taxes paid to the city of Los Angeles under protest, and it was there held that the claim should have been presented to the city council before suit was commenced. But that decision was in pursuance of an express provision of the Los Angeles charter that—'No suit shall be brought for any claim for money or damages against the city of Los Angeles

* * * until a demand has been presented as herein provided and rejected in whole or in part. * * *' That action was not brought directly under the state law, but under a similar ordinance of the city of Los Angeles, which, of course, was subject to the limitations of the city charter. Under earlier decisions in this state the same rule was applied in suits against a county, but these decisions were under a statute which expressly required such presentation to be made to the board of supervisors in all cases before action could be maintained. McCann v. Sierra County, 7 Cal. 121; Alden v. Alameda County, 43 Cal. 272; Rhoda v. Alameda County, 52 Cal. 350; Keyes v. San Francisco, 177 Cal. 313, 319, 173 P. 475. We have no such sweeping requirement at the present time which would hold against a reasonable implication under a special statute to the contrary."

The court in speaking of the "sweeping requirement" must have referred to the provision of the city charter of the city of Los Angeles providing for the presentation of claims to the city council before suit may be brought and making such prior presentment a prerequisite to the institution of an action on such claim. As we have indicated above, section 4075 as amended in 1931 of the Political Code is just as "sweeping" in its requirement as was the section of the city charter of Los Angeles considered in the Farmers' & Merchants' Bank case and it was because said section before its amendment contained no such requirement that the court held that Birch could recover without a prior presentation of his claim. That such was the case clearly appears from the following statement in the opinion in the Birch case, at page 742 of 186 Cal., at page 650 of 200 P.: "Section 4075 does not purport to declare what claims shall be presented to the board of supervisors as a prerequisite to bringing suit, but prescribes the manner in which certain claims shall be itemized and presented before the board may pass upon them." That statement was true of said section as then in force, but not after its amendment, as it now expressly declares that: "All claims against any county * * * shall be presented to the board of supervisors * * * and no suit shall be brought on any such claim until said claim has been presented as herein provided." Can it be said with any reason that had this "sweeping requirement" of section 4075 been a part of said section 4075 at the time the Birch case was brought, the decision of the court would not have been different? I think it clearly appears from the facts of that case and the language of the opinion that it would not have been so.

The requirement that claims against the state, a county, or other political division of the state, be filed with the governing body or board charged with the responsibility of paying said claim has become almost the universal practice in this state. Practically all of the city and county charters which have come to the attention of this court contain a section making the filing of a claim a prerequisite to the bringing of an action thereon. Claims against the state must be presented to the state board of control before any suit may be brought thereon against the state. Secs. 667, 688, Pol.Code. The Retail Sales Tax Act requires a taxpayer to file a claim with the state board of equalization as a condition precedent to maintaining a suit to recover sales taxes erroneously collected under said act, notwithstanding the board of equalization may have previously heard and determined the taxpayer's petition for reassessment. Secs. 20, 23 and 31, Retail Sales Tax Act, Stats.1933, p. 2599, as amended, St.1937, p. 2226. Like provisions are contained in the Use Tax Act. Secs. 12, 17 and 25, Stats.1935, p. 1297, as amended, St.1937, pp. 1941, 1942, 1946. The Personal Income Tax Act (Stats.1935, p. 1090, as amended, St.1937, p. 1851), section 20 requires the filing of a claim for any refund of taxes paid under said act before the same may be paid, and a similar provision is to be found in section 27 of the Bank and Corporation Franchise Tax Act. Stats.1929, p. 19, as amended, St. 1937, p. 2342.

It is true that under certain statutes like, for instance, section 3669a of the Political Code, a person claiming that an assessment of the board of equalization is void in whole or in part may pay the state treasurer the taxes assessed against him by the board by reason of said assessment, under protest, and may thereafter sue the treasurer for the amount claimed to be illegally assessed against him without filing any claim therefor with the state treasurer. Apparently it was so provided for the reason that in such cases the verified protest is made to the very officer against whom the suit to recover the protested payment may be instituted and for that reason he is thereby fully informed as to the nature of the taxpayer's claim. But when the taxpayer brings his suit against the state on this same claim he is precluded from recovery unless, before bringing suit, he files with the state board of control his claim under the general section of the code (sec. 688, Pol.Code), which section requires that all claims against the state must be presented to the board of control before suit may be brought thereon. Bekins Van & Storage Co. v. State of California, 135 Cal.App. 738, 741, 28 P.2d 61.

Plaintiffs argue in the present cases that there is no necessity of filing a claim with the board of supervisors after they had filed their written protest with the county tax collector. The same argument could well have been made and probably was made in the Bekins case, and it was answered by the court by pointing out the statute, section 688 of the Political Code, which made it necessary. The difference between the Birch case and the Bekins case is that the court in the former case was of the opinion that the filing of such a claim with the board of supervisors may have been of doubtful value and as there was no provision of law requiring such filing, held that it was not necessary. In the Bekins case, however, the court held that where there was a statute which expressly provided for the filing of a claim before suit, the filing thereof was necessary. The case before us differs from the Birch case as I have heretofore attempted to show, but is precisely like the Bekins case in that section 4075 of the Political Code, like said section 688 of the same code, made the filing of the claim a prerequisite before suit brought. I think it is obvious from the statutes to which I have called attention that it is the general policy of the state to require as a prerequisite to the institution of an action, the presentation of a verified claim to the proper board, charged with the payment thereof.

The majority opinion cites a large number of cases decided by the appellate courts of this state holding that when an action is brought under section 3819 of the Political Code, or a statute similar thereto, it is not a prerequisite that a claim be filed with the board of supervisors or other governing body before suit may be brought on such claim. Practically all of the cases like the Birch case were decided prior to the amendment of section 4075 of the Political Code in 1931, and for that reason are not applicable to the instant action. I think there is no occasion to give any more detailed consideration to these cases and show their inapplicability to any issue before us. A mere reading of them will disclose that fact.

As the complaint in each of these cases failed to state the prior presentation of a claim before action brought, it did not state facts sufficient to constitute a cause of action against either the said county, or the defendant, the city of Los Angeles. The judgment of the trial court in each action should be affirmed.

We concur: GIBSON, C. J.; SHENK, J.

42 Cal.App.2d 130

REIMAN v. MOORE et al.

Civ. 6349.

District Court of Appeal, Third District.
California.

Dec. 28, 1940.

Hearing Denied Feb. 24, 1941.

1. Landlord and tenant 🔑167(8)

Where a building is leased to various tenants between whom there is no privity of contract or interest, control of roof remains with landlord, as respects liability for personal injuries to tenant's invitee.

2. Landlord and tenant 🔑124(1)

Except for purposes of shelter, tenants have no "easement" over roof of leased building as "appurtenant" to their tenancies, unless tenants' rights are extended by agreement with or license from owner of building.

See Words and Phrases, Permanent Edition, for all other definitions of "Appurtenant" and "Easement".

3. Evidence 🔑264

An owner of a 3-story building which had leased second and third floors to lessee as an apartment house, by claiming that, aside from provisions of lease, owner had extended privilege of use of roof for limited purposes to lessee, admitted the reservation of control in owner over roof, as respects owner's liability for injuries sustained by an invitee of a tenant in falling through skylight while assisting in gathering laundry from clothes line which was on roof of building for use of tenants.

4. Landlord and tenant 🔑124(1), 167(8)

Where owner of 3-story building leased second and third floors to lessee as an apartment house and owner permitted tenants to use roof for laundry purposes, and lease, which made no reference to roof, would not have precluded owner from withdrawing or curtailing privilege accorded tenants to use roof, use of roof by tenants was not "appurtenant" to use of apartments but was in nature of a "privilege", for purposes of determining owner's liability for injuries sustained when an invitee of a tenant fell through skylight while assisting in gathering laundry from clothes line which was on roof for use of tenants.

See Words and Phrases, Permanent Edition, for all other definitions of "Privilege".

5. Landlord and tenant 🔑167(8)

Where owner of 3-story building leased second and third floors to lessee as an apartment house, and lease provided that lessee should keep demised premises in repair at his own expense but restricted lessee's obligation concerning repairs to interior of building, and lease made no mention of roof and did not exempt owner from liability for roof conditions, and owner permitted tenants to use roof for laundry purposes but could have withdrawn or curtailed the privilege at any time, control of roof remained in owner as matter of law, as respects owner's liability for injuries sustained when tenant's invitee fell through skylight while assisting in gathering laundry from clothes line which was on roof.

6. Landlord and tenant 🔑164(1), 167(8)

Where landlord retained control over portion of leased premises, landlord was bound to keep such portion in a safe condition for tenants and their invitees and not merely in as good condition as the portion was at time of commencement of tenancy.

7. Landlord and tenant 🔑167(1)

A landlord letting portions of a building to separate tenants and retaining other portions under his control is under responsibility of a general owner of real estate who holds out a general invitation to others to enter upon and use his property, and is bound to see that reasonable care is exercised to have the portion retained by him reasonably safe and fit for uses which he has invited others to make of it.

8. Landlord and tenant 🔑169(11)

In action by tenant's invitee against lessee and owner of apartment house for injuries received when invitee fell through skylight while assisting in gathering laundry from clothes line which was on roof of building for use of tenants, where owner had retained control over roof and permitted tenants to use it for laundry purposes, whether owner exercised reasonable care and kept roof reasonably safe for use of tenants was for jury.

9. Landlord and tenant 🔑169(5, 11)

In action by tenant's invitee against lessee and owner of apartment house for injuries received when invitee fell through skylight while assisting in gathering laundry from clothes line which was on roof of building for use of tenants, where owner had retained control over roof and permitted tenants to use it for laundry purposes, question whether any structure on roof was insecure or dangerous was for jury, and in determining owner's liability jury could consider proximity of skylight opening to doors or entrances generally used by those upon roof.

10. Landlord and tenant 🔑169(11)

In action by tenant's invitee against lessee and owner of apartment house for injuries received when invitee fell through skylight while assisting in gathering laundry from clothes line which was on roof of building for use of tenants, whether invitee was guilty of contributory negligence was for jury.

11. Landlord and tenant 🔑169(8)

In action by tenant's invitee against lessee and owner of apartment house for injuries received when invitee fell through skylight while assisting in gathering laundry from clothes line which was on roof of building for use of tenants, evidence sustained finding against claim that invitee was contributorily negligent.

12. Appeal and error 🔑1213

Where, upon appeal, a judgment of nonsuit is reversed, the law is established as applicable to the same facts if again found upon another trial of case.

13. Trial ⚿165

In ruling on a motion for nonsuit, trial court must disregard all conflicting evidence and accept as true all evidence offered in support of plaintiff's case and give to plaintiff benefit of any legitimate inference therefrom.

14. Appeal and error ⚿1213

Where at first hearing in trial court a verdict was directed for defendants upon plaintiff's opening statement and plaintiff appealed from judgment of dismissal, and District Court of Appeal reversed judgment and granted a new trial, and upon second trial case was submitted on merits and jury found the same facts as those presented in plaintiff's opening statement and returned verdict for plaintiff, doctrine of "law of the case" was applicable on defendants' appeal from judgment for plaintiff.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case".

◆

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Betty Reiman, etc., against Lutie Hineline Moore and others for personal injuries. From a judgment for plaintiff, defendant Stockton Realty Company, Limited, appeals.

Affirmed.

James C. Nichols, Gilbert L. Jones, Tom B. Quinn, Jones & Quinn, Jack J. Miller, and Levinsky & Jones, all of Stockton, for appellant.

Gumpert & Mazzera and C. H. Hogan, all of Stockton, for respondent.

PARKER, Justice, pro tem.

The case was before the court at an earlier stage and the opinion of the court on that proceeding is found in 30 Cal.App. 2d 306, 86 P.2d 156. We mention this at the outset, as reference will hereinafter be made thereto with relation to the law of the case as the rule may apply.

The case was tried before a jury and the judgment followed a verdict in favor of the plaintiff.

On this appeal no complaint is made as to any of the rulings in the trial court nor is any fault found in the instructions to the jury. The sole claim is that, accepting the facts as presented by the plaintiff, the appellant was and is entitled to judgment in its favor.

We now refer to the earlier opinion, as cited, for a general statement of the case, supplementing the same in analyzing and discussing the separate points urged upon this appeal.

The appellant Stockton Realty Company is the owner of a certain building in the city of Stockton, being a building three stories in height. The lower or street floor is used for business purposes. The second and third floors constitute an apartment house, having a separate street entrance and individual street number. The upper floors are leased to one Moore, codefendant, against whom no judgment was rendered and who is not before the court on this appeal. Merely for the sake of accuracy the fact is that Moore is the tenant in possession under an assignment of the original lease. Inasmuch as no point is made on this phase of the case our reference to Moore hereinafter will be as tenant, under the terms of the original lease.

The pertinent portions of the lease may be here noted. The premises leased are designated as "That certain Apartment House Building known as No. 316 N. California St., Stockton, California." It may be here noted that this description is incorrect, inasmuch as the entire building was not covered by this lease; it being admitted that tenancy of the ground floor was under separate leases to parties other than the lessee of the apartment house. A conceded interpretation of the lease is that the premises demised embraced only that portion of the building used for apartment house purposes. Lessees agree that they are familiar with the condition of the building and accept it in such condition; that they will use the same as and for an apartment house with the usual privilege of renting apartments in said building; that the lessees will and shall keep the demised premises in good repair, at their own cost and expense, and if any repairs are required to be made to either plumbing, electrical installation or interior of said building said repairs shall be made at the sole expense of lessees; that the lessees will not and shall not make any alterations, changes or additions in or to the herein demised premises, or any part or portion thereof, without the written consent of the lessor first had and obtained.

On the roof of the building was located a wash room, with an entrance out on the roof, which entrance was a doorway on which was hung a screen door opening out.

On the roof immediately in front of the screen door and approximately five feet therefrom was a skylight. This skylight appears to have been the ordinary roof type, three feet wide and four feet long. There was a twelve-inch baseboard and above this were four panes of glass, each seventeen by twenty-eight inches in size, placed on a slope. The area on the roof immediately adjacent to the wash house was used by all occupants of apartments on the floors below as a place for hanging out laundry, and clothes lines were maintained thereon for that purpose.

One of the tenants or occupants of a rented apartment was a Mrs. Green. This lady had become ill and had been confined to a hospital. As she was planning to return to her apartment she had requested certain members of her family to clean up her apartment and have it in readiness for her. Incident to this was the cleaning of the linen and other effects of Mrs. Green. The minor plaintiff herein was a relative of Mrs. Green and she was of the age of fourteen years. Accompanied by her cousin she took part in the preparations attending the homecoming of Mrs. Green. The clothes had been washed and hung out on the line and the plaintiff and her cousin, Leah Wyatt, a girl of sixteen years, went on to the roof to take the wash from the line. The Wyatt girl took the clothes off the line, placing them in plaintiff's arms as they stripped the line. When the clothes were thus gathered the plan was to take them downstairs. Accordingly, Miss Wyatt went ahead to open the doors and the plaintiff followed with the clothes. As the door of the wash room opened out it was necessary for plaintiff to step back to permit the door to swing and in so doing her heel struck against some object which tripped her and she fell backward against the skylight. The skylight glass was not strong enough to sustain or break the weight and plaintiff fell through to the floor below, sustaining the injuries complained of.

The first point presented under this statement of fact is whether or not, under the lease, or otherwise, the landlord had control over the premises whereon the accident occurred, and if so, what were his duties to the plaintiff, an invitee.

[1] There can be no question but that the roof of a building is common to the entire building and where that building is leased to various tenants between whom there is no privity of contract or interest the control of the roof must remain with the landlord.

[2] The primary purpose of the roof of a building is to shelter it and all of its occupants, and consequently, other than for purposes of shelter the tenants are given no easement thereover, as appurtenant to their tenancies, unless their rights be extended by agreement with or license from the owner. Smelser v. Deutsche Evangelische, etc., 88 Cal.App. 469, 474, 263 P. 838. Indeed, appellants do not question this principle of law but contend that under the lease and the conduct of the parties thereunder at least that portion of the roof upon which the apartment house patrons were privileged to hang their laundry was embraced within the demised premises, and as such as under the exclusive control of the lessee.

By the terms of the lease the demised premises were described as "those certain premises commonly known as, and designated as, that certain apartment house building known as No. 316 N. California St., Stockton, California." The entire building was not demised. All parties are in accord to the effect that only part of the building affected was embraced within that portion used as an apartment house.

The lease further restricted the obligation of the lessee as to repairs to the interior of the building and specifically exempted the lessor from liability on account of the condition of stairways or sidewalks. No mention was made of the roof and no rights or privilege, by express agreement or by implication were granted the lessee in or to any portion of the roof nor was any exemption from liability reserved in the lessor for or on account of roof conditions or repairs.

[3] Throughout the case and on this appeal the right accorded the lessee and her patrons to hang out wash on the roof or use the roof in any way or manner are referred to and described as a privilege and permissive use. Permission implies control existing somewhere and a right existing solely through permission must rest on the consent of the control. When the appellants not only admit but apparently urge the point that, aside and separate from the provisions of the lease, the lessor had extended the privilege of the roof for limited purposes to the lessee, it would seem a plain admission of the reserved control in the lessor over all portions of the roof.

[4] Let us assume that at any period of the lease the owner desired to withdraw the privilege or to curtail its enjoyment through the lease of the roof for display or advertising purposes. Surely no provision in the lease would operate against his right nor could the lessee of the apartment house premises complain. The most that can be said of the arrangement is that the use of the roof by the apartment house patrons was not appurtenant to the use of the apartments but more in the nature of a privilege, beneficial to all parties concerned. It tended to make more salable, as it were, the apartments and thereby more desirable the premises for apartment house purposes. It was equally of benefit to the owner of the building, the operator of the apartment house, and the individual patrons. And, to repeat, it was of vast importance to the tenants of the premises on the ground floor, that a roof be maintained.

We might concede that the lessor, having granted the privilege, might be free from any liability arising from a defect in any of the particular portions devoted exclusively to the user of the tenants; for example, if the clothesline posts were infirm and fell down or if the walk immediately under the clothesline was defective. Any negligence chargeable in such cases might rest upon the apartment house operator, although we concede this merely for purposes of narrowing the discussion. It would seem difficult to picture a situation where an owner leases a portion of a building to one tenant and then says to the tenant, in effect: "In addition to the premises leased you may have the privilege of using the roof, for purposes incidental to your tenancy, but you must assume the complete responsibility over the roof; if the roof collapses or becomes no longer a shelter, I will repair it for the benefit of the remaining tenants but will permit it to remain in its unusuable or unsafe condition, as far as you are concerned." A prejudiced or bigoted eye might read into a selected collation of cases something thought to be absurd, but we doubt if he would go that far.

[5] As a question of law we hold that the control of the roof remained in the landlord and in support of our conclusion we refer, without quotation, to the following cases: O. J. Gude Co. v. Farley, 28 Misc. 184, 58 N.Y.S. 1036; Alfred Peats Co. v. Bradley, 166 App.Div. 267, 151 N.Y.S. 602; MacNair v. Ames, 29 R.I. 45, 68 A. 950, 16 Ann.Cas. 1208; Perry v. Levy, 87 N.J.L. 670, 94 A. 569; Leuch v. Dessert, 137 Wash. 293, 242 P. 14; Spore v. Washington, 96 Cal.App. 345, 274 P. 407.

[6, 7] With this point determined we pass then to inquire what were the duties of the landlord in the case before us. The answer is found in the law already announced on the prior appeal of the instant case: "It was the duty of the landlord to keep the particular portion of the premises under his control in a safe condition and not merely in as good condition as the same were at the time of the commencement of the tenancy. * * * 'A landlord letting portions of a building to separate tenants, retaining other portions under his control, is under the responsibility of a general owner of real estate who holds out a general invitation to others to enter upon and use his property, and is bound to see that reasonable care is exercised to have the portion thus retained by him reasonably safe and fit for the uses which he has invited others to make of them.'" Reiman v. Moore, 30 Cal.App.2d 306, 86 P.2d 156, 158.

[8, 9] The terms "reasonably safe" and "reasonable care" become questions of fact inasmuch as the test of reasonableness is always relative to time, place and circumstance. However, somewhat in amplification, it might be conceded that if there were an open, unprotected hole upon the roof in this case, there would be little doubt of negligence, almost as a matter of law. From this state of complete lack of care to a condition of insured security is a wide range of condition. The opening might be covered with cellophane or transparent paper or might be encased in steel, or, as in the instant case, the protective material might have been a thin glass, insufficient to sustain any weight or pressure. Just how far any structure might have been insecure or dangerous was a question for the jury. And the jury could consider the proximity of the opening to any door or entrance generally used by those upon the roof.

There being no complaint as to any instruction given or refused we assume that the jury were fully and fairly instructed on this phase of the case, and the implied finding of the jury was that defendant had not fulfilled the duty of care chargeable to it. There was evidence that the defendant owner knew or in the exercise of reasonable prudence should have known the condition of the premises and also evidence supporting the conclusion that the plaintiff was unfamiliar with the premises.

[10, 11] There remains then but one phase of the case, namely, contributory negligence. Appellants contend that the facts disclose negligence on the part of plaintiff, as a matter of law, and that such negligence was a contributing factor in the injuries sustained.

The main argument in support of this contention is the claim that the danger was patent and readily observable by whomsoever had occasion to visit the roof. It might be true that the skylight was visible, but it does not follow therefrom that the danger was patent. One might lean in confidence against what appeared to be a well-constructed brick wall, and the fact that the wall was a cleverly constructed papier mache affair would not be patent or discernible without the aid of mechanical tests. And so here, one unfamiliar with the premises would not be presumed to see danger lurking in a construction obviously designed for safety under a duty of protection. The act of plaintiff on being on the roof was not negligent; gathering in the wash likewise was in the exercise of common prudence. The act of stepping back to permit entry through the open door was not negligence, and surely the accidental fall could not be so classed. In any event, whatever characterization may be given the acts of plaintiff under all of the circumstances was for the jury to determine, and we hold that there was sufficient evidence to sustain the finding against the claim of negligence on the part of plaintiff.

There is an important branch of the case that we have reserved and that is the rule of law of the case. Again we refer to the former decision in the instant case reported in 30 Cal.App.2d at page 306, 86 P.2d 156. It will be seen from a reading of the opinion that at the first hearing in the trial court a verdict was directed in favor of defendants upon the opening statement of plaintiff, and it was from that judgment the appeal was taken.

Appellants here contend that the doctrine of law of the case has no application in such a case, arguing the analogy between such a situation and a judgment of nonsuit. To say that the rule has no application is too broad a statement, even in the case of a nonsuit. It is true that there is perhaps a much different application of the rule in such cases, but it certainly does apply.

[12, 13] Where, upon appeal, a judgment of nonsuit is reversed, the law is established as applicable to the same facts, if again found. However, when a case wherein a nonsuit had been granted goes to judgment on its merits the same facts may result in different proof, having in mind the original distinction between evidence and proof. In ruling on a motion for nonsuit the court must disregard all conflicting evidence and accept as true all evidence offered in support of plaintiff's case and give to plaintiff the benefit of any legitimate inference therefrom.

[14] Upon a submission of the same state of facts on the merits the same rule would not apply at the outset; that is, the court, freed from the restrictions outlined, could draw different conclusions, and in that event the law of the case could or could not apply to a different set of facts. But if the trial court after resolving the conflicts and indulging the optional inferences, found the same facts as had been theretofore presented on the nonsuit ruling the law of the case would have been definitely established. And so here. The Appellate Court practically has told respondent that if she went back to the trial court and established the same facts as set forth in the opening statement, and those facts were found in her favor, she had then established her cause of action. She did go back, and the verdict of the jury, under proper instructions, finds the facts as she has alleged them. Then, upon a second appeal, to state that these facts do not support the verdict would be to practically discard the rule once and for all. This we decline to do.

The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

42 Cal.App.2d 99

SANBORN v. PACIFIC MUT. LIFE INS. CO.

Civ. 11349.

District Court of Appeal, First District,
Division 1, California.
Dec. 27, 1940.

Hearing Denied Feb. 24, 1941.

1. Judgment 🔑564(1)

The decision of appellate court of last resort is the final adjudication of issues involved on appeal, and unless issue is determined contrary to order as originally made by trial court, the order stands.

2. Insurance 🔑679

Where rehabilitation and reinsurance agreement provided that new insurance company did not assume liability for the disability benefits provided in noncancellable health policies issued by old company unless notice of claim was filed within 20 days after effective date of agreement, appeals to California and United States Supreme Courts from order approving agreement did not delay effective date designated in agreement, and hence insured, filing notice of claim after such effective date and before affirmance by United States Supreme Court, could not recover from new company the disability benefits provided in the policies as originally issued. St.1935, p. 540, § 1010 et seq.

3. Appeal and error 🔑893(1)
Courts 🔑380

Appeals to California and United States Supreme Courts are not trials de novo.

4. Appeal and error 🔑1

An appeal is not a "trial," but simply a method given litigants of rectifying errors, legal or factual, that may have occurred at a preceding hearing generally referred to as a trial.

See Words and Phrases, Permanent Edition, for all other definitions of "Trial".

5. Courts 🔑206(1)

An "appellate court" is a reviewing court, and, except in special cases where original jurisdiction is conferred, is not a "trial court" or court of first instance.

See Words and Phrases, Permanent Edition, for all other definitions of "Appellate Court" and "Trial Court".

6. Constitutional law 🔑67

The jurisdiction of appellate court is generally confined to correction of errors committed in trial court, and appellate tribunal's power cannot be extended beyond jurisdiction conferred by Constitution, unless subsequent constitutional provision is made to cover such case. Const. art. 6, § 4.

7. Insurance 🔑679

Where duty of appellate court on appeal from order approving rehabilitation and reinsurance agreement providing that new insurance company did not assume liability for disability benefits on noncancellable health policies issued by old company unless notice of claim was filed within 20 days after effective date of agreement was to approve or disapprove the agreement, appellate court affirming order could not rewrite agreement by substituting a different date of effectiveness. St.1935, p. 540, § 1010 et seq.

8. Appeal and error 🔑882(3)

An insured trying action against new insurance company on theory that date designated in rehabilitation and reinsurance agreement was effective date of such agreement, which provided that new company did not assume liability for disability benefits on noncancellable health policies issued by old company unless notice of claim was filed within 20 days after effective date of agreement, could not on appeal change his position and assert that another date, subsequent to the date on which insured filed notice of claim, was effective date of agreement. St. 1935, p. 540, § 1010 et seq.

9. Insurance 🔑683

Where noncancellable health policies issued by old insurance company provided for indemnity against disability resulting in continuous total loss of business time, and rehabilitation and reinsurance agreement provided that new insurance company did not assume liability for disability benefits unless disability commenced prior to effective date of agreement, and insured was disabled from angina pectoris and subsequently returned to full-time practice of law prior to effective date of agreement, and disability resulting from cerebral hemorrhage suffered by insured after effective date of agreement was entirely new, disability resulting from the hemorrhage was not a prolongation of disability resulting from angina pectoris, and hence insured could not recover from new company benefits for disability resulting from hemorrhage. St.1935, p. 540, § 1010 et seq.

Appeal from Superior Court, City and County of San Francisco; Pat R. Parker, Judge.

Action by Harvey Hackett Sanborn against the Pacific Mutual Life Insurance Company to recover disability indemnity under health insurance policies. From a judgment for the defendant, the plaintiff appeals.

Affirmed.

Hearing denied; EDMONDS and CARTER, JJ., not participating.

Courtney L. Moore, of San Francisco, for appellant.

Pillsbury, Madison & Sutro and Norbert Korte, all of San Francisco, for respondent.

WARD, Justice.

This is an appeal from a judgment for defendant company in an action to recover disability indemnity under three health insurance policies. The subject of dispute is the difference between disability indemnity at the full rate, as provided in the policies as originally issued by The Pacific Mutual Life Insurance Company of California, and that at the limited rate of twenty per cent as paid by respondent, the successor to that company.

In 1921, The Pacific Mutual Life Insurance Company of California, hereinafter called the original or old company, issued their noncancellable income insurance policies, referred to as "non-can" policies, to plaintiff, Harvey Hackett Sanborn. Among other things they provided for indemnity "against disability * * * resulting from sickness; such disability * * * to be such as will result in continuous total loss of business time". Provision was also made that in case of such disability "the company will pay indemnity * * * during the continuance of disability as defined above until such time as the Insured engages in a gainful occupation".

In January, 1934, appellant suffered an attack of angina pectoris, combined with arteriosclerosis. Upon proper notification in accordance with the terms of the policies, the insurer paid appellant indemnity of $500 a month until March 7, 1935, at which time, due to financial reverses suffered by him, and because his law partner had become ill and was unable to carry on their law practice appellant went back to work. At this time the original company under a "Receipt and Release" agreed to pay him the sum of $1,500 in full settlement of monthly benefits that might otherwise accrue prior to August 24, 1935. While appellant was engaged in his profession, on July 22, 1936, the insurance commissioner of the state of California, as conservator of all the properties of the old company, entered into a rehabilitation and reinsurance agreement with the Pacific Mutual Life Insurance Company, hereinafter called the new company. Insurance Code, div. 1, pt. 2, ch. 1, art. 14, § 1010 et seq., St.1935, p. 540 et seq. In connection with policies of the type held by appellant the agreement provided that the new company "does not assume any liability for monthly benefits on Non-Can Policies reinsured hereunder unless the disability commenced prior to the effective date of this agreement and notice of claim was filed in accordance with the terms of the policy, and in no event later than twenty (20) days after the effective date of this agreement, except to the extent of the following percentages of the monthly disability benefits originally provided under said policies * * *".

After appellant's return to work no disability payments were claimed and none were made. In January of 1938, appellant suffered a "cerebral hemorrhage, hypertension" and he has not been able to resume work since that time. On February 1, 1938, he notified the new company of his illness and made a claim for disability indemnity. The company declined to pay the full rate as provided in the policies as written by the old company, contending that the disability had not commenced prior to July 22, 1936, and that claim had not been made therefor within twenty days after that date. The new company did, however, pay the limited indemnity of twenty per cent, $100, as provided in the rehabilitation and reinsurance agreement.

In connection with the above agreement, the situation as it existed prior to the rehabilitation of the old company is set forth in Carpenter v. Pacific Mutual Life Ins. Co., 10 Cal.2d 307, 74 P.2d 761, where at pages 336, 329, 331, 332 and 322, at pages 778, 775, 776, 771, respectively, the court said: "The non-can policies were draining the old company to disaster. If any plan of rehabilitation was to succeed it was imperative that the intergrity of the life business be preserved in order to earn profits for the benefit of all concerned, including the non-can policyholders." "Obviously, if an insurance company gets into financial difficulties, something must be done to remedy the situation. Either the company must be liquidated, and its assets distributed to its creditors, thus immeasurably injuring many of its policyholders who are thus deprived of insurance protection, or the business must, if possible, be rehabilitated." "The convention examination disclosed that the old company was fundamentally sound, and that all its reserves were unimpaired, except those pertaining to the non-can policies, as to which there was a deficiency of approximately $23,000,000. The company had intangible assets consisting of good will, going concern value, and an extensive agency organization worth several millions of dollars. All these intangible assets would be lost if the old company were liquidated. The old company was powerless to change the existing non-can policies. The contract and due process clauses prohibited the company from making any changes therein. Const. art. 1, §§ 13, 16. But these prohibitions do not apply to the state acting under its police powers. Obviously, if the agency organization were to be preserved pending court approval of a rehabilitation plan, the business of the old company had to be continued. Faced with these facts the commissioner determined to organize a new company to continue the business pending the approval of a rehabilitation plan. All these steps, after a full hearing, were later approved by the court." "The plan does not require that old company policyholders are compelled to accept the offer of the new company to assume the old company's policies. Each policyholder is given a reasonable time to elect whether to accept or reject the offer."

In this case the following questions arise: What was the effective date of the agreement between the new company and the insurance commissioner as conservator of the old company? Did appellant's present disability commence prior to such date? Was notice of claim filed in accordance with the agreement?

The commissioner, as conservator or liquidator, may enter into rehabilitation agreements subject to the approval of the court. Insurance Code, sec. 1043. The effective date of the agreement herein was designated as "July 22, 1936, at the hour of one o'clock P. M., Pacific Standard Time." Immediately after its execution, an order of approval was inadvertently, but in good faith, made by one of the judges of the superior court of the county of Los Angeles, who was a policyholder in the original company. A second order by another judge was thereafter made on December 4, 1936, in effect the same as the first. The Supreme Court of this state upheld the second order, from which an appeal was taken. Carpenter v. Pacific Mut. Life Ins. Co., supra. In January, 1939, the Supreme Court of the United States took similar action. Neblett v. Carpenter, 305 U.S. 297, 59 S.Ct. 170, 83 L.Ed. 182.

[1, 2] Appellant contends that until such time as the agreement was finally upheld by the United States Supreme Court—the adoption of which date as the "effective date" of the agreement would be of assistance to appellant—the provisions of the old policy prevailed, and that, notice of claim of the later disability having been filed before the date of such affirmance, he is entitled to disability indemnity in accordance with the provisions of the policy as originally written and not as provided in the rehabilitation and reinsurance agreement. It is true that the decision of an appellate court of last resort is a final adjudication of the issues involved on an appeal. Unless an issue is determined contrary to the order as originally made, in whatever form it may be, the order stands. In this case the appellate courts simply affirmed the order of the lower court. That order was an approval of the rehabilitation and reinsuring agreement, which provided, as we have seen, that the effective date thereof was July 22, 1936. The appeals did not delay this effective date, which was necessarily fixed in accordance with the agreement of the parties. While the agreement did not become actually operative until approved by the court, an effective date of December 4, 1936, would be of no benefit to appellant as the notice and claim in connection with his later illness were not filed until long thereafter.

[3-6] Appellant also contends that as long as the appeals were pending the commissioner of insurance could not turn over the properties of the old company to the new company. This contention may have been technically correct, a matter which we do not feel it necessary to pass upon on this appeal for the reason that appeals to the Supreme Court of California and the Supreme Court of the United States are in no sense trials de novo as is sometimes the case under statutory provisions regulating appeals or hearings after trial in certain inferior courts, tribunals, boards or commissions. An appeal is not a trial but simply a method given litigants of rectifying errors, legal or factual, that may have occurred at a preceding hearing generally referred to as a trial. An appellate court is a reviewing court, and (except in special cases where original jurisdiction is conferred upon it) not a trial court or court of first instance. The jurisdiction of an appellate tribunal is generally confined to the correction of errors committed in the trial court, and its power may not be extended beyond the jurisdiction conferred by the Constitution (Pacific Telephone, etc., Co. v. Eshleman, 166 Cal. 640, 137 P. 1119, 50 L.R.A.,N.S., 652, Ann.Cas.1915C, 822; Const. of California, art. VI, sec. 4) unless subsequent constitutional provision is made to cover such case. This has occurred in some instances, notably in Railroad Commission matters (Southern Calif. Edison Co. v. Railroad Commission, 6 Cal.2d 737, 59 P.2d 808), but no such provision applies to appellate jurisdiction in cases involving insolvency and delinquency proceedings of insurance companies. (Insurance Code, Div. 1, Pt. 2, Ch. 1, Art. 14, supra.) Under no conditions is an appellate court permitted to rewrite the terms of a contract. All that was decided on the Carpenter appeals was that the order of the superior court was without reversible error. The appeal having been affirmed, the transaction between the parties is fixed in accordance with the terms of the contract.

[7] In the Carpenter case, referring to the contents of the petition for rehabilitation, also here involved, the court (10 Cal.2d pages 319, 320, 74 P.2d page 769) said: "* * * that it is in the interests of all concerned to preserve the good will, the agency organization, and the going concern value of the old company; that in order to accomplish these ends the commissioner organized the new company and on July 22, 1936, purchased all its stock with $3,000,000 of old company funds, and on the same date transferred to the new company all the other assets of the old company except the stock of the new company and certain described claims; that 'since said July 22, 1936, your petitioner, as conservator, and through the agency and instrumentality of the new company, has continued to carry on and conduct the business and affairs of the old company, and to preserve, so far as possible, its good will, going concern value, and agency organization.'" A number of objections, factual and legal, had been raised by "various persons and groups". When approved by the court, the effective date was not postponed until December 4, 1936. It was the duty of the court to approve or disapprove the agreement as presented. The agreement did not provide that it would become effective on the date of approval or in ten days or at any other time thereafter. The court could not rewrite the agreement by substituting a different date of effectiveness. Of necessity a definite date had to be fixed. If some indefinite time had been designated, changed conditions might not have warranted the acceptance by one or both of the parties of the terms of the agreement, or the amount paid by the new company to the old might not have been acceptable to the parties.

[8] Moreover, the contention that the effective date of the agreement was January 3, 1939, is not available to appellant. His complaint alleges: "That the disability had commenced prior to the effective date of said reinsurance agreement, that is to say, had commenced prior to July 22, 1936." The merits of the case having been tried by each side upon the theory that July 22, 1936, was the effective date of the agreement, and the judgment having been rendered with that date as the basis of the decision, appellant is not permitted upon appeal to substitute some other date, and thereupon urge a reversal; nor, assuming that it could be maintained as the date of actual effectiveness, can an appellate court substitute such date of January 3, 1939. McNeny v. Touchstone, 7 Cal.2d 429, 60 P.2d 986; Wall v. Equitable Life Assur. Soc., 33 Cal.App.2d 112, 91 P.2d 145; Papineau v. Security-First Nat. Bank, 6 Cal.2d 668, 59 P.2d 131. In Ernst v. Searle, 218 Cal. 233, 240, 241, 22 P.2d 715, 718, the court said: "The rule is well settled that the theory upon which a case is tried must be adhered to on appeal. A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but

manifestly unjust to the opposing litigant." If appellant's present theory is correct, he should have pleaded and proven it. Assuming the presentation to the trial court of the opinions on appeal in the Carpenter case, or their introduction in evidence, if such introduction occurred, there is nothing therein proving the effective date of the agreement to be January 3, 1939. The only effect in this respect of such introduction would be the fixing of the dates of the decisions; the opinions afforded no proof of the effective date of the contract.

Up to this point the effective date of the agreement has been considered particularly with reference to the parties thereto, namely, the old company and the new. The approved agreement provided: "Policy holders and policy claimants of the Old Company may elect to accept or reject the reinsurance and assumption hereunder of his policy, contract, or claim at any time within seventy-five (75) days after the entry of the order approving this agreement. The filing with the New Company after the entry of the order of the Court approving the agreement of any claim or proof of loss shall constitute an acceptance of this agreement and a waiver of any right to reject the same. Any policy holder or policy claimant who shall fail to notify the New Company, in writing, of his rejection within said period shall automatically be deemed to have assented to and become bound by this agreement, and entitled to the benefits hereof."

Appellant was officially informed of the provisions of the rehabilitation and reinsurance agreement on December 16, 1936. No notice of rejection was presented by him, although at some indefinite date he communicated to a representative of the defendant company that he "did not consider his reorganization agreement very good" and that he would take them to court if they did not pay claims "that were overdue me under those original contracts".

[9] Appellant points out that there is a distinction between disability and the right to indemnity therefor under a policy. His claim is that under the rehabilitation agreement, where an insured has been disabled and his condition is such that in the exercise of due care for his health he should not return to work, the fact that he does so should not prevent him from claiming that the disability under which he now suffers is no more than a prolongation of the original disability. In other words, that the effect of resuming work is merely to suspend the right to indemnity payments for the period of such resumption. The disability as described in the policies is such "as will result in continuous total loss of business time".

Appellant cites cases holding in effect that an insured may claim total disability and total loss of business time, for which he may recover indemnity, where, notwithstanding he performs a few minor duties of his business, his health is such that in the exercise of due care therefor he should cease business activity entirely. Appellant states his contention in the following manner: "The law does not require absolute helplessness for a person to be totally disabled, but all that the law requires is that the insured must become so ill and suffer from such a disability as renders him unable to perform the substantial and material acts of his business or occupation in the usual and customary way." Fitzgerald v. Globe Indem. Co. of New York, 84 Cal. App. 689, 258 P. 458; Sherman v. Continental Casualty Co., 103 Cal.App. 518, 284 P. 946; Pacific Mut. Life Ins. Co. v. Ringold, 5 Cir., 47 F.2d 738; Wright v. Prudential Ins. Co., 27 Cal.App.2d 195, 80 P.2d 752.

Assuming that a disability had occurred prior to July 22, 1936, as in fact one had, still appellant is not in the same situation as the insured in the above-cited cases. Appellant's lack of health may have hampered him and may have reduced his earning capacity; he may have continued to suffer from his old illness. He could have continued with the $500 a month indemnity payments, but he did not choose to do so. The court found that between March 7, 1935, and January 21, 1938, he was fully able to and did gainfully employ all business time in the practice of his profession; that he did not suffer such disability as resulted in continuous or total or any loss of business time or any disability whatsoever. The evidence is strong enough to support this finding. According to his own testimony, appellant's net income from the practice of law in 1935 was $15,851.10; in 1936, $19,225.87, and in 1937, $22,193.01. In behalf of clients he appeared in many trials and proceedings in the federal and state courts, also before the Railroad Commission and legislative committees. He may not have been able to stand the strain of work as he did when he was younger, but his labor was far beyond the performance of trivial acts (Sherman v. Continental Casualty Co., supra); it was of a continuous and substantial character. His return to work not only suspended the right to indemnity payments, but under the circumstances of this case broke the chain of disability. In Martin v. Postal Union Life Ins. Co., 31 Cal.App.2d 329, 87 P.2d 897, the court had before it a similar policy. At pages 332, 333 of 31 Cal.App.2d, 87 P.2d at pages 898, 899 of its opinion, the court said: "It will be noted that the terms of the insurance policy quoted are exceedingly stringent in effect, in that they provide, in order that one may be considered totally disabled, that he be not only wholly prevented from performing each and every duty pertaining to his occupation, but also 'from attending to any business or any occupation whatsoever.' * * * The fact that the assured received little or no remuneration for the work done is not the controlling factor. The question is: Did he actually, and in a substantial manner, perform the duties of any occupation or business? The answer must obviously be in the affirmative."

The determinative question in this case is not whether appellant was entitled to indemnity during the period in which he actually worked, but whether had he not worked during that period he would have been entitled to full payments in accordance with the terms of the policies prior to the rehabilitation of the company. Upon his return to work, on receipt of the payment of $1,500 by the company, he waived under the first claim of disability all rights to benefits that might have accrued prior to August 24, 1935. The notice of appellant's second illness was presented to the reinsuring company February 1, 1938. No claim was therein made of illness prior to January, 1938, nor is there any claim that the illness complained of was a continuation of a previous illness. The attending physician reported that the sickness was "cerebral hemorrhage, hypertension", contracted on January 21, 1938. The same physician testified that the heart condition causing angina pectoris and the cerebral hemorrhage both evidence arterial degeneration, but answered "Yes" in response to the following question: "And this cerebral hemorrhage that he suffered in 1938, in January, was an entirely new thing, wasn't it?" The witness further testified that it was the cerebral hemorrhage that incapacitated appellant in 1938. The court found: "The aforesaid disability suffered by plaintiff between the 21st day of January, 1938, and the commencement of this action did not commence prior to July 22, 1936, and no claim or notice of claim by reason thereof was filed or given to said Old Company or the defendant herein on or before July 22, 1936, or within twenty days after July 22, 1936." The evidence amply supports the finding. We are precluded from disturbing the judgment. Ives v. Prudential Insurance Co., 12 Cal.App.2d 306, 55 P.2d 273; Dietlin v. General American Life Ins. Co., 4 Cal.2d 336, 49 P.2d 590; Raggio v. Mallory, 10 Cal.2d 723, 76 P.2d 660.

The judgment is affirmed.

We concur: PETERS, P. J.; KNIGHT, J.

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42 Cal.App.2d 139

STETSON et al. v. ORLAND OIL SYNDICATE, Ltd., et al. (DOLAN, Intervener).

Civ. 6458.

District Court of Appeal, Third District. California.

Dec. 28, 1940.

Rehearing Denied Jan. 27, 1941.

1. Mines and minerals 🔑75

Under an oil and gas lease for a term of three years and as long thereafter as oil or gas is produced, with a provision for termination unless the lessee commenced a well within one year or paid a delay rental, each yearly payment after the original three-year term could do no more than extend the term for one year, and even though the lessees commenced a well in the eighth year, the lease terminated at the expiration of such year, where no oil or gas was produced. Civ.Code, § 1945.

2. Mines and minerals 🔑78(3)

Where the lessors in a quiet title action relied on termination of an oil and gas lease by its terms, which gave the lessees the option to commence a well within a specified period or pay a delay rental and entitled them to defer commencement until the last day of the lease, the lessees were not entitled to 90 days' notice of termination and opportunity to remedy any breach.

3. Mines and minerals ⚷78(2)

Arbitration provisions of an oil and gas lease do not preclude the lessors from bringing an action to quiet title on the theory that the lease had terminated by its terms because of nonproduction of oil or gas within the time limited.

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

Action to quiet title by Jean Bryan Stetson and others against the Orland Oil Syndicate, Ltd., etc., and others, wherein Elizabeth M. Dolan intervened. From a judgment for plaintiffs, defendants appeal. Affirmed.

Chas. I. Rosin, of Los Angeles, for appellants.

H. W. McGowan, of Willows, and Morrison, Hohfeld, Foerster, Shuman & Clark and Noel A. Troy, all of San Francisco, for respondents.

PARKER, Justice pro tem, delivered the opinion of the Court.

This was an action wherein plaintiff sought a decree quieting their title in and to certain lands in Tehama county.

The defendants admit title in the plaintiffs to the lands in controversy but claim a leasehold interest therein by virtue of a certain oil and gas lease entered into between the parties.

The trial court found that the lease was terminated prior to the commencement of the action and entered its decree quieting the title in the plaintiffs and further decreeing that the defendants have no interest in or to the property. From this decree defendants prosecute the appeal.

[1] A brief outline of the facts, as gleaned from the transcript before us will suffice to illustrate the points relied on. On the 24th day of March, 1930, the parties executed an oil and gas lease agreement, covering the premises in dispute. The instrument recited that the agreement was for "the sole and only purpose of mining and operating for oil and gas and of laying pipe lines and of building tanks, power stations and structures thereon to produce, save and take care of said products". The term of the lease was three years from the date thereof and as long thereafter as oil or gas or either of them is produced from said land by the lessee. The lease further provided, and it is around this provision that the controversy centers, as follows:

"If no well be commenced on said land on or before the 24th day of March, 1931, this lease shall terminate as to both parties, unless the lessee on or before that date shall pay or tender to the lessor, * * * the sum of Three Hundred forty-two & 50/100 dollars, which shall operate as rental and cover the privilege of deferring the commencement of a well for twelve months from said date. In like manner and upon like payments or tenders, the commencement of a well may be further deferred for like periods of the same number of months successively."

Pursuant to the instrument, the lessees entered upon the property. No well was commenced prior to March 24, 1931, and lessees availed themselves of the deferment privilege by paying the amount specified. The same procedure followed through the remaining two years of the lease.

On March 31, 1933, the date on which the lease expired, the lessees remained in possession and again paid the deferment money. From year to year this practice was followed until, at some date prior to March 24, 1938, the lessees became aware, after negotiations to that end had been initiated, that lessors would no longer accept delay money. On March 21, 1938, the lessees, aware that no deferment was obtainable, undertook the commencement of a well; that is, it is their contention that they did. The trial court found that the activities going to make up this claimed commencement were mere pretenses and not bona fide and thus inferentially found that no well had been commenced. The evidence at the trial was confined to this one point, namely, the good faith of the lessees in this so-called commencement, and the finding being as indicated is the main point of the appeal. From a careful reading of the scant testimony on the subject, we conclude that the trial court's finding has abundant support in the record and we refrain from any analysis for the reason that we consider the issues immaterial.

The mere commencement of a well, or the failure to commence a well, is not all-controlling.

Adopting, for the sake of argument, the contention of appellant that the acceptance of moneys from year to year continued the conditions of the lease, it could not extend the term thereof beyond each year. Even under the original lease, there was a choice of action, either to commence a well or to pay the delay money. If a well were commenced no delay money was due or payable or no deferment privilege was to be exercised. But the commencement of a well was merely one condition of the lease that in nowise affected the term of years constituting the life of the agreement. Under the lease appellants could have commenced a dozen wells and if at the expiration of three years no oil or gas was produced the lease terminated. The year to year deferment did not change this situation. The most favorable view would hold that the yearly payments, after the expiration of the three-year period, merely gave the lessees a term of one year additional upon payment of the delay money. Civ. Code, § 1945.

The whole effect of this extension, tying into the lease terms and the purpose thereof, was to permit the discovery and production of oil and gas or either. Taking, therefore, the matter by its four corners, if the lessees did not commence a well and did not pay the delay money for further deferment they were no longer entitled to any rights under the lease; if they did waive further deferment by the actual commencement of a well and the period of the lease had expired and no production had been attained, they were likewise out.

It is conceded that no deferment money was paid, and it is further conceded that no oil or gas was ever produced.

[2] Appellants further urge on this appeal that they were entitled to ninety days' notice of termination and a specification of the grounds claimed therefor in order that opportunity might be afforded to remedy any breach. From the statement of the case as made it is obvious that such a contention is without merit. In the first place, the lease imposed no obligation upon lessees to commence a well. Appellants had the option as to whether they would or would not commence a well and they had the right to defer any commencement until the last day of the lease. Therefore, there could have been no ninety-day period within which such a notice could have been given. No forfeiture of the lease is claimed by respondents. They stand squarely upon the fact that the lease has terminated by its own terms. Surely a forfeiture notice for breach of conditions would not be required to advise appellants that the term had ended. If the term ends there is nothing that appellants could do to remedy that situation. See Caswell v. Gardner, 12 Cal.App.2d 597, 55 P.2d 1222; C. M. Staub Shoe Co. v. Byrne, 169 Cal. 122, 145 P. 1032. We may further cite the case of Williams v. Edge, 192 Cal. 254, 219 P. 747, wherein it is stated that if the provision of the lease respecting the giving of notice of default had any operation in the case at bar it was waived by appellants by their contesting respondents' quiet title action upon the theory that they were not in default under the lease. This is followed in Calhoma Oil Corp. v. Conniff, 207 Cal. 648, 279 P. 771.

[3] Appellants next claim that, under the provisions of the lease, any question of disputed fact shall be first referred to arbitration and that respondents are therefore without remedy, other than through such procedure, inasmuch as the lease provides that the decision of the arbitrators shall be a condition precedent to any right of action, and that there was no submission to arbitration in the instant case. A complete answer to the foregoing contention is found in the case of Hanes v. Coffee, 212 Cal. 777, 300 P. 963. The appellants contend that this authority has no application. We accept it as controlling. It determines the issue of failure to arbitrate adversely to the appellants in this case.

In conclusion we are mindful of the contention of the respondents that there were never any issues presented in the court below under the pleadings. We think there is much merit in this contention, but we have chosen to review the case on its merits inasmuch as the trial court did make findings responsive to the evidence adduced.

Supporting the views herein announced reference is made to the case of Fagan Co. v. Burns, 247 Mich. 674, 226 N.W. 653, 67 A.L.R. 522, and to the exhaustive notes accompanying the reported case. A full discussion of the effect of delayed payments and the rights accruing to either party under oil leases providing for the commencement of a well, is there found.

The judgment is affirmed.

We concur: TUTTLE, J.; PULLEN, P. J.

KINNISON v. GUARANTY LIQUIDATING CORPORATION.*

Civ. 12164.

District Court of Appeal, Second District, Division 1, California.

Dec. 23, 1940.

Hearing Granted Feb. 20, 1941.

1. Mortgages 🔑199(2)

The pledge in mortgage of rents as security for mortgage debt, and provision in mortgage giving mortgagee right to take possession of mortgaged premises on mortgagor's default, or assignment of rents to mortgagee in a separate instrument and at a different time from execution of mortgage, do not entitle mortgagee to rents until mortgagee takes actual possession or until actual possession is taken in his behalf by receiver.

2. Mortgages 🔑199(1)

A mortgagor who is allowed to remain in possession until foreclosure and sale, is entitled to receive and apply to his own use the income and profits of mortgaged property, except as against a creditor who is hindered, delayed or defrauded thereby.

3. Mortgages 🔑199(2)

A mortgagor's assignment of rents from mortgaged premises to mortgagee contemporaneously with or subsequent to execution of a deed of trust, did not make mortgagee a "mortgagee in possession" so as to be entitled to rents. Civ.Code, § 2927.

See Words and Phrases, Permanent Edition, for all other definitions of "Mortgagee in Possession".

4. Mortgages 🔑199(1)

The rule that in order to constitute a "mortgagee in possession" or "trustee in possession", so as to be entitled to rents from mortgaged premises there must be something more than a mere paper title, and there must be an actual, open, visible possession, is the same in the case of trust deeds as of mortgages.

See Words and Phrases, Permanent Edition, for all other definitions of "Trustee in Possession".

5. Mortgages 🔑199(2)

Where mortgagor continued in possession of and managed and controlled mortgaged premises, and collected rents, and paid operating expenses, commingled balance of rents with mortgagor's general assets and deposited such balance in mortgagor's general bank account, and thereafter remitted balance remaining of collected rents to mortgagee, a recorded assignment of rents to mortgagee and unrecorded agreement between mortgagor and mortgagee by which mortgagor acted as mortgagee's agent in collecting rents, did not make mortgagee a "mortgagee in possession" so as to defeat right of mortgagor's judgment creditor to satisfaction of judgment out of rents in hands of mortgagor, notwithstanding that judgment creditor may have had notice of assignment of rents and of mortgagor's collection of rents as agent of mortgagee.

6. Execution 🔑471

In action by mortgagee to recover from mortgagor's judgment creditor proceeds of mortgagor's bank account, which was levied on by judgment creditor, evidence was insufficient to support findings that all the money in the account at time of execution levy represented rents collected by mortgagor for benefit of mortgagee and that judgment creditor had actual and constructive notice or knowledge that money deposited in account consisted of rents which had been assigned to mortgagee and had been collected by mortgagor as mortgagee's agent.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Ray H. Kinnison against the Guaranty Liquidating Corporation, to recover proceeds of bank deposit levied on and turned over to the defendant. From the judgment, the defendant appeals.

Reversed.

George W. Fenimore, of Los Angeles, for appellant.

Bettin, Painter & Wait, of Los Angeles, for respondent.

WHITE, Justice.

Guaranty Liquidating Corporation (hereinafter referred to as Guaranty Corporation), being the owner of a judgment in excess of some $26,000 against Bartlett Syndicate Building Corporation, Ltd. (hereinafter referred to as the Bartlett Company), caused a writ of execution to be levied upon all bank accounts, moneys, credits, etc., of said judgment debtor in the possession of or under the control of Farmers & Merchants National Bank of Los Angeles. The writ of execution was served on February 16, 1937. One week later the bank made its return, answering that at the time of the service of the writ and the levy it was indebted to Bartlett Company in the amount of $4,041.09. This last-named amount was thereupon remitted to the marshal of the municipal court of the city of Los Angeles, and he in turn delivered the same, less his charges, to the Guaranty Corporation. Thereafter the plaintiff herein, Ray H. Kinnison, as assignor of Pacific Mutual Life Insurance Company, brought this action to recover from the Guaranty Corporation $3,997.09, being the amount of money in the bank theretofore levied on by appellant, less the sum of $44 which was not claimed by plaintiff's assignor. Following trial, the court rendered judgment in the amount prayed for together with interest thereon. From such judgment this appeal is prosecuted.

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* Subsequent opinion 108 P.2d 466.

Respondent predicates his right to judgment upon the following facts: In December, 1928, the Bartlett Company, being the owner of certain valuable real property, borrowed from Pacific Mutual Life Insurance Company the sum of $835,000 for the purpose of erecting a building on said real property, and executed a deed of trust upon such property as security for the payment of the loan. Contemporaneously with the execution of the deed of trust and in consideration of the making of said loan and as additional security therefor, the Bartlett Company assigned to the insurance company the rents due and to become due from the lease of the Pantages Theater which was located on said real property. This assignment was recorded January 17, 1929. On February 17, 1932, the Bartlett Company, being in default under the terms of the trust deed, made a payment upon the principal and a new note and trust deed were executed in the principal sum of $794,000 after release of the first-mentioned trust deed. As part of this second transaction and for the same reasons and purposes as in the first transaction, the Bartlett Company again assigned to the insurance company the rents from the theater located on the property, and this assignment was also recorded on July 25, 1932. Again in April, 1933, the Bartlett Company was in default under the last-mentioned trust deed, whereupon, on December 28, 1933, the Bartlett Company assigned to the insurance company all the rents, issues and profits accruing from all the real property described in the deed of trust, including the theater rents theretofore assigned, and also the office and store rents, as additional security for the performance of its obligations under the note and deed of trust. The last-named assignment of rents was recorded January 12, 1934. It appears that the lease upon the theater and some of the store and office leases contained recitals that such leases were assigned to the insurance company, and the latter notified the other tenants whose leases did not contain the above provision that their leases were in fact assigned to it, but that the tenants, until further notice, were to pay the rents thereunder to the Bartlett Company. During March, 1935, the Bartlett Company again defaulted in payment of its obligations under the last-named deed of trust, and said default continued until after the filing of the present action. Commencing about February, 1934, the Bartlett Company, pursuant to its assignment and under authority vested in it by the insurance company, collected all the rents, issues and profits accruing from the real property mentioned in the deed of trust and deposited such money in the Farmers & Merchants National Bank in the name of the Bartlett Company, and disbursed such money monthly to the Pacific Mutual Life Insurance Company in accordance with the agreement.

The trial court made a finding that of the money which was on deposit in the Bartlett Company's bank account at the time of the levy of the execution, the sum of $3,997 represented rents collected by the Bartlett Company for the use and benefit of plaintiff's assignor, the insurance company, and that said sum was therefore the property of plaintiff's assignor. Appellant contends that such finding is without foundation in the evidence.

As an affirmative defense in the trial court, appellant alleged that each of the assignments of leases and rents upon which respondent's assignor relies were made as a part of or in connection with the execution of the deed of trust from the Bartlett Company to respondent's assignor, and were in each case given as additional security for the trust deed indebtedness; that respondent's assignor never at any time prior to the execution levy on February 16, 1937, took possession of the real property, either in person or through a receiver, but on the contrary, with the full knowledge and consent of the respondent's assignor, the Bartlett Company remained in full possession, control and management of said real property, and did at all times collect and deposit in its own bank account and assert ownership of all the rents collected on said real property.

[1-4] It is the established law of this state that although the rents, issues and profits of the mortgaged property are expressly pledged for the security of the mortgaged debt, coupled with the right of the mortgagee to take possession upon default, nevertheless such mortgagee is not entitled to such rents and profits until he takes actual possession, or until actual possession is taken in his behalf by a receiver. Bank of America Nat. Trust & Sav. Ass'n v. Bank of Amador County, 135 Cal.App. 714, 721, 28 P.2d 86, and cases therein cited. This rule also applies notwithstanding the fact that the assignment of rents to the mortgagee was done in a separate instrument and at a different time from the execution of the mortgage. Flower v. King, 189 Minn. 461, 250 N.W. 43. Where the mortgagor is allowed to remain in possession until foreclosure and sale, he is entitled to receive and apply to his own use the income and profits of the mortgaged property, except as against a creditor who is hindered, delayed or defrauded thereby. This for the reason that such creditor does not have the rights of the mortgagee, the latter of whom is secured in his rights by the mortgage. 17 Cal.Jur., p. 1013. We do not think that the assignment of rents in the instant case made respondent's assignor a "mortgagee in possession". Section 2927 of our Civil Code recognizes the right of the parties to a mortgage to agree that the mortgagee, either before or after default, may take possession. As was said in Bank of America Nat. Trust & Sav. Ass'n v. Bank of Amador County, supra [135 Cal.App. 714, 28 P.2d 88], "In order to constitute a mortgagee or trustee in possession, there must be something more than a mere paper title. There must be an actual, open, visible possession." The rule is the same in the case of trust deeds as of mortgages.

[5] The record in the case at bar shows without contradiction that the trustor, Bartlett Company, continued in possession of the premises included in the trust deed, managed and controlled the same, collected rents, paid operating expenses, employed elevator operators, janitors and an engineer on the property, paid their salaries, and then remitted the balance remaining of the rents collected to the insurance company as beneficiary under the deed of trust. While it is true that respondent claims his assignor entered into an arrangement with the Bartlett Company whereby the latter acted as agent of the former in collecting rents, such agreement was not made of record and remained as an understanding between the parties themselves. The acts and conduct of the parties herein did not operate to effect a change of possession as such is contemplated by law. True, the instruments by which the rents were assigned were recorded, but this is not sufficient to defeat the rights of a third person, claiming as a judgment creditor, to satisfy his judgment out of the rents remaining in the custody of the maker of the trust deed while the latter is in actual possession of the property named in such instrument.

It is true in the case at bar we are confronted with a finding made by the trial court that appellant had both actual and constructive notice and knowledge of the assignment of rent prior to the date of the levy of execution, and had like notice and knowledge that the said sum of $3,997.09 on deposit with the Farmers & Merchants National Bank standing in the name of the Bartlett Company in fact belonged to respondent's assignor, Pacific Mutual Life Insurance Company, and that the Bartlett Company was collecting said money for the insurance company pursuant to said assignments of rent and the authority so to do given by said insurance company. Nevertheless, it seems to us that such notice or knowledge is not sufficient to defeat the right of a third party in his capacity as a creditor to levy execution upon the bank account of a mortgagee who is permitted to remain in possession of the mortgaged premises. We feel that this is particularly true where, as in the instant case, such collected rents were not earmarked in any way nor in any way isolated or segregated from the general funds of the mortgagor in possession, but were by it commingled with its general assets and deposited in its general bank account without any designation as to its specific purpose. To defeat a creditor in the circumstances present in this case, more is required than an assignment of rents and profits accruing from the mortgaged property. That is to say, more is required than is present in the instant case, viz., the right conferred upon respondent's assignor to collect the rents if such action became necessary on its part to protect its security. To exercise this right the mortgagee must take possession. In this connection it must be borne in mind that the instruments which authorized the Bartlett Company to collect the rents for the mortgagee were never recorded. This unrecorded authority to the Bartlett Company to collect rents for and on behalf of the insurance company did not create either a constructive or implied possession of the property sufficient to meet the requirements laid down by the decisions of this state of actual and notorious possession.

Respondent's contention that conversations had between appellant's counsel and representatives of the insurance company in which the latter advised the former that the monthly rental income from the property was being paid to the insurance company each month, constituted actual notice, cannot be sustained. Nowhere is it made to appear that appellants were informed or knew that any such rents were deposited in the account of the Bartlett Company at the bank upon which account the execution was levied. In fact, with reference to the question of knowledge on the part of the creditor that the money in the Bartlett Company's account at the bank was claimed to be owned by respondent's assignor, there is contained in a stipulation of certain facts agreed to be true a letter signed by the assistant secretary of respondent's assignor in which it is stated: "I am in charge of this Company's accounts in connection with this loan. I have no personal knowledge, nor, so far as I have been able to ascertain, has any other employee of this Company any personal knowledge, of any moneys on deposit by Bartlett Syndicate and Building Corporation, Ltd., in the Farmers and Merchants National Bank of Los Angeles on February 16, 1937."

[6] There is nothing in the record to show that respondent's assignor had any interest in or title to the money on deposit in the Farmers & Merchants National Bank. Such money was subject to disbursement upon order of the Bartlett Company, and neither the bank nor appellant knew or had any reason to know that the money or any part thereof belonged to any one other than the depositor, the Bartlett Company. Certainly the assignments of rent were insufficient to indicate or convey ownership of the money on deposit in the general account of the mortgagor at the bank, upon which deposit the creditor's writ of execution was levied. Further, the evidence clearly shows that the Bartlett Company's bank account was not composed solely of rental collections, but contained moneys received by the depositor from divers and sundry sources. Therefore the finding of the trial court that all of the money in the account at the time of the execution levy represented rents collected by the Bartlett Company for the benefit of plaintiff's assignor, and the finding that appellant had both actual and constructive notice that the money constituting such deposit belonged to Pacific Mutual Life Insurance Company, respondent's assignor, are not sustained by the evidence.

For the foregoing reasons, the judgment is reversed.

We concur: YORK, P. J.; DORAN, J.

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42 Cal.App.2d 124

MARCHI v. VIRONE.

Civ. 6418.

District Court of Appeal, Third District.
California.
Dec. 28, 1940.

Rehearing Denied Jan. 27, 1941.
Hearing Denied Feb. 24, 1941.

1. Trial 🔑139(1)

A nonsuit may be granted only when, giving plaintiff's evidence all value to which it is legally entitled, indulging in every legitimate inference therefrom, and disregarding conflicting evidence, there is no evidence of sufficient substantiality to support verdict for plaintiff.

2. Negligence 🔑11

"Willful misconduct" implies at least the intentional doing of something with knowledge that serious injury is a probable result thereof or intentional doing of an act with a wanton and reckless disregard of its possible result and necessarily involves deliberate, intentional, or wanton conduct in doing or omitting to perform acts with knowledge or appreciation of fact that danger is likely to result therefrom, while "willfulness" necessarily involves deliberate or intentional act or omission, regardless of consequences.

> See Words and Phrases, Permanent Edition, for all other definitions of "Willful Misconduct" and "Willfulness".

3. Automobiles ⟹245(24)

In action for injuries to guest in automobile driven by defendant when it skidded and struck trees and traffic signs, plaintiff's evidence *held* sufficient to take to jury question of defendant's willful misconduct in driving automobile at great speed, with knowledge of slippery condition of boulevard and his approach to business district.

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Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Josephine Marchi against Mario J. Virone for personal injuries. From a judgment of nonsuit, plaintiff appeals.

Reversed.

Henry & Bedeau, of Sacramento, for appellant.

Charles V. Barfield and John J. Healy, Jr., both of San Francisco, for respondent.

G. L. JONES, Justice pro tem.

Plaintiff, Josephine Marchi, having received serious injuries while riding as a guest in an automobile driven by defendant, commenced an action against him to recover damages, alleging wilful misconduct on his part. A jury was empaneled. At the conclusion of her case, a motion for nonsuit was made on the ground that plaintiff had failed to prove her contention of wilful misconduct, which motion was granted, and from the judgment of nonsuit she has appealed.

[1] The proper exercise of the power of a trial court to grant a motion for nonsuit is again explained in the case of Estate of Arnold, Cal.Sup., 107 P.2d 25, 27, citing Estate of Flood, 217 Cal. 763, 21 P.2d 579, in which it is said, "A nonsuit or a directed verdict may be granted 'only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given.'" With that rule in mind, the evidence as presented by the plaintiff must be examined, in order to determine whether it was sufficient to support a verdict for plaintiff, had one been given in her favor by the jury.

On the evening of May 20, 1939, about eleven o'clock, the plaintiff was riding with defendant on Folsom boulevard in Sacramento county. They had been at the Power Inn, near Perkins, which inn is located at the Power Line road and Folsom boulevard, about two miles easterly from the corner of Rodeo way and Folsom boulevard, this corner being within the city limits of Sacramento, and being the corner at which the accident in question occurred. Shortly after they had left the inn, plaintiff, judging that defendant was driving around sixty miles, said to him—"it seems to me you are going a little fast, aren't you", whereupon defendant mumbled something which plaintiff could not understand, and kept on going faster. Later, as they neared a subway, she said, "Oh please go slow", and his reply was, "Oh shut up". As they drew out of the subway, she looked at the speedometer which registered sixty-two miles an hour. She then said, "Oh for God's sake please go slow. If you are a few minutes late your mother and sister will wait for you," the defendant having desired to meet his mother and sister at the Alhambra Theater in Sacramento a little after eleven o'clock. His reply to plaintiff's appeal was, "Oh shut up. Who is driving this car? I will go as fast as I like, and besides I don't want them to wait." When she looked at the speedometer she was sitting on the edge of the seat because she was frightened. She does not recall what happened after she looked at the speedometer. When he got mad at her he would sometimes say to her, "Shut up".

The witness Sirrine, a bus driver, on the evening of May 20th, about 11:20 o'clock P. M., was parked at Fifty-Seventh street and Folsom boulevard (about four and one-half blocks from the accident). An automobile going approximately fifty-five or sixty miles an hour passed him, and, expecting an accident, he watched it travel four or five blocks, saw it apparently skidding; saw it swerve sharply from the north to the south; about a minute later he came on down the street and saw a Buick automobile over the curb on the north side of "Folsom" and the west side of Rodeo way, and also saw a young lady apparently unconscious lying near the store on the corner. It was raining very hard and the pavement was "definitely slippery", that Folsom boulevard is a very slippery street when wet. The defendant was examined as an adverse witness and testified that the road was wet the night of May 20th, and he knew it was slippery when wet; that he had traveled over it on numerous occasions and when it was slippery; that before reaching the subway he was traveling probably "forty, forty-five or fifty miles an hour"; that he cut the speed when approaching the subway to thirty-five miles and kept that speed until near Rodeo way, the commencement of a business district; that he was doing thirty-five miles when he started to skid near Rodeo way; that the car slid off to the right and over a curb about six inches high, struck a tree (which stands four feet from the curb near the northeast corner of the intersection), the front wheel or front fender on the right side of the car hitting the tree; then the car hit a "20 mile sign" (standing about three feet from the tree) and broke the sign down; guessed it was the front part of the car that hit the sign; then the car swung around, making a complete circle on the paved part of the boulevard, and, moving sideways, went to the north*west* corner of the intersection (over another six-inch curb), struck an arterial stop sign with the rear bumper (the stop sign being about forty feet from the "20 mile" sign); then struck a tree with the right front wheel or fender, (tree being about twelve feet from the stop sign); then bounced back probably four feet, coming to a stop partly on the sidewalk and partly on the street. (The statements given above in parenthesis are from the testimony of the surveyor.) Defendant further testified that when he hit the tree, just before the car stopped, he "went over" in the back seat; that plaintiff was in the back seat before him. Photographs exhibited in evidence of the driver's side and the rear of the car show a badly damaged automobile. It was shown by other evidence that Folsom boulevard from Rodeo way to the easterly city limits is constructed of black asphaltum.

We now reach the question to be here decided—is the evidence as heretofore set out sufficiently substantial to have justified the submission of the case to the jury and to have justified a verdict in favor of plaintiff, had the jury found one? In other words, is the evidence here presented of such a nature that a verdict finding the defendant guilty of wilful misconduct, would lack the necessary legal support?

[2] In the case of Robertson v. Brown, 37 Cal.App.2d 189, 99 P.2d 288, 293, decided February 7, 1940, and hearing in the Supreme Court denied April 4, the doctrine of wilful misconduct is again stated after its announcement in many decisions of both the Supreme and Appellate Courts of the state. This exposition is in part as follows: "Wilful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a probable (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its possible result."

In Norton v. Puter, 138 Cal.App. 253, 32 P.2d 172, 174, cited with approval in Porter v. Hofman, 12 Cal.2d 445, 85 P.2d 447, wilful misconduct is thus defined: "Willful misconduct depends upon the facts of a particular case, and necessarily involves deliberate, intentional, or wanton conduct in doing or omitting to perform acts, with knowledge or appreciation of the fact, on the part of the culpable person, that danger is likely to result therefrom. * * * Willfulness necessarily involves the performance of a deliberate or intentional act or omission regardless of the consequences."

[3] It should be particularly noted that the defendant Virone is not charged with driving at an excessive speed as the sole basis for the complaint of wilful misconduct, but it is the contention of plaintiff that the evidence shows the driving by defendant at great speed and under conditions which would bring his conduct within the definition as given. If the jury would have been justified in this case of finding that the defendant, with full knowledge of the slippery condition of the boulevard, and at a speed of at least fifty-five miles an hour, approached the "20 mile" sign at the intersection; that he had driven over the street on numerous times and knew the necessity of reducing his speed before entering the business district; that the plaintiff had twice pleaded with him to slow down, but was answered in a way that indicated an angry man, can the conclusion well be avoided that the jury should have been per-

mitted to determine whether or not defendant was guilty of wilful misconduct as defined, and that a verdict of guilty would be deemed supported by the evidence? In several cases, based on alleged fast driving over wet pavements, the courts have held that the conditions were not such as would constitute wilful misconduct on the part of the drivers. Lack of knowledge of a slippery condition of the pavement, as in the case of Spencer v. Scott, Cal.App., 102 P.2d 554, or the car proceeding at a much less speed than was the car in the instant case, have been facts considered by the courts, in some instances in reaching their conclusions against the claim of wilful misconduct. Here, however, we have the situation of speed at fifty-five miles or more, combined with a knowledge on the part of the driver of the slippery condition of the highway, and, it may reasonably be inferred, with the further knowledge on his part that he was approaching a district which would necessitate a reduction in speed.

This knowledge of a slippery pavement made unnecessary for him the cautionary signs, such as "Slow, Slippery Pavement"; "Slippery When Wet", frequently placed at particular spots on our highways. To travel at great speed over such a pavement, with knowledge of its dangerous condition, may well be characterized of itself as a deliberate act done with appreciation of the fact that danger is likely to result therefrom, and if, in addition to the knowledge of the probable result of serious injury, there is displayed a feeling of anger toward an accompanying guest, a jury would be justified in finding "the intentional doing of an act with a wanton and reckless disregard of its possible result."

The case of Chandler v. Quinlan, 25 Cal. App.2d 646, 78 Pac. 235, is a pertinent one to be considered in connection with the subject here under discussion.

It therefore appears to us in this case that, "giving to plaintiff's evidence all the value to which it is legally entitled", the question of the alleged misconduct of defendant should have been allowed to go to the jury.

The judgment of nonsuit is reversed.

We concur: PULLEN, P. J.; THOMPSON, J.

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42 Cal.App.2d 87

PEOPLE v. HUNTER.

Cr. 3364.

District Court of Appeal, Second District, Division 2, California.

Dec. 24, 1940.

1. Larceny ⚷65

Evidence that seller of used automobiles made false representations to buyer that seller was selling certain automobile as agent for finance company which had repossessed automobile, that title thereto was clear, and that possession would be delivered to buyer within short time, warranted seller's conviction of grand theft. Pen.Code, § 484.

2. Larceny ⚷14(1)

Where one obtains possession of a thing of value from another on representation that it is to be used for a designated purpose, the victim is not thereby deprived of title to his property, hence, if at the time of gaining possession by such fraudulent statements defendant cherishes secret purpose of converting property to his own use and does so, he is guilty of grand theft. Pen.Code, § 484.

3. Larceny ⚷68(2)

In prosecution for grand theft on theory that accused acquired another's property by false representations with intention of converting property to his own use, the question of his intention was one of fact for the trial court.

4. Larceny ⚷57

In prosecution for grand theft, evidence that accused, engaged in selling used automobiles, fraudulently took money from prospective customer without intention of giving anything of value therefor, warranted conviction. Pen.Code, § 484.

5. Criminal law ⚷982

Where accused was convicted of grand theft, and proceedings were suspended and he was placed on probation for five years, and term of probation was extended for an additional five years because of violation of probation, and prior to expiration of extended period the court, on report of probation officer, found that accused had made no restitution and was living with a woman not his wife, court had jurisdiction to sentence him for a term in prison on the counts on which he was convicted. Pen.Code, § 1203.2.

6. Criminal law ⚷982

The authority of a court to revoke a prisoner's probation under a suspended sentence does not depend on his violation of specific conditions of probation, but order suspending sentence may be set aside if court has reason to believe that accused is associating with lawless or improper persons or is engaged in criminal practices. Pen.Code, § 1203.2.

7. Criminal law ⚷982

Upon the revocation of a prisoner's probation, he stands before the court guilty of his crimes, and it is court's duty to sentence prisoner to a penal institution.

8. Criminal law ⚷982

Where probation under suspended sentence is revoked before expiration of the probationary period, fact that accused is committed to prison subsequent to the expiration of the probationary period is immaterial.

9. Criminal law ⚷982

Where court found no reason to vacate order revoking probation under suspended sentence, the order of revocation was valid notwithstanding accused was not present at time of its entry.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Paul Hunter was convicted on three counts of an information charging grand theft, and proceedings were suspended and defendant placed on probation. From the judgment and an order revoking the probation and sentencing him to prison, defendant appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

By information, appellant was accused of four counts of grand theft, by taking from one Phillip Brenion the sum of $150 (count 1); by taking his Chevrolet car of a value in excess of $200 (count 2); by taking a Durant automobile from Brenion (count 3); and by taking the sum of $700 from one F. A. Blount and his wife (count 4). After a trial by the court ending April 23, 1929, defendant was found guilty on all counts but the third.

May 9, 1929, proceedings were suspended and defendant was placed on probation for five years on condition that he serve four months at the county road camp and abide by the rules prescribed by the probation department. May 9, 1932, defendant was arraigned for violation of his probation and his period of probation was at that time extended "for an additional five years from May 9, 1934. May 1, 1939, by an ex parte order, the probation was revoked and a bench warrant was issued for the arrest of defendant. After a hearing on the "violation of probation" April 8, 1940, he was sentenced to the state prison at San Quentin on the three counts, the sentences to run concurrently.

He appeals on the grounds: (1) that the evidence was insufficient to constitute a felony in either case, and (2) that the court was without jurisdiction to revoke defendant's probation.

[1] In October, 1928, defendant and another were operating a business of selling used cars in the city of Santa Monica under the firm name of Crescent Marmon Motors Company. In order to purchase a Durant car on display in the show room of the Crescent Marmon Motors Company, Brenion delivered his Chevrolet car to and paid defendant the sum of $950. At the time of making said transaction, defendant stated to Brenion: (1) that the Durant selected by Brenion was a repossessed car; (2) that its title was in the Commercial Credit Company; (3) that appellant was selling it as the agent for said company; (4) that he would get the pink slip from said company in about two weeks from Sacramento; and (5) that the title was clear.

The truth was that appellant and his partner owned an equity in the Durant while the Commercial Credit Company held its legal title as security for the obligation of the Crescent Marmon Motors Company. Instead of delivering the $950 to the Credit Company, appellant deposited the money in the checking account of the Crescent Marmon Motors Company.

Upon the discovery of the absence of the Durant car from the show room of defendant, efforts were made by the Credit Company to cause defendant to pay its claim. Such efforts having failed, the creditor company caused the car to be repossessed by lawful authority. These facts are sufficient, if believed by the court, to support the findings that the defendant had made false statements of material facts to Brenion for the purpose of gaining possession of his money and his Chevrolet car; that the statements were made with a fraudulent intent; that at the time of receiving the money and property of Brenion, defendant harbored the secret purpose of withholding the money from the Commercial Credit Company and of converting the money and the car to his own personal use; that he did convert the money to his own use by placing it in the checking account of his firm and by appropriating the car; that he had no intention of giving anything to Brenion in return for his money or for his car.

[2, 3] These findings support the contention that where one obtains possession of a thing of value from another upon the representation that it is to be used for a designated purpose and the statement is false, the victim of such representation is not thereby deprived of the title of his property. People v. Solomon, 75 Cal.App. 9, 241 P. 931. It follows that if at the time of gaining possession of property by means of such fraudulent statements, the defendant cherished a secret purpose of converting the property to his own use and did so, he was guilty of theft. People v. Delbos, 146 Cal. 734, 81 P. 131; People v. Edwards, 72 Cal.App. 102, 236 P. 944. Theft includes the act of defrauding another of his property by means of fraudulent representations. Pen. Code, § 484. If at the time of receiving the money and the Chevrolet car, defendant had no intention of delivering a clear title to the Durant car, he was guilty of larceny and his intention was a fact to be determined by the trial court. People v. Mills B. Sing, 42 Cal.App. 385, 183 P. 865.

[4] The factual background of count 4 is as follows: F. A. Blount purchased a new Durant automobile from defendant's firm to whom he delivered his check in the sum of $675. Defendant did not disclose to Blount that there was a lien of any kind upon the automobile but the purchaser was assured that the pink slip would come from Sacramento in about two weeks. The truth was that the Pacific Finance Corporation held the legal title to the same Durant automobile as security upon a conditional sales contract. The car had originally been sold by defendant to a patron and repossessed. On October 16, 1928, a week after the car had been sold to Blount, defendant made a payment of $39.16 on the car and on the 17th of November made a similar payment. No other sums were ever paid on the contract. January 29th the corporation repossessed the car. Thus defendant had Blount's money and the latter had no car.

These facts, under the principles above announced, were sufficient to warrant the finding and judgment that the defendant had fraudulently taken the money from Mr. Blount without any intention of giving anything of value therefor.

[5] The contention that the court had no jurisdiction to revoke defendant's probation is without merit. He was legally convicted in 1929 on three counts of grand theft. Proceedings were suspended for the purpose of enabling defendant to avoid imprisonment and he was placed on probation for a period of five years. Having violated the terms of his probation, the court, in the exercise of its authority on May 9, 1932, extended the period of his probation for an additional five years, making the term of probation expire May 9, 1939. Prior to the expiration of the extended term, to-wit, on May 1, 1939, upon the report of the probation officer and by reason of defendant's violation of the rules of the probation department, the court revoked the probation of defendant and issued a bench warrant for his arrest.

[6-9] Upon a finding by the court that the defendant had made no restitution and was living with a woman not his wife, the court sentenced him for a term in prison upon three counts upon which he was convicted in 1929. This proceeding is authorized by the broad powers of section 1203.2 of the Penal Code. The authority to revoke a prisoner's probation does not even depend upon his violation of the specific conditions of the probation. The order suspending his sentence may be set aside if the court has reason to believe from the report of the probation officer or otherwise that he is associating with lawless or improper persons or that he is engaged in criminal practices. In re Young, 121 Cal. App. 711, 10 P.2d 154; People v. Fields, 131 Cal.App. 56, 20 P.2d 988. Upon the revocation of his probation, defendant stood before the court guilty of his crimes. He had failed to re-establish himself as a worthy citizen of the state. It was the duty of the court to sentence him to a penal institution.

The fact that defendant was committed at a time subsequent to the expiration of the period of his probation is immaterial. His probation had been revoked prior to the expiration of the probationary term. The court having found no reason to vacate the order of revocation, it was valid notwithstanding the fact that appellant was not present at the time of its entry on May 1, 1939. Sullivan v. Superior Court, 185 Cal. 133, 139, 195 P. 1061. We see no reason to interfere with the exercise of its discretion by the trial court.

The judgment and the order are affirmed.

We concur: McCOMB, J.; WOOD, J.

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42 Cal.App.2d 92

KAVANAGH v. WADE et al.

Civ. 12162.

District Court of Appeal, Second District, Division 1, California.

Dec. 26, 1940.

1. Conspiracy 🔑18

In action for alleged conspiracy to fraudulently deprive plaintiff of money and certain shares of stock based on theory that plaintiff's agent unauthorizedly transferred plaintiff's margin account to a certain brokerage firm and procured plaintiff's ratification by false representation, and that in dealing with plaintiff's account another was represented as being the plaintiff, complaint which merely alleged that a defendant knew the other was not plaintiff but failed to show any connection between that knowledge and the alleged cause of action was demurrable. St.1933, p. 2308.

2. Conspiracy 🔑18

Where action for alleged conspiracy to fraudulently deprive plaintiff of money and certain shares of stock was based on theory that plaintiff's agent unauthorizedly transferred plaintiff's margin account to a certain brokerage firm and procured plaintiff's ratification by false representation, and that in dealing with plaintiff's account another was represented as being the plaintiff, and only acts which appeared from complaint to be chargeable against brokerage firm were acts of omission in failing to detect the fraud of the others, or to report the same to plaintiff, and in accepting margin account in apparent violation of rules of Los Angeles Stock Exchange, the complaint did not state cause of action against the brokerage firm. Civ.Code, §§ 1710, subd. 3, 2022, 2350.

3. Fraud 🔑17

Where complaint was based on theory that plaintiff's agent fraudulently transferred margin account to brokerage firm, and obtained plaintiff's ratification by false representation, and falsely represented, in dealing with the account, that another was plaintiff, there was no duty on part of the brokerage firm to detect the fraud of the others or to report the same to plaintiff, and therefore no action of deceit would lie against the brokerage firm. Civ.Code, §§ 1710, subd. 3, 2022, 2350.

4. Fraud 🔑17

The suppression or concealment of a fact is only actionable when done by one who is bound to disclose it.

5. Pleading 🔑225(1)

Failure to grant further leave to amend complaint was not error, where complaint to which demurrers were sustained without leave to amend was second amended complaint, and leave to amend further was not asked.

6. Money received 🔑17(1)

Where second count of complaint was in form of common count for money had and received, it was good as against a general demurrer.

7. Limitation of actions 🔑180(1)

Where second count of complaint was in form of common count for money had and received, and bar of statute of limitations did not affirmatively appear on face of count, the bar of the statute could not be raised by demurrer.

8. Appeal and error 🔑916(1)

Where first count of complaint was insufficient to state cause of action, but it did not appear from allegations of second count, which was in form of common count for money had and received, that the second count was based upon same facts as first count, and there was no admission in rec-

ord or in brief that such was the case, the court could not assume on appeal that the first count and second count were based on same facts.

◆

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Louis Kavanagh against R. C. Wade and others and Charles C. Akin and others for damages as result of alleged conspiracy to fraudulently deprive plaintiff of his money and certain shares of stock, and for money had and received. From a judgment dismissing plaintiff's action as against Charles C. Akin and others, the plaintiff appeals.

Judgment reversed, with direction.

Elmer P. Delany, of San Francisco, for appellant.

Fleming & Robbins and C. S. Tinsman, all of Los Angeles, for respondents.

DORAN, Justice.

This is an appeal from a judgment dismissing plaintiff's action as against respondents after their demurrers to the second amended complaint herein were sustained without leave to amend.

The second amended complaint in question contains two counts, the first for damages as the result of an alleged conspiracy to fraudulently deprive plaintiff of his money and certain shares of stock, the second in the form of a common count for money had and received. Respondents demurred to both counts, respondent Thomas Akin, sued herein as "First Doe", demurring separately, all on the same grounds, to-wit: That the first count does not state a cause of action against respondents; that said count is uncertain, ambiguous and unintelligible for specific stated reasons; that said count contains three causes of action not separately stated and that it is barred by the statute of limitations; that the second count fails to state a cause of action against these respondents and that it is barred by the statute of limitations. The order sustaining respondents' demurrers did not set forth the grounds upon which they were upheld.

The following appears from the allegations contained in the first count of said complaint:

That on or about the 30th day of June, 1933, plaintiff (appellant) opened a margin account with one of the defendant brokerage firms; that defendants Wade and Kavanagh were in the employ of said firm and that defendant Wade was appointed by said firm to handle appellant's margin account. That on or about June 28, 1933, defendant Wade, without the knowledge or consent of appellant, transferred said margin account to respondent Akin-Lambert Company, a brokerage firm consisting of respondent Charles C. Akin and G. C. Lambert, doing business in the city of Los Angeles, and after having so transferred the account defendant Wade, on the same day, represented to appellant that the transfer was necessitated by the Corporate Securities Act of 1933, St.1933, p. 2308, which representation was false. That defendant Wade forged appellant's signature to a brokerage contract with respondent Akin-Lambert Company, which contract provided that all statements and confirmations pertaining to said account were to be forwarded to defendant Wade; that defendant Kavanagh signed said contract as a witness. That appellant allowed said account to remain with respondent Akin-Lambert Co. because of the trust and confidence appellant reposed in defendants Wade and Kavanagh and because of reliance upon the representations alleged to have been made to appellant by said defendants.

It is alleged in said complaint that defendant Kavanagh represented himself to be appellant, drew on said margin account and depleted the same. It is also alleged that respondent Akin-Lambert Company knew that defendant Kavanagh was not appellant; that said respondent delivered checks to said defendant payable to appellant; that said defendant forged the endorsement of appellant to said checks and that said respondent knew the endorsements were forged. It is also alleged that defendant Kavanagh was an associate of and assistant to defendant Wade, and that during the time covered by the complaint defendants Wade and Kavanagh were in the employ of various brokerage firms, all of whom are named as defendants. That on June 17, 1935, respondent Akin-Lambert Company sold out appellant's said account without notice to appellant and without call for further margin, and that no accounting for the funds and stock in said account has ever been made to appellant. It is alleged that at various times from June, 1933, up to and including August, 1937, defendant R. C. Wade falsely and fraudulently, and with intent to defraud appellant, represented to appellant that his investment was safe and sound, that said account was in good order; that only defendant Wade was to have dealings with respondent Akin-Lambert Company; and that said Wade made other specified representations and concealed the true state of said account from appellant. False representations are also attributed to defendant Kavanagh.

The allegation of conspiracy reads as follows: "That plaintiff is informed and believes, and therefore alleges that defendants R. C. Wade, Kenneth M. Kavanagh, Akin-Lambert Company, Charles C. Akin and G. C. Lambert corruptly confederated, agreed and conspired together to fraudulently deprive plaintiff of his stocks and money; that in furtherance of this conspiracy the aforesaid representations and acts were made and performed; that said representations were false in fact and known to be false by the said defendants at the time they were so made; that by reason of the said conspiracy and the false representations and acts made and performed in furtherance thereof, plaintiff was damaged as hereinafter set forth; that in furtherance of the said conspiracy the following representations and acts were made and performed, * * *." Then follows a list of representations and acts, most of which have already been mentioned above.

The complaint also states in effect that respondent Akin-Lambert had the means to discover the forgery of appellant's name to the brokerage contract above referred to.

It should also be noted that it appears from the complaint that said respondent firm made periodic statements to defendant Wade as to the margin account in question; that various calls for additional margin were made and that appellant responded to these calls with additional payments; that at no time did appellant have any dealings directly with respondents. The complaint also alleges facts, which, if true, reveal the transfer of appellant's account as above mentioned to have been in violation of the rules of the Los Angeles Stock Exchange and charge said respondent firm with knowledge of said violation.

[1] As to respondent Thomas Akin, sued herein as "First Doe", the complaint merely alleges in the first count that said respondent knew defendant Kavanagh was not appellant, but fails to show any connection between said respondent's knowledge in this respect and the alleged cause of action. "First Doe" is alleged to be a partner in the "White Company", a fictitious firm name, which firm is not again mentioned in the first count of said complaint, nor do any of the allegations of the said first count show the connection of said firm with the acts complained of therein. It is obvious that respondent Thomas Akin's demurrer as to the first count of said complaint was properly sustained.

As to the other respondents, it appears affirmatively that none of the representations alleged were made by them, since, as seen above, it is alleged that appellant had no dealings with said respondents, copartners under the firm name of Akin-Lambert Company. All said representations appear to have been made by defendants Wade and Kavanagh.

From the allegations set forth in the first count of said amended complaint it must be concluded that either defendants Wade and Kavanagh were acting as the agents of appellant in the handling of his margin account, or that defendant Wade was such an agent and defendant Kavanagh was his servant and assistant in the matter; and that the agency created by Wade with the respondent firm of Akin-Lambert Company, was not authorized by Wade's principal, appellant. The subsequent apparent ratification of the transfer of appellant's account to said respondent firm, based, as it is alleged to be, upon a fraudulent representation, could be of no effect in creating any such authority, under the circumstances alleged in the said amended complaint.

[2-4] It is to be noted that, aside from accepting the margin account in apparent violation of the rules of the Los Angeles Stock Exchange, the only acts which appear from the complaint to be chargeable to respondents are acts of omission in failing either to detect the fraud of defendants Wade and Kavanagh or to report the same to appellant. In this connection, the position of respondent firm as the unauthorized agent of appellant's agent should be borne in mind. "If an agent employs a subagent without authority, the former is a principal and the latter his agent, *and the principal of the former has no connection with the latter.*" Sec. 2350, Civ.Code. (Italics added.) "A mere agent of an agent is not responsible as such to the principal of the latter." Sec.

2022, Civ.Code. Any liability of respondents for such omissions or failures presupposes a duty on their part to act in the matter. The sections of the Civil Code quoted above negative any such duty on the part of respondents in the present instance, and no action for deceit would lie against respondents in this regard. "The suppression or concealment of a fact is only actionable when done 'by one who is bound to disclose it.'" Fink v. Weisman, 129 Cal.App. 305, 318, 18 P.2d 961, 966. See Civ.Code, sec. 1710, subd. 3. The amended complaint herein does not allege that any such acts or omissions were done wilfully by respondents. For the same reason, appellant could have no cause of action against respondents for the alleged violation of the rules of the stock exchange. Unless the allegations of conspiracy alone are sufficient to charge respondent firm and its members with a liability to appellant, the said first count fails to state a cause of action as against these respondents.

As may be seen above, the facts set forth by appellant in support of his charge of conspiracy are not such as would support a charge that they were wrongful, as far as these respondents are concerned, and in the absence of a showing of facts which, if true, would support such a charge the bare allegation that the defendants entered into a conspiracy to defraud the plaintiff and that the various acts narrated were done for the purpose of defrauding the plaintiff is not a sufficient averment of fraud. Moropoulos v. C. H. & O. B. Fuller Co., 186 Cal. 679, 683, 200 P. 601. It should also be pointed out that it appears from the said amended complaint that respondent firm fully discharged its duties in the handling of said margin account as the agent of defendant Wade.

It follows, therefore, that the first count of the second amended complaint herein fails to state a cause of action against respondents Akin-Lambert Company, Charles C. Akin and G. C. Lambert, as well as against respondent Thomas Akin, and that said respondents' demurrers to said count were properly sustained.

[5] Appellant contends that the trial court abused its discretion in denying leave to plaintiff to amend his complaint. The complaint to which the demurrers were sustained without leave to amend was the second amended complaint. It does not appear that leave to amend further was asked. In such a situation it may not be claimed that it was error not to grant further leave to amend. Davis v. Rite-Lite Sales Co., 8 Cal.2d 675, 683, 67 P.2d 1039.

[6, 7] The second count of said complaint, being in the form of a common count, is good as against a general demurrer, Pike v. Zadig, 171 Cal. 273, 152 P. 923; and see cases cited in 3 Cal.Jur. 387, note 4, and since it does not affirmatively appear upon the face of said count, the bar of the statute of limitations cannot be raised by demurrer thereto.

[8] Respondent claims that said second count is admittedly based upon the same facts as count one. However, such an admission does not appear in the record or in appellant's brief and there is nothing in the allegations of the second count to show that it is so based. It is not possible therefore to assume on this appeal that such is the case.

The court erred in sustaining respondents' demurrers to the second count of said complaint herein.

For the foregoing reasons the judgment is reversed and the trial court is directed to enter an order sustaining the demurrers to plaintiff's first cause of action herein without leave to amend and overruling the demurrers as to plaintiff's second cause of action, with a reasonable time allowed defendants to answer said second cause of action.

We concur: YORK, P. J.; WHITE, J.

42 Cal.App.2d 110

KEATING v. PRESTON.

PRESTON v. KEATING.

Civ. 6403, 6404.

District Court of Appeal, Third District.
California.
Dec. 27, 1940.

1. Bailment 🔑11, 22
Landlord and tenant 🔑105, 134(6)

The statute providing that when a thing is let for a particular purpose and hirer uses it for another purpose, hirer is liable to the letter for all damages resulting from such use, or the letter may treat the contract as thereby rescinded, applies to the leasing of realty as well as to the hiring of personalty. Civ.Code, § 1930.

2. Landlord and tenant 🔑105, 134(6)

Under statute providing that when a thing is let for a particular purpose and hirer uses it for another purpose, he is liable to the letter for all damages resulting from such use, or the letter may treat contract as rescinded, unless lease specifically limits use of property to a particular purpose, or restriction is necessarily inferred from language which is employed, lease may not be forfeited on account of use of property for another purpose even though that use is illegal, and the lessor must resort to an action for damages or for injunctive relief, since forfeitures are not favored. Civ.Code, § 1930.

3. Landlord and tenant 🔑105, 134(6)

The remedy for illegal use of leased property is a suit for damages or injunctive relief in absence of a statutory provision authorizing forfeiture.

4. Landlord and tenant 🔑134(1)

The statutory restriction against using property for conducting a bookmaking enterprise, or for accepting, recording, holding or forwarding any bet or wager on result of any contest or race between men or beasts, was a part of lease of a restaurant. Pen.Code, § 337a; Civ.Code, §§ 1643, 1656.

5. Landlord and tenant 🔑105

Violation of statutory restriction against accepting money to be wagered on horse races, which restriction was an implied part of lease, would not authorize lessor's rescission of a lease of restaurant, in absence of a specific or implied provision in the lease for cancellation on that account, since conditions involving forfeiture must be strictly construed against the party in whose behalf they are invoked. Civ.Code, §§ 1442, 1643, 1656; Pen.Code, § 337a.

6. Landlord and tenant 🔑105

Under statute authorizing rescission where contract is unlawful, lease of restaurant was not rendered unlawful even if lessee's acceptance, for customers' accommodation, of money to be wagered on horse races constituted violation of penal statute. Civ. Code, § 3406; Pen.Code, § 337a.

7. Statutes 🔑225

The statute providing that when a thing is let for a particular purpose and the hirer uses it for another purpose, he is liable to the letter for all damages resulting from such use, or the letter may treat the contract as thereby rescinded, must be read in connection with other statutes which specify grounds upon which a contract may be rescinded. Civ.Code, §§ 1689, 1930, 3406.

8. Landlord and tenant 🔑34(2), 103(1)

A lease may be terminated only when it is procured by fraud, for lack of consideration, or for breach of express or implied covenants contained in the instrument.

9. Landlord and tenant 🔑47

The conditions involving forfeiture of a lease must be strictly construed against the party in whose behalf they are invoked. Civ.Code, § 1442.

10. Landlord and tenant 🔑105

Under lease demising all space in hotel necessary to do restaurant business and authorizing lessor to re-enter for failure to pay rent when due and on default in any of covenants contained in lease, where, as an accommodation to her customers lessee personally accepted money to be placed on horse races, lessee's acts did not show that property or business was being used for the purpose of conducting bookmaking enterprise in violation of statute so as to warrant forfeiture of lease. Pen.Code, § 337a; Civ.Code, § 1930.

11. Landlord and tenant 🔑103(1)

A lease may be terminated only for a substantial breach and not for a mere technical violation, and the breach of an implied covenant will not result in a forfeiture of lease unless the instrument declares that it shall be so construed.

12. Landlord and tenant 🔑134(2)

Where a lease fails to specify that demised premises shall be used only for a designated business, inference is that it may be used for other appropriate purposes.

13. Landlord and tenant 🔑134(2)

A lease demising "space necessary to do the restaurant business" in hotel strictly construed against the lessor who sought forfeiture of the lease did not prohibit the use of the space rented for some other lawful and appropriate purpose, since quoted language meant that space in the building, large or extensive enough in which to conduct a restaurant business, was thereby leased. Civ.Code, § 1442.

See Words and Phrases, Permanent Edition, for all other definitions of "Space Necessary to Do the Restaurant Business".

14. Landlord and tenant 🔑134(6)

Where lessor demised space necessary to do restaurant business in hotel and other use of premises was not specifically prohibited, lessee's alleged violation of Penal Code provision against accepting money to be wagered on horse races was not an unauthorized use of the property such as would authorize forfeiture of the lease under statute providing that when a thing is let for a particular purpose, and hirer uses it for another purpose, letter may treat the contract as rescinded. Pen.Code, § 337a; Civ.Code, § 1930.

15. Landlord and tenant 🔑134(6)

Where lessor, after having full knowledge that lessee for accommodation of customers in restaurant accepted money from customers to be delivered to others as wagers on horse races in same manner as lessor had previously done, received rent for the premises, lessor could not complain that lessee was damaging property, and lessor "waived" her right to terminate the lease for alleged violation of penal statute against accepting money to be wagered on horse races. Pen. Code, § 337a.

See Words and Phrases, Permanent Edition, for all other definitions of "Waived".

16. Landlord and tenant 🔑112(2)

The forfeiture of a lease for breach of covenant with full knowledge thereof on part of the lessor is "waived" by acceptance of rent which accrues after the breach.

17. Landlord and tenant 🔑134(5)

Where lessor demised space in hotel building necessary to do restaurant business together with the right to serve liquors, not only on the leased premises, but also in any part of the hotel, parties intended that exclusive right to operate a restaurant in hotel building should be demised, and lessor was properly enjoined from renting other space in hotel to another to conduct competing restaurant.

18. Monopolies 🔑12(1)

Where a covenant in a lease prohibiting a lessor from demising other property in the same building or vicinity to be used for conducting a competing business tends to create a monopoly in the lessee or constitutes a limitation in restraint of trade, it will be strictly construed against the lessee. Civ.Code, § 1673.

19. Monopolies 🔑12(1)

A covenant in a lease prohibiting lessor from demising other property in the same building to be used for conducting a competing business will be construed in the light of reason and common sense so as to uphold reasonable limited restrictions. Civ.Code, § 1673.

20. Monopolies 🔑12(1)

Generally, courts will not hold to be in "restraint of trade" a contract, main purpose and effect of which is to promote and increase business in the line affected, merely because its operation might possibly in some theoretical way incidentally and indirectly restrict trade. Civ.Code, § 1673.

See Words and Phrases, Permanent Edition, for all other definitions of "Restraint of Trade".

21. Estoppel 🔑68(2)

In lessor's suit to rescind lease demising all space in hotel necessary to do restaurant business, together with right to serve liquors, where lessee contended that instrument did not specifically restrict the use of the demised space, and in lessee's suit to enjoin lessor from renting other space to be used in conducting a competing restaurant lessee alleged that she obtained the exclusive privilege of operating a restaurant in hotel, lessee was not maintaining inconsistent positions, since, under lease, if restaurant was maintained lessee was to have exclusive right to conduct that kind of business which was not limited strictly to operation of a restaurant

22. Abatement and revival ⚿8(4), 9

A lessee's suit to enjoin lessor from demising other premises in a hotel building to competitor on ground that lease gave lessee exclusive privilege of operating restaurant was not barred by the pendency of another action to which lessor was not a party and in which same relief was not demanded.

23. Landlord and tenant ⚿24(3)

A lease demising space in building necessary to do restaurant business was not rendered uncertain because the street number of the hotel in which restaurant was located was designated in lease as "36" West Central Avenue instead of "30" West Central Avenue, where one of the numbers designated the main entrance to the hotel and the other indicated the front entrance to the restaurant, and the description and location of the leased premises was not in dispute.

◆

Appeals from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action to terminate a lease of a portion of hotel property for a restaurant on ground of breach of an implied covenant by Helen R. Keating against Deborah Preston, consolidated for trial with an action by Deborah Preston against Helen R. Keating, etc., to enjoin the lessor from using space in a hotel for a competing restaurant business. From adverse judgments, Helen R. Keating appeals.

Affirmed.

Chapman & Chapman and John S. Frazer, all of Los Angeles, and Clyde F. Murphy, of North Hollywood, for appellant.

Arnold Praeger, of Los Angeles, for respondent.

THOMPSON, Acting Presiding Justice.

The above-entitled suits were consolidated for trial. Both actions involve the validity and construction of a lease of a portion of hotel property in Sierra Madre for the purpose of conducting a restaurant business. The first case is a suit to terminate the lease for alleged breach of an implied covenant not to violate section 337a of the Penal Code by accepting wagers from restaurant customers on horse races. The second suit sought to enjoin the lessor from demising or using space in the hotel for a competing restaurant business, and from closing the doorway communicating between the lessee's restaurant and the hotel lobby. The court adopted findings in both cases adverse to the lessor. From the judgments which were accordingly rendered, separate notices of appeal were given.

May 1, 1935, the Farmers & Merchants National Bank of Los Angeles executed its written lease to Deborah Preston of "All the space * * * necessary to do the restaurant business" together with the right to "serve * * * liquors not only on the leased premises but also in any part of the hotel" for the term of three years, in consideration of monthly rental "to be paid on the 5th of the month for the previous calendar month". The lease provides for the right of the lessor to re-enter the premises for failure to pay any instalment of rent when due or "if default shall be made in any of the covenants herein contained". The restaurant occupied a portion of the ground floor of the Hotel Sierra Madre which was conducted by the appellant in the remaining portion of the two-story hotel building fronting on West Central avenue in that city. At all the times involved in this litigation the appellant, Helen R. Keating, managed and operated the hotel business in that building. There was a doorway connecting the restaurant with the lobby of the hotel, which was commonly used by the lessee in providing the guests of the hotel with both food and liquor. The restaurant contained no adequate wash-room or toilet. By common consent, the hotel wash-room and toilet were frequently used by customers of the restaurant. The hotel property and lease of the restaurant were conveyed to the appellant, Helen R. Keating, January 29, 1937. Both the hotel and the restaurant were patronized by many persons who were interested directly and indirectly in horse racing. During much of the time involved in this litigation the appellant employed in her hotel a clerk by the name of Frank Fishback, who accepted money from both the appellant and from many of her hotel guests, to be delivered to the proper parties at the race track as wagers on horse races. It appears that Deborah Preston, the lessee of the restaurant property, also occasionally accepted money from her restaurant customers to be placed on horse races. The appellant first heard that the lessee accepted money for that purpose, as an accommodation to her customers, in November and December, 1936. The appellant had positive knowledge on February 19, 1937, that the lessee accepted money for that purpose. On March 4th, the appellant demanded and accepted on the following day rent for the restaurant for the month of February, which accrued on March 5, 1937. After the execution of the lease the appellant closed and barred the door intervening between the restaurant and her hotel, and threatened to lease to other individuals another portion of her hotel to be operated as a restaurant or cocktail room in competition with the respondent's restaurant. Mrs. Keating then brought suit to rescind the lease of the restaurant property on the ground of breach of covenant not to use the property for a purpose other than that of maintaining a restaurant, and that the violation of section 337a of the Penal Code, in accepting money to be wagered on horse races, constituted a forfeiture of the lease.

About the same time Deborah Preston commenced another suit against Mrs. Keating, seeking to enjoin her from leasing any other portion of her hotel property to other persons for the purpose of operating a restaurant in competition with the respondent's restaurant. This suit was tried on the theory that the lease of the restaurant gave Deborah Preston exclusive right to conduct a restaurant in the Sierra Madre hotel property.

The lease does not specifically restrict the use of the premises to that of the restaurant business. It merely demises "All the space in the Hotel Sierra Madre * * * necessary to do the restaurant business." That language may be susceptible of construction implying that the lease of premises was not necessarily restricted to a use only for the restaurant business. The lease does further provide that the lessor may re-enter the premises for failure to pay rent when it is due, and "if default shall be made in any of the covenants herein contained". Section 1930 of the Civil Code provides that: "When a thing is let for a particular purpose the hirer must not use it for any other purpose; and if he does, he is liable to the letter for all damages resulting from such use, or the letter may treat the contract as thereby rescinded."

[1, 2] The preceding section of the Code has been held to apply to the leasing of real property, as well as to the hiring of personal property. Isom v. Rex Crude Oil Company, 147 Cal. 659, 661, 82 P. 317; 15 Cal.Jur. 672, sec. 81. Unless the lease specifically limits the use of the property to a particular purpose, or that restriction is necessarily inferred from the language which is employed, the lease may not be forfeited on account of the mere use of the property for another purpose even though that be an illegal use prohibited by statute, for the reason that forfeitures of leases are not favored by the law. But under such circumstances the lessor will be compelled to resort to a suit for damages or for injunctive relief to compensate him or to prevent a continued unauthorized use of the premises.

The appellant concedes at page 92 of her opening brief that the lessee was not restricted by the terms of her lease to use the demised property exclusively for conducting a restaurant therein, and upon the contrary admits that she might conduct any other lawful business in the leased premises. She says in that regard: "Under the lease, she (Deborah Preston) is probably not even obligated to conduct a restaurant but might, under the provisions thereof, conduct any other kind of lawful business."

[3] By her preceding language the appellant admits that section 1930 of the Civil Code has no application to the facts of this case. That section merely declares that a contract may be treated as rescinded on account of a breach of covenant not to use the property for a purpose different from that which is specified in the lease "when a thing is let for a particular purpose". If the property in question was not leased "for a particular purpose", then there is no statutory provision authorizing the forfeiture of a lease merely because it may be used for an illegal purpose. The remedy for such illegal use of leased property is a suit for damages or injunctive relief.

That rule is concisely stated in 2 Tiffany on Landlord and Tenant, page 1359, section 193, where it is said: "The fact that the tenant uses the premises for an illegal purpose does not, in the absence of a statutory provision to that effect, give the landlord a right to terminate the tenancy."

In 16 Ruling Case Law, page 1115, section 633, it is said: "It is the general rule that the breach by the lessee of the covenants or stipulations on his part contained in the lease does not work a forfeiture of the term in the absence of an express proviso to that effect in the lease, the lessor's remedy being by way of a claim for damages."

Section 634 states: "Where the lessor's right of re-entry is in terms restricted to the breach of specified covenants of the lessee, this impliedly excludes the right to re-enter for the breach of other covenants."

[4-9] It is true that section 337a of the Penal Code is deemed to constitute a part of the lease in the present case. Brown v. Ferdon, 5 Cal.2d 226, 230, 54 P.2d 712; secs. 1643 and 1656, Civ.Code; 6 Cal.Jur. 310, sec. 186. But the statutory restriction against using property for conducting a bookmaking enterprise or for accepting, recording, holding or forwarding any bet or wager on the result of any contest or race between men or beasts contrary to section 337a of the Penal Code does not necessarily authorize the rescission of the lease for violation of the statute in the absence of a specific or implied provision in the lease for cancellation on that account. Neither section 1689 nor section 3406 of the Civil Code specify as grounds of rescission of a contract the use of the property for a purpose other than that which is specified in the instrument. Section 3406 does authorize the rescission "where the contract is unlawful". But the contract in this case is not unlawful even though the property may have been subsequently used for an unlawful purpose. We are of the opinion that section 1930 of the Civil Code should be read in connection with the preceding sections which specify the grounds upon which a contract may be rescinded. A lease may be terminated only when it is procured by fraud, for lack of consideration or for breach of expressed or implied covenants contained in the instrument. Conditions involving forfeiture of a lease must be strictly construed against the party in whose behalf they are invoked. Sec. 1442, Civ.Code.

[10] In support of the findings and judgment that the leased premises were not used for an illegal purpose in conflict with the provisions of section 337a of the Penal Code, it is reasonable to assume that even though the lessee of a restaurant personally accepted money as an accommodation to her customers to be placed on horse races in violation of the penal statute, it does not necessarily follow that the property was thereby used for the purpose of conducting a bookmaking enterprise or that the restaurant business was thus maintained for an illegal purpose.

[11] Moreover, the court found, in effect, that if there was a violation of section 337a, it was so slight and trivial a violation of the implied covenant that it does not constitute ground for terminating the lease on that account. It does appear that Deborah Preston, on several occasions did accept money, as an accommodation to her customers in the restaurant business, to be placed as bets on horse races, but that she invariably turned the money over to the parties for whom it was intended, and that she did not maintain the restaurant business as a bookmaking enterprise, nor did she act as an agent for any other person for that illegal purpose. She neither used her own money nor personally bet on horse races. She believed that all of the money which she handled in that manner, as an accommodation to her restaurant customers, was legally received and placed in accordance with the "pari-mutuel betting system". There is ample evidence to support the implied findings that the lessee, at all times, conducted a legitimate restaurant business, and that she did not maintain or use the restaurant property for an unlawful business in violation of the penal statute. Even though her personal conduct may have constituted a violation of section 337a, it does not follow that it resulted in a breach of lease which would justify its forfeiture, or that the restaurant business or property was used for that illegal purpose.

The lessee's receipt of money from her restaurant customers, to be delivered to others as wagers on horse races, is accounted for by the fact that the Hotel Sierra Madre, in which building the restaurant was located, was headquarters for individuals who owned race horses and for those who were especially interested in that pursuit. One of the chief issues in this case was based on an allegation that the lease was breached by the lessee's failure to exercise special care in preparing and serving meals on trays to the customers in the hotel. The delivery of wagers on horse races through the medium of the lessee was also for the special accommodation of the customers of the hotel. The court, in effect, so found.

In 35 Corpus Juris, at page 1064, it is declared that a lease may be terminated only for a substantial breach thereof, and not for a mere technical or trivial violation. It is there said: "Trivial breaches of covenants have been held insufficient to work forfeiture. The breach of an implied covenant will not work a forfeiture of a lease."

[12-14] Certainly the breach of an implied covenant will not result in a forfeiture of a lease unless the instrument declares that it shall be so construed. If a lease fails to specify that the demised premises shall be used only for a designated business, the inference is that it may be used for other appropriate purposes. The present lease merely demised "space" in the building "necessary to do the restaurant business". We may reasonably assume that language meant that space in the building was thereby leased, large enough or extensive enough in which to conduct a restaurant business. On the doctrine of construing the language of a lease most strongly against one who seeks thereby to forfeit the lease, we may say the quoted language in the present case does not prohibit the use of the space rented for some other lawful and appropriate purpose. The most that may be said of section 1930 of the Civil Code, upon which the appellant relies for cancellation of the lease, is that "when a thing is let for a particular purpose", the lessor, in the event of a breach of that covenant, may exercise an option to sue for damages or for rescission of the contract. Since the use of the premises in this case was not specifically prohibited for another purpose, and since the alleged violation of section 337a of the Penal Code constituted a mere implied covenant, and that the handling of funds by the lessee, incidental to horse racing, was specifically found by the trial court to be for the accommodation of customers, and a mere technical and trivial violation of law, we are of the opinion we may not interfere with the province of the court in its determination that the lessee's personal violation of section 337a of the Penal Code was not an unauthorized use of the property, under the circumstances of this case. It was not grounds for forfeiture of the lease.

It appears that the lessee did not intend to violate the law against betting on horse races. She believed that the transactions in which she accommodated customers in her restaurant by conveying their bets to another person who placed them with the interested parties constituted the pari-mutuel system of betting and was lawful under the provisions of the Horse Racing Act. Stats. 1933, p. 2046; Deering's Supp. for 1935, p. 767, Act 3421. The acts complained of occurred not later than February, 1938. It was not until June, 1938, that the Supreme Court determined for the first time that section 337a of the Penal Code provides for an offense separate and distinct from the provisions of the Horse Racing Act. In re Walker, 11 Cal.2d 464, 80 P.2d 990, 117 A.L.R. 825. Assuming that her conduct was in violation of section 337a of the Penal Code, it appears that the appellant could hardly complain of those acts as damaging to her property, for she was herself not only guilty of betting in a similar way on horse racing, but for some time her hotel clerk, Frank Fishback, accepted bets from the appellant and also from numerous guests of her hotel, with her knowledge, to be taken by him and placed with the proper parties at the race track. Mr. Fishback testified in that regard:

"Q. Did Mrs. Keating ever give you any money to place as a bet on a horse race at any time? A. Yes. * * * When I would be going down to the track. * * *

"Q. Did you at any time tell Mrs. Keating that you had ever received any money from any guests to be placed as a bet on a horse race? A. Why, yes.

"Q. You did? A. Some days when I would be going to the track I used to take money, as I say, bets from Mrs. Keating down there."

There is an abundance of evidence to support the implied finding of the court that the lessee was not using the leased property for the purpose of conducting a bookmaking business, although she did take some money from her restaurant customers to be placed as bets on horse racing, as an accommodation to her patrons as well as to the guests of the hotel. Many hotel guests ate their meals at the restaurant. An accommodation to a customer of the restaurant was often also a favor to the hotel guests. Under such circumstances, we are of the opinion the trial court was justified in refusing to terminate the lease on account of the lessee's alleged violation of section 337a of the Penal Code.

[15] Moreover, the appellant waived her right to terminate the lease for violation of section 337a of the Penal Code by demanding and receiving rent for the premises which accrued after full knowledge of that asserted breach of implied covenant. The violation of that penal statute may not be deemed to be a continuing

covenant so as to avoid the effect of the waiver on that account. The Farmers & Merchants National Bank of Los Angeles was the original lessor of the restaurant property. The lease and the title to that portion of the hotel property was assigned and conveyed to the appellant, Helen R. Keating, January 29, 1937. Mrs. Keating had heard rumors which led her to believe Deborah Preston had violated that statute as early as November or December, 1936. She had definite information on February 19, 1937, from which she positively knew that the statute had been violated. Under the terms of the lease the rent became due and payable on the 5th of each month for "the previous calendar month". On March 4th, the appellant served Deborah Preston with notice to pay the rent due for the month of February. The following day, March 5th, that instalment of rent for the previous month was paid and accepted by the appellant. That acceptance of rent for the month of February, during which she had actual knowledge of the alleged violation of section 337a of the Penal Code constituted a waiver of the breach complained of. The court specifically determined by its findings that the asserted breach of covenant was waived in that manner.

[16] The authorities are uniform to the effect that the forfeiture of a lease for breach of covenant, with full knowledge thereof on the part of the lessor, is waived by acceptance of rent which accrues after the breach. Jones v. Maria, 48 Cal.App. 171, 191 P. 943; Inman v. Schecher, 86 Cal.App. 193, 260 P. 605; 15 Cal.Jur. 787, sec. 205; 2 Tiffany's Landlord and Tenant, 1387, sec. 194 i. [b]; 35 C.J. 1080, sec. 255. The present case is a clear example of circumstances under which a landlord is estopped from terminating a lease for use of the premises contrary to an implied covenant by demanding and receiving rent which accrued after the asserted breach, with full knowledge of the illegal use of the property. This does not mean that the lease might not be forfeited by a subsequent similar breach after the waiver occurred. That situation however, is not involved in this suit.

The case of Myers v. Herskowitz, 33 Cal.App. 581, 165 P. 1031, upon which the appellant relies, is not in conflict with what we have previously said regarding the principle of waiver of a breach of covenant. All that case may be said to determine in that regard is that the circumstances clearly indicated that the landlord did not intend to thereby waive the breach of contract.

In the injunction proceeding, entitled Preston v. Keating, the court adopted findings and rendered judgment favorable to the plaintiff, restraining the defendant and her agents from renting other space in her hotel or permitting any person other than the plaintiff to conduct therein a competing restaurant, lunch-room, coffee-shop or place where meals are regularly served, during the term of the lease in question. the court found that the plaintiff was granted by the terms of the lease the exclusive privilege of maintaining a restaurant in that building. The court further found that the Hotel Sierra Madre is a small thirty-room, two-story hotel; that the plaintiff is dependent to a considerable extent upon the patronage of the guests for the successful maintenance of her restaurant; that soon after the execution of the lease the defendant procured the closing and barring of the doorway intervening between the restaurant and the lobby of her hotel, to the detriment of the plaintiff's business; that the defendant refused to permit the altering and construction of an adequate wash-room and toilet in the restaurant to conform to the city ordinance as a prerequisite to the issuance of a liquor license; that the defendant discouraged and prevented many of the guests of her hotel from patronizing the restaurant, to the great damage of the plaintiff; and that the defendant threatened to lease other space in her hotel to be used in conducting a competing restaurant.

[17] We are of the opinion the findings and judgment in the injunction proceeding are amply supported by the evidence. We are satisfied from the language of the lease that it was the intention of the parties thereto to demise to the lessee the exclusive right to operate a restaurant in the hotel building. Belvedere Hotel Co. v. Williams, 137 Md. 665, 113 A. 335, 14 A.L.R. 622; 90 A.L.R. 1457, note. The lease clearly grants and demises:

> "All the space in the Hotel Sierra Madre * * * necessary to do the restaurant business, including the restaurant, kitchen and store rooms, * * * with the appurtenances. * * * The lessee may also serve various beer, wines and liquors not only on the leased premises but also in any part of the hotel."

"All the space * * * necessary to do the restaurant business" in the Hotel Sierra Madre was leased to the plaintiff. No space to be used for a restaurant business was reserved to be rented to others. Moreover, the lessee was authorized to dispense liquor "in any part of the hotel". It seems clear that the parties to that lease contemplated that the lessee should have the sole and exclusive right to operate a restaurant business in that hotel. The facts and surrounding circumstances indicate that there is no justification for another competing restaurant to be established in that small hotel with its limited patronage.

In the Belvedere Hotel Company case, supra, the lease demised "to the party of the second part, the barber shop and manicuring concession in its hotel for a term of two years." The court held that "Under the lease of May 10, 1920, the appellee had, during the continuance of this lease, the sole and exclusive right to operate a barber shop and a manicuring establishment in the Hotel Belvedere."

[18-20] When a covenant in a lease prohibiting a lessor from demising other property in the same building or vicinity to be used for conducting a competing business tends to create a monopoly in the lessee or constitutes a limitation in restraint of trade, it will be strictly construed against the lessee. 2 Underhill on Landlord and Tenant, p. 741, sec. 453. The modern trend of authorities, however, is to construe such statutes as section 1673 of the Civil Code, and contracts between individuals intended to promote rather than to restrict a particular business, "In the light of reason and common sense" so as to uphold reasonable limited restrictions. Great Western Distillery Products Inc. v. John A. Wathen Distillery Co., 10 Cal.2d 442, 446, 74 P.2d 745, 746. In the case last cited it is said with respect to the construction of section 1673: "Statutes are interpreted in the light of reason and common sense, and it may be stated as a general rule that courts will not hold to be in restraint of trade a contract between individuals, the main purpose and effect of which are to promote and increase business in the line affected, merely because its operations might possibly in some theoretical way incidentally and indirectly restrict trade in such line."

The circumstances of the present case bring it within the exception to the general rule which is concisely expressed in the preceding quotation.

[21] The appellant contends that it is inconsistent for Deborah Preston to assert, in the suit to terminate the lease, that the instrument does not specifically restrict the use of the demised space in the hotel for the operation of a restaurant, and on the contrary, to assert, in the injunction proceeding, that she obtained the exclusive privilege of operating a restaurant in the hotel building. We do not perceive that those contentions are necessarily inconsistent. One may be granted all the space in a hotel building necessary to accommodate a restaurant, without definitely requiring the lessee to conduct that particular business. In other words, the space is demised with the option of running a restaurant therein, or some other lawful business. But the language clearly indicates that if the restaurant is maintained, the lessee shall have the exclusive right to conduct that kind of a business in the hotel. The fact that the lease specifically authorizes the lessee to serve liquor, in connection with her restaurant business, "in any part of the hotel" reinforces that construction of the language of the instrument. Clearly it would be inequitable for the defendant to be permitted to thus damage or possibly destroy the respondent's established business.

[22] There is no merit in the contention that this suit is barred by the pendency of another action. The respondent did previously commence a suit against the Farmers and Merchants National Bank merely to enjoin the closing of the intervening doorway. The appellant was not a party to that suit. Moreover, that suit was dismissed. It did not seek to restrain a threatened leasing of space in the hotel for a competing restaurant, as this proceeding does.

[23] It is immaterial and harmless that the court found the correct street number of the hotel to be "30" West Central avenue, instead of number "36" as the lease stated. It appears that one of those numbers designates the main entrance to the hotel, and the other one indicates the front entrance to the restaurant. The description and location of the space which was leased for restaurant purpose is not in dispute.

The judgments are affirmed.

We concur: TUTTLE, J.; PAULSEN, Justice pro tem.

UNION LEAGUE CLUB v. JOHNSON, State Treasurer.*

Civ. 6461.

District Court of Appeal, Third District, California.

Nov. 29, 1940.

Hearing Granted Jan. 27, 1941.

1. Licenses 🔑15(1)

A bona fide, nonprofit social club furnishing food and drink to its members and their guests, and not to general public, and as incidental to main purpose of club, was not engaged in "business" of selling tangible personal property at retail, and hence was not subject to sales tax imposed by Retail Sales Tax Act of 1935, prior to 1939 amendment specifically embracing club transactions. Civ.Code, § 593; Gen.Laws 1937, Act 3796, § 2(h); St.1933, p. 2610, § 31; St.1935, pp. 1256, 1252, 1258, 1259, §§ 2(a–e), 3, 9, 17.

See Words and Phrases, Permanent Edition, for all other definitions of "Business".

2. Clubs 🔑1

A nonprofit social club, in its transactions with its members in the carrying on of the clubhouse looking simply to the giving to members of such privileges in the property devoted to bona fide club purposes as all members are in common entitled to under constitution and rules of club, is not engaged in "business" in commercial or trade sense. Civ.Code, § 593.

3. Licenses 🔑15(1)

The word "business" in Retail Sales Tax Act imposing tax on persons engaged in business of making sales at retail is not used in its broad sense, but in the sense of an occupation for livelihood or profit, or an activity for gain, benefit, and advantage. St.1935, pp. 1257, 1252, §§ 2(e), 3.

4. Clubs 🔑1

The furnishing of meals and liquor by nonprofit social club to members and their guests only, and not to general public, is not principal function of club, but is instead merely one of the incidents of membership in the club. Civ.Code, § 593.

5. Licenses 🔑15(1)

The 1939 amendment to Retail Sales Tax Act, specifically subjecting club transactions to sales tax, indicated that Retail Sales Tax Act of 1935 did not apply to club transactions, since amendment of prior statute indicates an intention to change pre-existing law. St.1935, pp. 1256, 1252, §§ 2(a–e), 3; St. 1939, p. 2170.

6. Statutes 🔑147

Changes introduced by amendment will not be assumed to have been without design, and usually an intent to change the law is inferred.

7. Statutes 🔑219

Testimony that officers of tax department regarded social club furnishing food, liquors and cigars to members and their guests, as engaging in business of selling tangible personal property at retail so as to be subject to sales tax, did not establish a contemporaneous administrative interpretation of Retail Sales Tax Act as it existed in 1935 prior to 1939 amendment, which must be applied in determining whether club was subject to sales tax, where department promulgated no definite rules or regulations to that effect, and such question only arose with the 1935 amendment to the act, and actions for recovery of sales tax paid under protest were brought almost immediately after payment of protested tax. St.1935, pp. 1256, 1252, §§ 2(a–e), 3.

8. Statutes 🔑245

Taxes similar to taxes imposed under Retail Sales Tax Act are in invitum, and should be strictly construed in favor of taxpayer, and will not be construed beyond the plain import of the language of the statute. St.1935, pp. 1256, 1252, §§ 2(a–e), 3.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by the Union League Club against Charles G. Johnson, Treasurer of the state of California, for recovery of sales taxes paid under protest. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

Earl Warren, Atty. Gen., and H. H. Linney and A. A. Kragen, Deputy Attys. Gen., for appellant.

Peter tum Suden and Richard tum Suden, both of San Francisco (Nat. Schmulowitz and Peter S. Sommer, both of San Francisco, of counsel), for respondent.

PULLEN, Presiding Justice.

The Union League Club, a bona fide social club, for a consideration, furnished to its members, during the period between January 1, 1936, and September 30, 1937, certain tangible personal property as food, liquors, cigars, etc. The Board of Equalization of the State of California, hereinafter referred to as the board, deeming that the club was a retailer, within the provisions of the California Retail Sales Tax Act, demanded from the club a sales tax, being three per cent of the gross receipts collected by the club for the furnishing of the tangible personal property mentioned above.

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* Subsequent opinion 115 P.2d 425.

The club paid these taxes under protest, and brought this action to recover the same. A judgment was rendered in favor of the club, and this appeal was taken from that judgment.

The taxes here under consideration were levied and paid subsequent to the amendment of 1935 and prior to the amendment of 1937, and we are here concerned solely with the law as it existed in 1935.

The various sections of California Retail Sales Tax Act (Stats. 1933, page 2599, as amended in 1935, St.1935, pp. 1225, 1252, 1256) pertinent to our consideration here, reads as follows: Sec. 3. "For the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers at the rate of two and one-half per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State on and after August 1, 1933, and to and including June 30, 1935; and at the rate of three per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State on and after July 1, 1935. Such tax shall be paid at the time and in the manner hereinafter provided and shall be in addition to any and all other taxes."

Section 2 of the act provides in part as follows:

"(a) 'Person' includes any individual, firm, copartnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate, this State, any county, city and county, municipality, district or other political subdivision thereof, or any other group or combination acting as a unit, and the plural as well as the singular number.

"(b) 'Sale' means any transfer of title or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property, for a consideration, and includes the fabrication of tangible personal property for consumers who furnish either directly or indirectly the materials used in the fabrication work and the furnishing, preparing or serving for a consideration of any tangible personal property consumed on the premises of the person furnishing, preparing or serving such tangible personal property. A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price shall be deemed a sale.

"(c) A 'retail sale' or 'sale at retail' means a sale to a consumer or to any person for any purpose other than for resale in the form of tangible personal property, except that the expressions 'transfer of possession,' 'lease', and 'rental' as used in subdivision (b) of this section shall mean and include only such transactions as the board, upon investigation, finds to be in lieu of sales as defined in subdivision (b) of this section without the words 'lease or rental.'

"(d) 'Business' includes any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit or advantage, either direct or indirect.

"(e) 'Retailer' includes every person engaged in the business of making sales at retail; provided, however, that when in the opinion of the board it is necessary for the efficient administration of this act to regard any salesmen, representatives, peddlers or canvassers as the agents of the dealers, distributors, supervisors or employers under whom they operate or from whom they obtain the tangible personal property sold by them, irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors or employers, the board may so regard them and may regard the dealers, distributors, supervisors or employers as retailers for purpose of this act."

Section 9 of the act requires every retailer to file quarterly returns with the board and to pay a sales tax based upon such returns.

Section 17 of the act provides in part as follows:

"* * * For the purpose of the proper administration of this act and to prevent evasion of the tax hereby imposed it shall be presumed that all gross receipts are subject to the tax hereby imposed until the contrary is established. * * *"

Section 31 of the act allows a taxpayer to pay the disputed taxes under protest and to bring an action within sixty days to recover the same.

The question here presented is whether a bona fide social club is a retailer within the purview of the Retail Sales Tax Act, and taxable as such.

The Union League Club occupied a building in San Francisco wherein are maintained some ninety bedrooms, dining rooms, a barber shop, a swimming pool, a gymnasium, a library and reading rooms, a sun room, locker rooms, a billiard room, and bar. The club is not open to the public but has a membership of approximately 600 who pay dues, and in addition each member individually pays for what he consumes in the dining room or at the bar.

The purposes of the club are those expressed in Article 2 of its Constitution, and provides that this club "is instituted to bring about the association of citizens in the United States in support of, to promote and inculcate the principles of the Republican Party, to encourage and sustain absolute and unqualified loyalty to the Government of these United States, to further, by social, moral and political influence, to assist in advancing the cause of good and wise government and the honest and patriotic administration thereof, and by the same means to preserve the political equality of all men before the law, and in furtherance of these objects to establish, maintain and conduct a clubhouse and all conveniences usually connected therewith, and in every manner to deal in such property as may be necessary or convenient to carry out the purposes above expressed or intended."

Among the by-laws, No. 10 provides: "No member of the club shall receive any salary or emolument of any kind or nature from the funds or property of the club, nor shall any member of the club be employed by the club within 90 days after he shall have ceased to be a member of the club."

Article No. 13 provides: "At the request of a member any nonresident of San Francisco residing more than 50 miles distant may be admitted to the privileges of the club for a period of two weeks upon the consent of two members of the Board of Directors. Members may bring resident visitors to the club but such resident visitors shall not be extended any courtesies or privileges of the club."

It is the contention of appellant that respondent is a retailer within the meaning of the Sales Tax Act for two reasons, first, the express language of the act includes respondent; and secondly, if there is any ambiguity in the act itself, it must be construed in the light of the administrative interpretation by the State Board of Equalization from the effective date of the California Sales Tax Act.

Appellant, seeking support in the language of the act, points to Section 3 thereof which imposes a tax upon retailers. Section 2, Sub. (e) defines a retailer as including every person engaged in the business of making sales at retail. The act defines a person as including any association or group or combination acting as a unit. Section 593 of the Civil Code, as it read in 1880, under which section the respondent was incorporated, provides that "Any number of persons associated together * * * may incorporate * * *", and the next succeeding section states, "Any number of persons associated together * * * may incorporate such association * * *." From these sections appellant concludes that respondent is an "association" and as such is a "person" within the provisions of Section 2 (a) of the Sales Tax Act.

As to the meaning of a "sale", appellant cites Section 2 (b) of the act as "any transfer of title * * * in any manner or by any means whatsoever, of tangible personal property, for a consideration * * *", and a "sale at retail" is defined in Section 2 (c) as a "sale to a consumer * * * for any purpose other than for resale * * *". Such being true, it is contended, the transfer of food, etc., constituted a sale for a purpose other than for resale, to-wit, for consumption, and therefore the transfers were sales at retail within the purview of the act.

Business is defined in Section 2 (d) as "any activity * * * with the object of gain * * *".

Appellant therefore contends that the transfers by respondent to its members of food, etc., constituted a sale for purposes other than resale, and that it was engaged in business with the object of gain. In addition to the foregoing analysis of the language of the act appellant cites us to State v. Zellner, 133 Ohio St. 263, 13 N.E.2d 235, and Ada County v. Boise Commercial Club, 20 Idaho 421, 118 P. 1086, 38 L.R.A.,N.S., 101.

As to the second point that in case of an ambiguity in the act, it must be construed in the light of the administrative interpretation by the board since the effective date of the act.

In support of this principle appellant quotes from Cuzner v. California Club, 155 Cal. 303, 100 P. 868, 20 L.R.A.,N.S., 1095, and Helvering v. Reynolds Tobacco Co., 305 U.S. 587, 59 S.Ct. 101, 83 L.Ed. 371, and cases cited in 23 Cal.Jur. p. 776, Note 1.

In support of the judgment respondent claims there is no express language in the act which indicates that a social club is included within the definition of the word "retailer". It may be, respondent asserts, that the definition of "person" as found in the act might include a social club, but they deny that the definition of a "sale" or "business" or "retailer" may be so enlarged.

[1-4] Without indulging in fine shades of meaning of the word, "business" it would seem that the language used in Cuzner v. California Club, 155 Cal. 303, 100 P. 868, 871, 20 L.R.A.,N.S., 1095, is a sufficient answer. It is there said that, "in its transactions with its members in the carrying on of the clubhouse looking simply to the giving to them such privileges in the property devoted to bona fide club purposes as they are all, in common, entitled to under the constitution and rules of the club, it is not engaged in business at all in the commercial or trade sense, as ordinarily understood."

It is not business in its broad sense that we are here considering but rather as an occupation for livelihood or profit—an activity for "gain, benefit and advantage". Here it is conceded that respondent is a social club and a nonprofit organization; that the service of food and drink to its members is but an incident to its main purpose; that it does not have customers; that it does not serve the general public and that its facilities and privileges are for the use in common by members and their guests only.

All who have any knowledge of the operation of a social club such as respondent, realize that the furnishing of meals is not the principal function of such an association, and that as a matter of fact the cost of such meals to the member is usually less than cost, which is made up from dues and other sources of revenue, the serving of food and liquor being merely one of the incidents of membership.

As again said in Cuzner v. California Club, supra: "The question, then, as it appears to us, is whether a bona fide social club, engaged in transactions of the character hereinbefore detailed, with the sole object, as we look at it, of distributing articles provided for the use of the members in such a way 'that there shall not be unequal contributions to the treasury which purchases them' (Klein v. Livingston Club, 177 Pa. [224] 231, 35 A. 606, 608, 34 L.R.A. 94, 55 Am.St.Rep. 717), is to be held to be within the purview of a law or ordinance which simply imposes a license tax upon the business of selling liquors and does not contain other provisions that show a clear intent to include them. Upon this question, we are satisfied that the great weight of authority is in favor of the proposition that they are not so included."

To the same general effect is Varcoe v. Alameda Lodge, 174 Cal. 549, 163 P. 909.

Bona fide social clubs have long been recognized in this state as a distinct class, and a club is now defined in Deering's General Laws, 1937, Act 3796, section 2, paragraph (h), as follows: "'Club' means a corporation or association which is the owner, lessee or occupant of an establishment operated solely for objects of social or athletic nature, having a bona fide membership list, and the majority of the members of which pay dues at least once in every year, but not for pecuniary gain, and the property as well as the advantages of which, belong to the members."

When the Revenue Laws of the United States (26 U.S.C.A. Internal Revenue Code, sec. 1710) imposed a special tax upon the dues or membership fees of a social, athletic or sporting club, many of such clubs attempted to claim that they were not in fact clubs but business organizations, thereby hoping to escape the tax, but without success. See Transportation Club of San Francisco v. United States, Ct. Cl., 17 F. Supp. 201; Chicago Engineers' Club v. United States, Ct. Cl., 9 F.Supp. 680; Chance v. United States, Ct. Cl., 9 F.Supp. 1011.

Appellant calls our attention to and quotes at length from the case of Blauner's, Inc. v. City of Philadelphia, 330 Pa. 342, 198 A. 889, where it was held that a club transaction was a transfer of possession for a consideration, and under the particular ordinance in question, constituted a sale, and was therefore subject to a tax. That case may be distinguished from the case here before us by remembering that the tax there involved was in the nature of a transaction tax rather than a sales tax as we are here considering.

[5, 6] An additional reason which impels us to conclude that respondent is not liable under the Act of 1935 is that in 1939 the legislature amended the Sales Tax Act to embrace club transactions. St.1939, p. 2170. In People v. Weitzel, 201 Cal. 116, 255 P. 792, 52 A.L.R. 811, where several cases to the same effect are cited, the court held that where changes have been introduced by amendment it is not to be assumed that they were without design; usually an intent to change the law is inferred.

More recently in Fresno v. DeCaristo, 33 Cal.App.2d 666, 92 P.2d 668; Mason v. Buck, 99 Cal.App. 219, 278 P. 461; Loew's, Inc. v. Byram, 11 Cal.2d 746, 82 P.2d 1; Jensen v. Hugh Evans & Co., 13 Cal.2d 401, 90 P.2d 72, the doctrine has been reaffirmed that the amendment of a prior statute indicates an intent to change the pre-existing law.

[7] It is also claimed that in case of an ambiguity in the act it must be construed in the light of the contemporaneous administrative interpretation of the department having to do with its enforcement, and we are referred to the testimony of certain of the officers of the tax department who testified they regarded clubs such as respondent as engaged in the business of selling tangible personal property and had so interpreted the law. No definite rules or regulations of the department, however, were promulgated to that effect, and in fact rule No. 32 of the Board of Equalization then provided, and still does, that "Gross receipts from sales of meals furnished by restaurants, hotels, boarding houses and caterers are taxable." No reference is made to social clubs. Also the question here presented only arose with the amendment of 1935, and these or similar actions were brought almost immediately after the payment of the protested tax.

[8] It is also to be remembered that taxes such as are here considered are in invitum and are therefore to be strictly construed in favor of the taxpayer (Barker Bros. v. Los Angeles, 10 Cal.2d 603, 76 P. 2d 97; Uhl v. Badaracco, 199 Cal. 270, 248 P. 917) and such taxes are not to be construed beyond the plain import of the language of the statute. Hughson v. Board of Equalization, 23 Cal.App.2d 281, 73 P. 2d 290.

In view of all that has been said we believe the judgment must be affirmed. It is so ordered.

We concur: TUTTLE, J.; THOMPSON, J.

JACKSON v. MASTER HOLDING CORPORATION et al.

L. A. 17395.

Supreme Court of California.

Dec. 30, 1940.

Rehearing Denied Jan. 27, 1941.

1. Limitation of actions 🔑177(3)

An action for fraud in the sale of corporate stock occurring almost eight years previously is barred by limitations, unless the complaint pleads sufficient facts to excuse the late discovery of the alleged fraud.

2. Limitation of actions 🔑179(2)

A complaint for fraud in the sale of stock of a holding company for building and loan associations was barred by limitations where there was no showing of any inquiry by plaintiff even though for five years she received none of the dividends promised, and where no explanation was offered for the absence of inquiry except the averment that the facts were concealed and kept in the private files of defendants.

◆

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Emma Jackson against the Master Holding Corporation and others, for fraud in the sale of stock of defendant named. From a judgment against plaintiff after demurrers to the complaint were sustained without leave to amend, plaintiff appeals.

Affirmed.

For prior opinion, see 95 P.2d 498.

Rehearing denied; CURTIS, HOUSER, and CARTER, JJ., dissenting.

F. W. Sawyer, of Los Angeles, for appellant.

Wm. N. Graybiel, of Turlock, for respondent Turlock Guarantee Building-Loan Ass'n.

T. B. Scott and E. H. Zion, both of Modesto, for respondent El Portal Building-Loan Ass'n.

PER CURIAM.

Plaintiff commenced this action on March 17, 1938, against defendants for fraud. Defendant Turlock Guarantee Building-Loan Association filed a general demurrer to the second amended complaint, which included the plea of the statute of limitations. Defendant El Portal Building-Loan Association filed a similar general demurrer, and also demurred specially upon the ground of uncertainty. Plaintiff's counsel indicated that he did not desire to amend, and the demurrers were sustained without leave to amend. Judgment against plaintiff followed, and she then brought this appeal.

In order to determine the sufficiency of the complaint against the demurrers it will be necessary to summarize its main allegations, which are as follows:

On March 20, 1930, defendant Master Holding Corporation was organized to act as a holding company for building and loan associations in California. On information and belief, plaintiff alleged that prior to July 29, 1930, two other associations and Master Holding Corporation entered into a written agreement of "general agency", executed by their respective officers, under which they "were united, allied and affiliated together in the doing of the business of each", and all came under the control and supervision of Master Holding Corporation; and that thereafter "by virtue of certain resolutions, agreements and transactions duly adopted by the respective boards of directors" of said defendants, these corporations were governed by a regional board of directors, and that Master Holding Corporation acted for all of them.

On July 29, 1930, plaintiff was approached by H. R. Acteson, claiming to be the authorized agent of Master Holding Corporation and its "allied and affiliated interests", who attempted to sell her stock in the corporation. He invited her to meet with him and the officers of the Turlock Association, and plaintiff came to its office. At this meeting, on or about July 30, 1930, Acteson, in the presence of R. Anderson, secretary of said association, stated to plaintiff that he, Acteson, was the authorized agent of Master Holding Corporation and of its allied interests; that the corporation had acquired the control of some twenty or more building and loan associations in the state by purchase of over 50 per cent of their issued and outstanding capital stock; that among these associations were the Turlock Association and El Portal Association; that Master Holding Corporation was receiving over 50 per cent of the net earnings of said associations as dividends, and that all of said associations were producing income; that Master Holding Corporation was receiving over 7 per cent per annum on its stock; that all of these associations were united and affiliated with Master Holding Corporation and that their business was performed through a regional board of directors, thus assuring experience and knowledge in the business; and that the acquisition by Master Holding Corporation of the stock had been approved by the corporation commissioner. Many other representations as to the safety and value of the investment are alleged. Anderson at no time questioned any of the statements but instead advised plaintiff that she could rely on them and that the investment was sound.

Plaintiff further alleged, on information and belief, that the sale of the stock of Master Holding Corporation to plaintiff was part of a general sales campaign, conducted by the regional board of directors of the affiliated associations, and that Acteson was employed by said regional board of directors, and under resolutions and agreements of said board was fully authorized by all of the allied and affiliated associations to make the representations alleged; and that the money received from plaintiff by Master Holding Corporation for the purchase of said stock was actually used for the benefit of all of the said associations.

Allegations of falsity of the representations and reliance thereon then follow. In particular it is alleged that Master Holding Corporation never acquired any of the stock of any of the corporations, and that its stock was of no value whatever. Instead, it is alleged on information and belief that in order to induce plaintiff and others to purchase its stock, Master Holding Corporation, with the full knowledge and consent of a majority of officers and members of the regional board of directors, arranged for an exchange of its stock for over 50 per cent of the stock of the other associations, which stock was delivered to Theodore Kemp in a secret escrow; that Kemp retained the shares but never did consummate the exchange, and after the sales campaign, Kemp returned the shares to the original owners so that Master Holding Corporation never acquired anything by this transaction.

Plaintiff alleges finally that all of the facts constituting the fraud were concealed by the defendants, and that all information respecting these transactions was kept in the private files of defendants. She did not discover the facts until May 9, 1935, when another investor, told her of the void exchanges and the insolvency of Master Holding Corporation. She alleges that prior to said discovery and the resulting litigation, she had no notice of any circumstances which would lead her to discover the facts constituting the fraud.

[1] From the foregoing summary of the allegations of the complaint it is clear that the serious question on this appeal is whether the complaint pleads sufficient facts to excuse the late discovery of the fraud, in order to take the case out of the bar of the statute of limitations. Unless it does, the action is barred, for the fraud occurred in 1930, and the action was not brought until 1938.

[2] Defendants rely on the many cases which establish the requirement of pleading facts to excuse the belated discovery of the alleged fraud, of which Lady Washington C. Co. v. Wood, 113 Cal. 482, 45 P. 809, 810; Consolidater Reservoir & Power Co. v. Scarborough, 216 Cal. 698, 16 P.2d 268; Nighbert v. First Nat. Bank, 26 Cal. App.2d 624, 79 P.2d 1105; Turner v. Liner, 31 Cal.App.2d 196, 87 P.2d 740, are typical. The argument, based on these cases, is that plaintiff was a stockholder with a duty to inquire into the acts of officers and directors of the corporation, and that she is charged, in some degree at least with knowledge of facts which appear on the records of the corporation. The complaint alleges that plaintiff was promised an income of 7 per cent and never received any dividends at all. But she made no inquiry of the officers of the corporation nor of the building and loan commissioner as to the reasons why no dividends were paid, and she made no attempt to inspect the books of the corporation. There is no allegation that she attended any stockholders' meeting, nor is it claimed that no meetings were held. Other sources of information and circumstances calling for inquiry are suggested by defendants, and it is therefore contended that since she had the means of acquiring knowledge, and failed to make any inquiry, she cannot justify her action after the period in which the statute of limitations would normally run.

It is neither necessary nor desirable at this time to consider the extent to which the doctrine of the foregoing cases has been or should be relaxed in situations where the failure to make inquiry is a result of deceptive assurances by the fraudulent parties, or other conduct tending to lull the plaintiff into a sense of security; nor where the plaintiff does make some inquiry, but fails to discover the truth. See discussion in Bainbridge v. Stoner, Cal.Sup., 106 P.2d 423. The present pleading cannot be justified even under the most liberal relaxation of the rule for there is no showing of any inquiry at all, and no explanation is offered for the failure to make it except the vague averment that the facts were "concealed" and "kept in the private files" of defendants. The pleading simply fails to meet the minimum requirements of a complaint for fraud which is filed more than three years after its commission.

In view of our conclusion on this issue it is unnecessary to consider the numerous specifications of uncertainty raised by the special demurrer.

The judgment is affirmed.

* * *

16 Cal.2d 829

HARTH v. TEN EYCK et al.

L. A. 16863.

Supreme Court of California.
Jan. 2, 1941.

1. Dismissal and nonsuit 🔑43(2)

That an order dismissing action with prejudice as to one of defendants was an appealable order would not make an appeal therefrom the exclusive method of attacking it, but trial court on a proper motion, timely made, could set order aside. Code Civ. Proc. § 473.

2. Dismissal and nonsuit 🔑43(5)

Power of trial court to set aside an order dismissing action with prejudice as to one of defendants, under statute, was not exhausted by trial court's conclusions on order of denial, but trial court had power to reexamine evidence while cause was still pending on its merits and arrive at a different conclusion if it thought ends of justice would be best served thereby. Code Civ.Proc. § 473.

3. Dismissal and nonsuit 🔑43(5)

Where affidavits submitted by plaintiff were sufficient to show that plaintiff had action dismissed as to one of defendants upon such defendant's promise to testify to certain facts, which he failed to do, trial court did not abuse its discretion in reconsidering plaintiff's motion to set aside order dismissing action with prejudice as to such defendant, after motion had been denied. Code Civ. Proc. §§ 473, 2055.

4. Judgment 🔑388

Trial court is without power to set aside an order involving judicial action and regularly made, and enter another and different order without notice to the adverse party.

5. Appeal and error 🔑927(2)
Judgment 🔑569

Where trial court permitted plaintiff to renew his motion to set aside an order dismissing action with prejudice as to one of defendants during course of trial on proper notice to adverse party, pursuant to statute, doctrine of "res judicata" did not necessarily apply, and test of regularity of trial court's action on appeal from order was whether trial court abused its discretion in permitting a renewal of the motion and in arriving at a different conclusion. Code Civ.Proc. § 473.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

EDMONDS, J., dissenting.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by H. A. Harth, Sr., against Warren Ten Eyck, L. E. Olinger, and others, to rescind the purchase of royalty interests in an oil well. The plaintiff dismissed as to defendant L. E. Olinger. Thereafter plaintiff moved under Code of Civil Procedure, § 473, to set aside the order of dismissal on the ground that it was made upon promise of defendant L. E. Olinger to testify to certain facts, which he failed to do. From an order setting aside the order dismissing the action as to the defendant L. E. Olinger with prejudice as to him, defendant L. E. Olinger appeals.

Affirmed.

See, also, 12 Cal.2d 709, 87 P.2d 693.

L. Lee Bernstein, of Los Angeles, for appellant.

Cummins, McMillan & Cummins, of Los Angeles, for respondent.

R. Dechter and B. L. Hoyt, both of Los Angeles, for Petroleum Supply Co., Sam Goldman, and Frank Goldman.

Hanna & Morton, of Los Angeles, for Canal Oil Co., Warren Ten Eyck, and Marian Ten Eyck.

SHENK, Justice.

This is an appeal by the defendant L. E. Olinger from an order setting aside an order dismissing said action with prejudice as to him.

The action was brought to rescind the purchase of royalty interests in an oil well. The defendant Olinger was alleged to be the agent of his codefendants. Seven defendants, including Olinger, answered and the cause went to trial. After the plaintiff had put on a part of his proof, a recess was taken. Up to that time the defendant Olinger had not been present at the trial. During the recess a conversation took place between the attorney for the plaintiff and the attorney for the defendant Olinger, the result of which was that plaintiff's counsel agreed that if the defendant Olinger would appear as a witness for the plaintiff, plaintiff's counsel would dismiss the action as to him. The minutes of the court for the day show that after certain witnesses other than Olinger had testified on behalf of the plaintiff the court made the following order: "On motion of plaintiff, cause is dismissed as to defendant L. E. Olinger."

Thereafter the trial proceeded. Mr. Olinger was sworn and examined as a witness for the plaintiff. After the introduction of other evidence, the cause was argued and ordered to be submitted on briefs. Before submission of the cause the plaintiff served and filed a notice (1) of motion to reopen the case for the purpose of taking further testimony, and (2) of a motion to set aside the order dismissing the defendant Olinger from the case. The latter motion was made under section 473 of the Code of Civil Procedure and was supported by the affidavits of Joseph J. Cummins, the attorney for the plaintiff who had conducted the trial, wherein at some length he set forth the conversation between himself and counsel for defendant Olinger during the recess and just prior to making the motion to dismiss Olinger from the case. The affiant, Mr. Cummins, stated that during the recess counsel for Olinger said to him, "Why do you not dismiss against my client? If you will, I will see to it that he gives your clients a break." To which the affiant responded in substance as follows: "The only break we want from Olinger is that he appear in court and tell the truth, and that is that he did represent himself to the Harths as the agent of Ten Eyck and the Petroleum Supply Company;" that Olinger's attorney thereupon extended his hand to the affiant and stated: "That is a deal. You dismiss as against Olinger in open court before the noon recess and I will have him in court this afternon and he will so testify;" that before Olinger went on the witness stand affiant asked him if it were not a fact that by his statements, representations and conduct he represented to the Harths that he was an agent of said defendants Ten Eyck and the Petroleum Supply Company; that Olinger replied in substance: "That is the truth and I will so testify."

An affidavit made by H. A. Harth, Sr., averred that Olinger stated to him that he was the agent and acting in behalf of the defendants Petroleum Supply Company, Sam Goldman and Frank Goldman. And an affidavit made by H. A. Harth, Jr., averred that Olinger had made statements to him which would be favorable to the plaintiff's cause.

The affidavit of Cummins averred that because of the dismissal of Olinger from the case the plaintiff was compelled to call him as his own witness and not as an adverse witness under section 2055 of the Code of Civil Procedure; that when Olinger was called as a witness on behalf of the plaintiff he testified contrary to his statements and representations made prior to his being sworn as a witness, denied that he had represented to the plaintiff that he was the agent of the other defendants, repudiated the statements and representations upon which his dismissal from the case was predicated, and thereby prevented and precluded the plaintiff from impeaching him by contrary statements made out of court.

On the motion counter-affidavits were made by Olinger and by his attorney, in which the crucial averments of the plaintiffs' averments were drawn in issue. Much was set forth in both sets of affidavits which need not be related. Enough has been said to indicate a very definite conflict in the showing thereby made to the court on said motions.

The motions were denied on March 31, 1938. Eleven days later the plaintiff served and filed a notice of motion to "reconsider" the denial of said motions. Concurrently with the filing of this motion the trial judge made an order extending the plaintiff's time to file his brief on the merits of the cause as tried "until after disposition of the motion of the plaintiff this day filed for the purpose of moving the Court to reconsider the denial of two motions", namely, the motion to set aside the dismissal of Olinger from the case and the motion to reopen and take further testimony. On the hearing of this motion to reconsider, the following minute order was entered: "Said motion is by the Court ordered granted. The order of March 31, 1938, denying the above motions is vacated and set aside and the said motions are granted." This appeal is taken from the minute order last noted.

[1] It was stated in Harth v. Ten Eyck, 12 Cal.2d 709, 87 P.2d 693, that the order here appealed from was an appealable order. It is argued by the defendant Olinger that since said order was appealable the power of the court was exhausted when it denied the motion to set aside the order of April 18th dismissing Olinger from the case. But the fact that the order of dismissal was appealable would not make an appeal therefrom the exclusive method of attacking it. The trial court on a proper motion, timely made, could set it aside.

That the court had jurisdiction to entertain the motion under section 473 of the Code of Civil Procedure may not successfully be questioned. The burden of the appellant's contention is that having ruled on that motion by denying it, the court thereby lost all power to deal with the subject-matter thereof on a motion to reconsider its action, especially in the absence of a showing different from that made on the original motions.

Neither of the objections to the final order on the motions is persuasive. Although the second motion was called a motion to reconsider, the reasonable import of the action of the court, drawn especially from its order of April 11th, wherein the time for the filing of briefs on the merits of the cause was extended until after disposition of that motion, is that the court considered it a renewal of the motion to set aside its previous order of denial and to grant the original motions. When so construed, the order of April 11th was tantamount to permission to renew the motion to vacate.

With the motion then before it the court had the power to dispose of it and to set aside the order of dismissal. Indeed the dismissal of an entire action might thus be set aside. McDonald v. Severy, 6 Cal.2d 629, 59 P.2d 98. Here one defendant only had been dismissed from the case and the cause on its merits was still pending before the court. It is in much the same situation as the case of De La Beckwith v. Superior Court, 146 Cal. 496, 80 P. 717, 718, where certain defendants had been excluded from the case by orders sustaining their demurrers. A motion was made to vacate said orders and to bring in the same parties as parties defendant. They objected on the ground, among others, that the orders sustaining the demurrers "were in effect res judicata, and the court had no power to set aside or vacate the same, directly or indirectly; that by reason thereof said defendants had been dismissed from the action, and the court had lost jurisdiction over them". The trial court ruled that it had no power to hear the motion. Mandamus was successfully invoked to compel the court to exercise its jurisdiction by hearing and disposing of the motion. It is true that in that case it was also held that no showing under section 473 of the Code of Civil Procedure was necessary, if the motion was otherwise well grounded. Here the cause on its merits was likewise still pending and undetermined in the trial court. In the De La Beckwith Case this court stated: "In Richman v. Board, 77 Iowa 513, 524, 42 N.W. 422 [426], 4 L.R.A. 445, 14 Am.St.Rep. 308, where the court had practically reconsidered its ruling on demurrer, the Supreme Court of Iowa said: 'We are not prepared to hold that if, during the trial of the issues of an action, a court becomes convinced of error, he may not correct it. It would be a serious impediment to a fair and speedy disposition of causes if such a rule was to obtain.' "

[2] When the motion to vacate was before the court on the conflicting affidavits already on file, the court's power then to weigh the conflicts was the same as upon

first consideration thereof. In other words, the power of the court to resolve the conflicts was not exhausted by its conclusions on the order of denial, but it had the power to reexamine the evidence and arrive at a different conclusion, if it thought the ends of justice would be best served thereby. Unless an abuse of discretion was committed, the final order of the court should be permitted to stand.

[3] On a survey of the record and a reading of the affidavits, we find no abuse of discretion. The affidavits were sharply conflicting. If those filed on behalf of the plaintiff were to be believed, there was sufficient upon which to base the conclusion that the plaintiff had been misled to his prejudice in connection with his motion to dismiss defendant Olinger from the case. Whether the truth and right of the matter lay with the plaintiff or with the defendant Olinger might not appear so clear on a first examination of the facts presented. A more thorough examination might, and in fact did, lead to a contrary conclusion.

[4, 5] The cases relied upon by the appellant, such as Stevens v. Superior Court, 7 Cal.2d 110, 59 P.2d 988; Owen v. Crocker-Huffman L. etc. Co., 38 Cal.App. 649, 177 P. 299; Dolan v. Superior Court, 47 Cal.App. 235, 190 P. 469, and Vale v. Maryland Casualty Co., 101 Cal.App. 599, 281 P. 1058, are not controlling. It was there held in accordance with the well-established rule that the trial court is without power to set aside an order involving judicial action and regularly made, and enter another and different order without notice to the adverse party. This is necessarily true whether the second order be made on the same or a different set of facts. The cases so relied upon all recognize that the court has the power to act under appropriate legislative authority, such as section 473 of the Code of Civil Procedure, on proper notice. When this is done during the course of the trial the doctrine of res adjudicata does not necessarily apply and the test of the regularity of the court's action on an appeal from the order is, as stated, whether the court has abused its discretion in permitting a renewal of the motion and in arriving at a different conclusion. Kenney v. Kelleher, 63 Cal. 442; 2 Freeman on Judgments, 1408, sec. 669. On the record here presented no abuse of discretion is shown and the conclusion of the trial court should not be disturbed.

The order is affirmed.

We concur: GIBSON, C. J.; CURTIS, J.; HOUSER, J.; CARTER, J.; TRAYNOR, J.

EDMONDS, Justice (dissenting).

I cannot agree with conclusions which have been reached in this case and do not believe that long-settled rules of procedure should be set aside because of what may appear to be the equities in a particular situation.

The case of De La Beckwith v. Superior Court, 146 Cal. 496, 80 P. 717, which is relied upon by my associates as authority for their determination, was decided upon facts quite different from those which are now before the court. There demurrers were sustained by the trial judge, who before rendering a judgment reconsidered and overruled them. The distinction is clear. An order sustaining a demurrer is not a judgment although it may form the basis of a judgment.

On the other hand, a minute order of dismissal is the equivalent of a final judgment which disposes of the action. Southern Pac. R. Co. v. Willett, 216 Cal. 387, 14 P.2d 526. And when the action has been dismissed with prejudice by agreement of the parties in open court, it is presumed that the parties meant it to be a final adjudication of the cause so as to bar further litigation upon the same issues. Breznikar v. T. J. Topper Co., 23 Cal.App.2d 298, 72 P.2d 895; Merritt v. Campbell, 47 Cal. 542; McCord v. Martin, 47 Cal.App. 717, 191 P. 89; see Goddard v. Security Title Ins. & Guarantee Co., 14 Cal.2d 47, 92 P.2d 804.

A dismissal with prejudice has also been held to have the same effect as a common-law retraxit. Lamb v. Herndon, 97 Cal.App. 193, 275 P. 503. It is considered to be the same as any other judgment and may be vacated upon a motion made pursuant to the provisions of section 473 of the Code of Civil Procedure (McDonald v. Severy, 6 Cal.2d 629, 59 P. 98), and this court recently decided that the order now under review is a special one made after final judgment from which an appeal lies. Harth v. Ten Eyck, 12 Cal. 2d 709, 87 P.2d 693. See, also, James v.

Center, 53 Cal. 31; Colby v. Pierce, 15 Cal.App.2d 723, 59 P.2d 1046.

The rule is well settled that a court may correct a clerical error in an order previously made because such correction is not a judicial act but a change of language to make the record speak the truth. Estate of Soboslay, 4 Cal.2d 177, 47 P.2d 714. So, also, an order may be vacated when made prematurely or through inadvertence (Holtum v. Grief, 144 Cal. 521, 78 P. 11; Owen v. Crocker-Huffman L. etc. Co., 38 Cal.App. 649, 177 P. 299), as this presents no question of judicial review upon the merits. The situation is far different, however, when, as in the present case, the court has made an order denying a motion regularly submitted for decision. Under such circumstances, the order previously made may not be set aside when the only reason for so doing is that the judge has come to a conclusion different from that expressed by the order previously made. Vale v. Maryland Casualty Co., 101 Cal.App. 599, 281 P. 1058; Stevens v. Superior Court, 7 Cal.2d 110, 59 P.2d 988, 990. In the Vale Case the order which was reversed was made after a hearing in which the court considered an additional affidavit presented in support of the motion. In the Stevens Case this court reviewed the authorities and pointed out that where "all of the matters before the court at the time of the making of the second order having been considered by it at the time of the making of the first order, it cannot, simply because upon a reexamination of the same matters it has reached a different conclusion, give effect to the second determination of the same issue by modifying or annulling the original order or judgment".

At one time, the rule of res judicata did not apply to decisions upon motions because they did not receive the same consideration as the trials of issues of fact, and there was no right of review in a higher tribunal. However, the right to review a motion was a qualified one. As stated in the early case of Kenney v. Kelleher, 63 Cal. 442, 444, although "The court may, upon a proper showing, allow a renewal of a motion once decided. * * * this leave will rarely be granted unless it appears that a new state of facts has arisen since the former hearing, or that the then existing facts were not presented by reason of surprise or excusable neglect. But this is not a determination that leave may never be granted upon the same facts more fully stated. The granting or refusing of leave to renew the motion is within the legal discretion of the court, which we ought not to interfere with except in case of abuse." Later, the court said that "in recognition of the authorities generally, and admitting the broad power on the part of the trial court to entertain successive motions with regard to the decision either of a disputed matter of fact, or matter of law dependent upon the fact thus established, the further conditional principle has been declared that ordinarily leave to renew a motion should be predicated upon the assumption that at the hearing thereof the moving party can and will produce material and relevant evidence additional to that which he presented on the hearing of the former motion and that the facts which gave rise to such additional evidence either occurred after the date of such former hearing, or that they were not presented at that time 'by reason of the surprise or excusable neglect of the moving party'". Tiffany Productions, etc., v. Superior Court, 131 Cal.App. 729, 734, 22 P.2d 275, 277.

Under our present procedure, there is no justification for allowing a party who has had a full hearing on a motion, with a right of review in a higher court, to renew the same motion on the same facts. And even when the doctrine of res judicata was not applied to orders made upon motion with the same strictness as to judgments, it was uniformly held that it was a clear abuse of judicial discretion for a court to reach a different conclusion upon a renewal of a motion or upon a second motion based on identical grounds, particularly when its action on the original motion was reviewable on appeal.

In the present case, the motion to reconsider was not based upon any new facts or even a more complete statement of the facts which had been previously considered by the court, and it was not even reargued. Certainly there is nothing in the record to indicate that the trial judge or counsel considered the motion to be a renewal of the one previously made. On the contrary, it was presented and ruled upon as a motion to reconsider the previous ruling. In effect, the court purported to correct judicial error in its disposition of the original motion. Such judicial error, if any, was reviewable on appeal from the order denying the original motion to vacate, for the grounds advanced in support of that motion would not be disclosed or be available on an appeal from the judgment itself, and the order denying the original motion to vacate would therefore come within the exception to the rule which precludes an appeal from an order refusing to vacate where it serves to allow two appeals.

For those reasons, I believe the order granting the second motion should be reversed.

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42 Cal.App.2d 281

PEOPLE v. TERRAZAS.

Cr. 3382.

District Court of Appeal, Second District,
Division 2, California.
Dec. 31, 1940.

Poisons ⚷9

Evidence that accused threw something from automobile when officers approached, that accused was arrested and taken to rubbish pile near automobile where the object was believed to have been thrown and a package containing nine marihuana cigarettes was found, and accused then said, "Well, I threw it," sustained conviction for violation of statute pertaining to possession of narcotics. St.1939, p. 756, § 11036.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Enrique Terrazas was convicted of violating section 11036 of the Health and Safety Code, St.1939, p. 756, pertaining to the possession of narcotics, and he appeals.

Affirmed.

L. V. Beaulieu, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Lewis Drucker, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of guilty of violating section 11036 of the Health and Safety Code, St.1939, p. 756, pertaining to the possession of narcotics, after trial before the court without a jury, defendant appeals.

Viewing the evidence in the light most favorable to the people (respondent), the essential facts are:

On March 27, 1940, at about 8:30 p. m., defendant was observed by officers of the Los Angeles Police Department seated in an automobile in the city of Los Angeles. When they approached the car, defendant threw something from it. The officers arrested defendant and took him to a pile of rubbish near the car, where they believed the object thrown by defendant had lighted. After a little search they found a package consisting of nine cigarettes containing marihuana. The defendant then said to them, "Well, I threw it."

Defendant relies for reversal of the judgment on the ground *that there is no substantial evidence to sustain the findings of fact upon which the judgment was necessarily predicated.*

This proposition is untenable. An examination of the record discloses direct testimony of the officers as to each and every fact above set forth, from which it is clear the trial court reasonably inferred that defendant had in his possession the cigarettes containing marihuana. Further discussion of the evidence is unnecessary.

For the foregoing reasons the judgment is affirmed.

We concur: MOORE, P. J.; WOOD, J.

WINDER v. WINDER. *

Civ. 12812.

District Court of Appeal, Second District, Division 2, California.

Dec. 30, 1940.

Hearing Granted Feb. 24, 1941.

1. Executors and administrators ⇨443(7)

In action against executor by coexecutor on rejected claim against the estate for services rendered, complaint not alleging compliance with statutes requiring presentation of claim to probate judge for allowance or rejection did not state a cause of action. Probate Code, § 703.

2. Executors and administrators ⇨224, 424, 441

A coexecutor's claim against estate must be filed with clerk of court, who shall present it to probate judge for allowance or rejection, and if claim is rejected, action may be filed against estate, in which event summons must be served upon probate judge, who shall appoint attorneys to defend the action at expense of the estate. Probate Code, § 703.

Appeal from Superior Court, Los Angeles County; Raymond McIntosh, Judge.

Action by Jerome E. Winder against John R. Winder, executor of the estate of Elizabeth Winder, deceased, on claim against the estate.

From a judgment for plaintiff, defendant appeals.

Reversed.

William Ellis Lady, of Los Angeles, for appellant.

Percilla Lawyer Randolph and W. Neil Randolph, both of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury predicated upon a claim of plaintiff against the estate of Ray Elizabeth Winder, deceased, defendant appeals.

The material facts are:

March 25, 1938, plaintiff and his brother John R. Winder were appointed coexecutors of the estate of their deceased mother, Ray Elizabeth Winder. April 6, 1938, was the date of the first publication of notice to creditors. June 23, 1938, plaintiff prepared a creditor's claim against the estate of decedent for the reasonable value of services rendered to decedent during her lifetime, pursuant to an agreement between plaintiff and decedent. This claim on the date just mentioned was presented to John R. Winder by plaintiff, which claim on July 24, 1938, was rejected by said coexecutor of plaintiff. September 23, 1938, plaintiff filed the present action, which, upon a complaint as amended after trial resulted in the judgment from which this appeal is taken.

This is the sole question necessary for us to determine:

Did plaintiff's complaint as amended fail to state a cause of action, as it failed to allege compliance with the provisions of section 703 of the Probate Code?

[1, 2] This question must be answered in the affirmative. Where a coexecutor has a claim against an estate, the claim must be filed with the clerk of the court, who in turn shall present it to the probate judge for allowance or rejection. If the claim is rejected by the probate judge, an action may be filed against the estate by the claimant, in which event the summons must be served upon the probate judge, who shall appoint an attorney at the expense of the estate to defend the action. Sec. 703 Probate Code; Estate of Norins, 108 P.2d 64, filed in the clerk's office of the District Court of Appeal, Second Appellate District, Division Two, December 13, 1940.

In making it the duty of the judge to appoint an attorney to defend an action filed against an estate, the legislature provided a safeguard against collusion between coexecutors. In the absence of such a provision, the way would be open for coexecutors to approve each other's claims and, notwithstanding rejection by the judge, to fail to furnish a proper defense to the actions subsequently filed.

As the complaint in the present case did not allege, nor did the evidence disclose, that the procedure above outlined was followed by plaintiff, the complaint failed to state a cause of action, and evidence was lacking upon a material element necessarily involved in the present suit.

For the foregoing reasons the judgment is reversed.

We concur: MOORE, P. J.; WOOD, J.

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* Subsequent opinion 114 P.2d 347.

42 Cal.App.2d 255

JACKMAN v. PATTERSON et al.

Civ. 12601.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1940.

Rehearing Denied Jan. 28, 1941.

Hearing Denied Feb. 27, 1941.

1. Physicians and surgeons ⚷18(4)

Where amended complaint in action against physicians alleged that plaintiff in September, 1938, was a patient in Los Angeles County General Hospital, operated by Los Angeles county, and that defendants, physicians employed by county, treated plaintiff in such manner as to constitute malpractice which resulted in damage to plaintiff, complaint was not fatally defective for failure to allege that plaintiff had within 90 days after alleged acts of malpractice presented a verified claim for damages in writing to defendants and filed a copy thereof with clerk or secretary of Los Angeles county as provided by statute. Gen.Laws 1937, Act 5150, § 1.

2. Statutes ⚷117(8)

An amendatory act, the title of which limited its scope to liability of school districts for negligence of its officers for injuries to persons or property, was unconstitutional for failure to express the subject of the Act in its title, where the body of the act by section 1 related to liability of various political subdivisions for negligence of their officers for injuries to persons or property resulting, and was not limited to school districts. Gen.Laws 1937, Act 5150, § 1; Const. art. 4, § 24.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Jene Jackman against Dr. Joseph H. Patterson and others, for damages claimed to have resulted from alleged malpractice. From a judgment of dismissal predicated upon the sustaining without leave to amend of defendants' general demurrers to plaintiff's complaint as amended, plaintiff appeals.

Reversed, with directions.

Samuel A. Rosenthal and Philip Cohen, both of Los Angeles, for appellant.

J. H. O'Connor, Co. Counsel, W. B. McKesson, Gerald G. Kelly, and J. F. Moroney, Deputy Co. Counsels, and W. I. Gilbert, all of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment of dismissal predicated upon the sustaining without leave to amend of defendants' general demurrers to plaintiff's complaint as amended in an action for damages resulting from alleged malpractice, plaintiff appeals.

The complaint as amended alleged in substance that plaintiff in September, 1938, was a patient in the Los Angeles County General Hospital, operated by the county of Los Angeles; and that defendants, physicians employed by said county, treated plaintiff in such a manner as to constitute malpractice, which resulted in serious damage to plaintiff.

[1] This is the sole question necessary for us to determine:

Was there a material allegation to a cause of action lacking in the complaint as amended, since it failed to allege that plaintiff had within 90 days after the alleged acts of malpractice presented a verified claim for damages in writing to defendants and filed a copy thereof with the clerk or secretary of Los Angeles county, as provided in section 1 of Act 5150, Deering's General Laws, 1937, vol. 2, p. 2205?

This question must be answered in the negative. It is conceded that Act 5150 as originally adopted in 1931 was inapplicable to a group of facts such as set forth in the present case. By amendment in 1933 the Legislature endeavored to make the act applicable to a situation such as we have here presented, by providing that the act should apply in the cases of injuries to persons or property resulting from the negligence or carelessness of officers employed by counties, etc. However, the amendment was held unconstitutional and inoperative as to a set of facts such as are here presented in Jackson v. City of Santa Monica, 13 Cal.App.2d 376, 386, 57 P.2d 226, for the reason that the title of Act 5150, Deering's General Laws, failed to express the subject of the amendment to the act, in conformity with the requirements of article 4, section 24 of the Constitution of California.

In attempting to cure the defect in the act as indicated in the case just cited, the Legislature in 1937 adopted an act (Chap. 269, p. 585, Statutes [1937]), the title to which read thus:

"An act to amend the title of an act entitled 'An act relating to the liability in damages of officers of municipalities, counties, cities and counties, school districts, and the State of California, in the case of injuries to persons or property resulting from the defective or dangerous condition of public streets, highways, bridges, buildings, works or property, and alleged to be due to the negligence or carelessness of such officers; prescribing the duties of claimants in such cases, and authorizing the State and such public or quasi public corporations to take out and pay for insurance to protect their officers against such liability,' approved June 19, 1931, and approved as amended June 10, 1933, RELATING TO LIABILITY OF, AND DAMAGES AGAINST, SCHOOL DISTRICTS." (Capitals added.)

[2] This later act, it is claimed, is likewise unconstitutional as not complying with article 4, section 24 of the California Constitution, in that the subject of the act is not expressed in the title thereto. This claim is undoubtedly sound. It is clear that the title of the act, as we have indicated by the portion which has been printed in capitals, restricts its scope to acts "relating to liability of, and damages against, school districts". Therefore, the provision in section 1 of the 1937 act reading, "and/or liability in damages of such officers in the case of injuries to persons or property resulting from the negligence or carelessness of such officers" has no relation to the subject expressed in the title of the 1937 act, and it contravenes the requirements of article 4, section 24 of the Constitution and is thus invalid and of no effect.

In view of our conclusions, Act 5150 stands, so far as applicable here, in the same position as when originally enacted in 1931, and, since at such time it did not apply to a set of facts such as now confront us, there was no requirement that plaintiff comply with the provisions thereof. His complaint as amended stated a cause of action, and demurrers thereto should have been overruled.

The judgment is reversed and the trial court is directed to overrule defendants' demurrers and allow them a reasonable time within which to file answers if they are so advised.

We concur: MOORE, P. J.; WOOD, J.

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42 Cal.App.2d 262

PEOPLE v. MANES.

Cr. 3390.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1940.

1. Criminal law ⚿1186(4)

In prosecution for robbery, where there was uncontradicted evidence that accused's husband had been shot and killed shortly after having perpetrated a robbery, questioning of accused as to whether husband was an ex-convict, and as to whether husband had committed other robberies, to which questions objections were sustained and jury admonished to disregard questions, was not prejudicial error. Const. art. 6, § 4½.

2. Criminal law ⚿1186(4)

In prosecution for robbery, where witness was permitted to testify without objection as to the time when police officers arrived at accused's apartment and that he and accused had been in bed for about a half an hour when officers arrived, admission of witness' testimony that he had sexual intercourse with accused was not prejudicial, since testimony added nothing to the deduction which jury could have made from testimony received without objection. Const. art. 6, § 4½.

◆

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Lois Manes was convicted of robbery in the first degree, and from the judgment of conviction, and from an order denying a motion for new trial, she appeals.

Judgment and order affirmed.

James O. Warner, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of guilty of robbery in the first degree after trial by jury defendant appeals. There is also an appeal from an order denying her motion for a new trial.

The essential facts are:

Shortly before 2 A. M. on January 4, 1940, Mr. Sellman, who operated a liquor store at 4263 South Western Avenue, Los Angeles, was held up by a bandit at the point of a gun, who removed cash from the register in the front of the store. Having done so, he said to Mr. Sellman, "Stand there and nobody will get hurt." The bandit left, whereupon Mr. Sellman, seeing the bandit standing in front of the store, got his own gun, shot at the bandit, and mortally wounded him.

At about the same time defendant was observed driving her car very slowly in front of the liquor store while she looked into it. This was shortly after the shooting.

Thereafter defendant mingled with the crowd around the dying bandit, looked at him, asked what had happened, walked across the street, and engaged in conversation with a Mr. Roah, who was a total stranger to her. She accepted his invitation to go to a restaurant and have something to eat and thereafter Mr. Roah and defendant repaired to her apartment where she served him two drinks, and they had sexual intercourse. Defendant was the wife of the deceased bandit.

It is significant that appellant does not urge as a ground of reversal of the judgment insufficiency of the evidence to sustain the conviction. Therefore, we will not set forth in detail the abundance of incriminatory evidence upon which the judgment was based.

She relies for reversal of the judgment on these propositions:

First: The district attorney committed prejudicial error by asking the following questions during the course of the trial:

"Q. Your husband was an ex-convict, wasn't he?

"MR. WARNER: Just a second. I object to that as incompetent, irrelevant and immaterial and I assign it as misconduct on the part of the District Attorney in this case.

"THE COURT: It will be sustained and the jury is admonished to disregard the same.

* * * * * *

"Q. You knew your husband had committed other robberies?

"A. No.

"MR. WARNER: Just a second. I object to that line of questioning on the ground that it is prejudicial conduct on the part of the District Attorney, incompetent, irrelevant, immaterial; and I ask the Court to declare a mistrial if this conduct continues.

"THE COURT: It will be sustained.

"MR. GALLIANO: The matter was brought out by the defense himself.

"THE COURT: It will be sustained. The jury is admonished to disregard the last question."

Second: The trial court committed prejudicial error in permitting Mr. Roah to testify over objection that he had sexual intercourse with defendant on the evening her husband was shot and killed.

[1] Defendant's first proposition is untenable. To the questions asked, which are here urged as error, by the district attorney, the trial court in each instance sustained an objection and admonished the jury to disregard the same. In view of the fact that the jury had before it uncontradicted evidence that defendant's husband had been shot and killed shortly after having perpetrated a robbery we fail to see where any prejudice which was not fully cured by the admonitions of the court resulted to defendant from the questions which were asked and to which objections were sustained. Hence, under section 4½ of article VI of the Constitution, the error, if any, was not prejudicial.

[2] Defendant's second proposition likewise is untenable. It may be conceded that it was error to admit evidence of defendant's immoral act with Mr. Roah; however, under the circumstances such error was not prejudicial to the defendant, since Mr. Roah was permitted to testify without objection that it was around 4 A. M. of the morning defendant's husband was killed that the police officers arrived at defendant's apartment. The following questions and answers were also asked and given during his examination:

"Q. How long had you and this defendant been in bed when the police officers came?

"A. I wouldn't know the exact time.

"Q. Just approximately?

"A. I would say about a half an hour."

Since the foregoing quoted testimony was received without objection and we must assume that the jury was composed of men and women of ordinary intelligence and experience in the ways of the world, Mr. Roah's statement that he had sexual intercourse with defendant added nothing to the deduction which they undoubtedly made from the testimony just quoted.

An examination of the record fails to disclose any prejudicial error.

For the foregoing reasons the judgment and order are and each is affirmed.

We concur: MOORE, P. J.; WOOD, J.

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42 Cal.App.2d 270

PEOPLE v. PIANEZZI.

Cr. 3354.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1940.

Hearing Denied Jan. 30, 1941.

1. Criminal law 🔑1144(13)

On defendant's appeal from first-degree murder conviction, evidence was viewed most favorable to the people.

2. Homicide 🔑234(1)

Evidence sustained finding identifying defendant as perpetrator of crime of first-degree murder.

3. Homicide 🔑253(1)

Evidence sustained first-degree murder conviction.

4. Criminal law 🔑1159(2)

A court on appeal will not attempt to determine the weight of evidence but will decide whether on the face of evidence it can be held that sufficient facts could have been found by the jury to warrant the inference of guilt.

5. Criminal law 🔑1159(2)

Before verdict of jury will be set aside on appeal on ground of insufficiency of evidence, it must be made clearly to appear that upon no hypothesis whatever is there substantial evidence to support conclusion reached by triers of fact.

6. Criminal law 🔑1159(6)

If circumstances reasonably justify verdict of jury, opinion of appellate court that those circumstances might also reasonably be reconciled with innocence of defendant will not justify appellate court in interfering with jury's determination.

7. Criminal law 🔑1159(2)

The strength or weakness of identification of accused as perpetrator of crime, incompatibility of and discrepancies in testimony, if any, and uncertainty of witnesses in giving testimony are matters solely for consideration of triers of fact in first instance and for consideration of trial judge on motion for a new trial.

8. Criminal law 🔑1159(3)

The question of whether defendant has established his alibi is one of fact, the determination of which on conflicting evidence will not be disturbed on appeal.

9. Criminal law 🔑404(4), 1169(1)

In first-degree murder prosecution, receiving in evidence four guns found in defendant's apartment at time of his arrest was not prejudicial error, although the evidence was inadmissible, in view of fact that district attorney stated in presence of jury that he conceded that the guns were not the ones used in the murder. Const. art. 6, § 4½.

10. Witnesses 🔑383

In first-degree murder prosecution, refusal to permit defendant to prove that witness had testified before grand jury that he was unable to describe or identify another man involved in the murder was not error, since the inquiry was directed to immaterial matter.

11. Witnesses 🔑383

A witness may not be impeached on an irrelevant and collateral matter.

12. Witnesses 🔑389

In first-degree murder prosecution, excluding evidence that witness had at other times made statements contradictory to testimony she gave during trial was not error where witness admitted that prior to trial she had made statements which were contradictory to testimony, since there was no reason for introducing the alleged impeaching testimony.

13. Criminal law 🔑785(16)

In first-degree murder prosecution, statement that a witness willfully false in one material part of his testimony is to be distrusted in others was not erroneous because of the inclusion therein of the word "willfully."

14. Criminal law ⚷783(2)

In first-degree murder prosecution, insertion of word "attempted" in instruction that certain evidence was admitted for sole and limited purpose of attempted impeachment of certain witnesses and that such evidence was only to be considered as tending to affect credibility of witness concerning whom evidence was admitted did not make the instruction susceptible of inference that court was instructing jury that defendant had attempted but was not able to impeach witness, in view of other instructions.

15. Criminal law ⚷822(1)

The instructions must be read as a whole.

16. Criminal law ⚷762(5)

In first-degree murder prosecution, instruction that it had been established that death of deceased named in one indictment and death of deceased named in other indictment occurred as result of commission of crime of murder and that such murder was murder in the first-degree and if jury should find defendant guilty of the offense charged in either or both of the indictments, jury should find defendant was guilty of murder in first degree was free from error and did not deprive jury of right to determine whether defendant had committed the crime.

17. Homicide ⚷308(3)

In first-degree murder prosecution, evidence justified court in limiting jury to a verdict finding defendant either not guilty or guilty of murder in first degree.

18. Homicide ⚷286(1)

In first-degree murder prosecution, instruction regarding intention was correct statement of law.

19. Homicide ⚷305

In first-degree murder prosecution, instruction that all persons concerned in commission of a crime, whether they directly committed the act constituting the offense, or knowingly and with criminal intent aided and abetted in its commission, are to be prosecuted, tried and punished as principals was proper.

20. Criminal law ⚷800(3)

Where court instructed that all persons concerned in commission of crime, whether they directly committed the act or knowingly and with criminal intent aided and abetted in its commission shall be punished as principals, further instruction that legal definition of "aid" was not different from its meaning in common parlance, that to "aid" means to assist, to supplement the efforts of another, that to "abet" means to bait or excite, and that the word "aid" does not imply guilty knowledge or criminal intent, whereas "abet" includes knowledge of the wrongful purpose of the actual perpetrator of the crime, and counsel and encouragement in the crime was proper.

See Words and Phrases, Permanent Edition, for all other definitions of "Aid" and "Abet".

21. Criminal law ⚷792(3)

Instruction that to authorize conviction of one as an "aider" and "abettor" of a crime, it must be shown not only that he aided and assisted therein, but also that he abetted the act, that is, that he criminally or with guilty knowledge and intent aided the actual perpetrators in the commission of the act or crime was proper. Pen.Code, § 971.

See Words and Phrases, Permanent Edition, for all other definitions of "Aider" and "Abettor".

22. Criminal law ⚷814(19)

Where evidence disclosed that two or more persons participated in murders of which defendant was convicted, court properly gave instruction regarding conviction of one as an aider and abettor. Pen.Code, § 971.

23. Criminal law ⚷778(11)

In first-degree murder prosecution, instruction that the flight of a person immediately after the commission of a crime, or after he is accused of a crime is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence, and that the weight of such circumstance is matter for jury was proper. Pen.Code, § 1127c.

24. Criminal law ⚷778(11)

In first-degree murder prosecution where court instructed that flight of person immediately after commission of crime or after he is accused of crime is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence, and that the weight to which such circumstance is entitled is a matter for jury to determine, it was not necessary for court to give any other instruction upon the doctrine of flight. Pen.Code, § 1127c.

25. Criminal law ⟹942(2)

In first-degree murder prosecution, newly discovered evidence that wife of witness, who had given testimony identifying defendant, would upon retrial testify that witness had stated that he could not identify the men who had committed the crime was not ground for granting motion for new trial, since the alleged newly discovered evidence was purely of an impeaching nature.

26. Criminal law ⟹1186(4)

Where while jury in first-degree murder prosecution were deliberating and before they had returned verdict trial of defendant was commenced in the same court on another indictment, error, if any, in such procedure did not justify reversal where defendant failed to point out wherein any prejudice resulted to him. Const. art. 6, § 4½.

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Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Peter Pianezzi was convicted of murder in the first degree, and he appeals.

Affirmed.

Hearing denied; CURTIS, HOUSER, and CARTER, JJ., dissenting.

Nathan O. Freedman, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., R. S. McLaughlin, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Thomas F. O'Brien, Deputy Dist. Atty., both of Los Angeles, for respondent.

McCOMB, Justice.

From judgments finding him guilty of murder in the first degree and fixing the punishment as life imprisonment after trial before a jury, defendant appeals.

There are also appeals from the orders denying his motions for a new trial.

[1] Viewing the evidence most favorable to the people (respondent), the facts are:

Shortly after midnight on the morning of October 25, 1937, defendant and another man entered a cafe in the city of Los Angeles, shot and killed a man by the name of George Leslie Bruneman who was sitting at a table in the cafe. The two assailants then left the cafe. Frank Greuzard, an employee of the cafe, followed the men out of the room and onto the porch, where he was shot and subsequently died from the injuries which he had received.

Defendant relies for reversal of the judgments on these propositions:

First: There is no substantial evidence to sustain the finding of the jury that he participated in the murders of which he was convicted.

Second: He proved an alibi.

Third: The trial court committed prejudicial error in receiving in evidence certain guns found in defendant's possession at the time of his arrest.

Fourth: The trial court committed prejudicial error in refusing to permit defendant to introduce (a) statements made by a witness Dean Farris before the grand jury when it was investigating for the purpose of determining who murdered decedent, and (b) evidence that a witness Ella Smith had at other times made statements contradictory to the evidence she gave during the trial of the present action.

Fifth: The trial court committed prejudicial error in instructing the jury as follows:

(a) "A witness willfully false in one material part of his or her testimony is to be distrusted in others; that is to say, the jury may reject the whole of the testimony of a witness who has willfully sworn falsely as to a material point; and the jury, being convinced that a witness has stated what was untrue as to a material point, not as a result of mistake or inadvertence, but willfully and with the design to deceive, may treat all of his or her testimony with distrust and suspicion, and reject all unless they shall be convinced that he or she has in other particulars sworn to the truth."

(b) "Certain evidence was admitted in the trial of this case for the sole and limited purpose of attempted impeachment of certain witnesses. Such evidence is only to be considered by you as tending to affect the credibility of the witness concerning whom such evidence was admitted. Evidence received for the purpose of impeachment of a witness cannot be considered upon the general issue of guilt or innocence of the accused excepting as your judgment in that regard may be affected by your determination of the credibility of the witness concerning whom the impeachment testimony was admitted."

(c) "By all the evidence in this case upon the point, it has been established that the death of George Leslie Bruneman, the deceased named in the indictment in action number 72994, and the death of Frank Al-

bert Greuzard, the deceased named in the indictment in action number 72995, occurred as the result of the commission of the crime of murder and that such murder was murder in the first degree.

"If, therefore, you should find this defendant, Peter Pianezzi, guilty of the offense charged in either or both of said indictments, it would be your duty to find that he was guilty of murder in the first degree. Your duty concerning the matter of determination of the penalty is defined in other instructions given you herewith."

(d) "You are instructed that in determining the intention of the defendant at the time of the transaction complained of, it is important to consider the means used to accomplish the killing. The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots, nor lunatics, nor affected with insanity.

"A person is presumed to intend to do that which he voluntarily and willfully does in fact do, and must also be presumed to intend all of the natural, probable and usual consequences of his own acts. Therefore, if you are satisfied to a moral certainty and beyond a reasonable doubt that the defendant did assail, on the date mentioned, one Geo. L. Bruneman violently with a dangerous weapon, likely to kill, and which did in fact destroy the life of said Frank Albert Greuzard, the natural presumption is that such assailant intended death or great bodily harm, and in the absence of evidence to the contrary this presumption must prevail."

(e) "The Court further instructs the jury, that it is the law of this State, that all persons concerned in the commission of a crime, whether they directly committed the act constituting the offense, or knowingly and with criminal intent aided and abetted in its commission, shall be prosecuted, tried and punished as principals and are equally guilty."

(f) "The legal definition of 'aid' is not different from its meaning in common parlance. To 'aid' means to assist, to supplement the efforts of another. To 'abet' means to bait or excite. The word 'aid' does not imply guilty knowledge or criminal intent, whereas 'abet' includes knowledge of the wrongful purpose of the actual perpetrator of the crime, and coun- and encouragement in the crime.

"To authorize the conviction of one as an 'aider' and 'abettor' of a crime, it must be shown not only that he aided and assisted therein, but also that he abetted the act, that is to say, that he criminally or with guilty knowledge and intent aided the actual perpetrators in the commission of the act or crime."

(g) "The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine."

Sixth: The trial court committed prejudicial error in denying defendant's motions for a new trial on the ground of newly discovered evidence.

Seventh: The trial court committed prejudicial error in beginning the trial of another criminal action pending against defendant before the jury in the present case had reached a verdict.

[2, 3] Defendant's first proposition is untenable. An examination of the record discloses substantial evidence taken in connection with the inferences which the jury may have reasonably drawn therefrom to sustain each and every material finding of fact upon which the judgments were necessarily predicated, including the finding that defendant perpetrated the crimes. For example, Mrs. Huddel, wife of the proprietor of the cafe where the murder was committed, testified that she looked into the face of the defendant before he entered the cafe and she identified him as the man who shot and killed George Bruneman. Witness Farr, a bartender in the cafe who was standing about three feet from defendant at the time of the murder, testified that he had both a side and front view of the murderer's face, and identified defendant as the man who shot and killed George Bruneman.

From the circumstances above set forth it is clear that the jury's inference that defendant either killed Frank Greuzard when he stepped onto the porch of the cafe or aided and abetted in so doing, finds substantial support in the evidence. The case of People v. Lamson, 1 Cal.2d 648, 653, 36

P.2d 361, strongly relied upon by appellant, is of no value as a precedent. As was said by our Supreme Court in People v. Newland, 104 P.2d 778, the Lamson case decided nothing except that the judgment of the trial court should be reversed. In the same case our Supreme Court limited the rule on circumstantial evidence stated in People v. Staples, 149 Cal. 405, 86 P. 886, to the facts of that case.

[4-6] The rule in California is now that a court on appeal will not attempt to determine the weight of the evidence but will decide whether on the face of the evidence it can be held that sufficient facts could have been found by the jury to warrant the inference of guilt, and before the verdict of a jury will be set aside on appeal on the ground of insufficiency of the evidence it must be made clearly to appear that upon no hypothesis whatever is there substantial evidence to support the conclusion reached by the trier of fact. If the circumstances reasonably justify the verdict of the jury, the opinion of the appellate court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not justify the appellate court in interfering with the determination of the jury. People v. Newland, Cal.Sup., 104 P.2d 778.

[7] The argument which counsel has addressed to the court upon this subject was a proper argument to present to the trial jury but cannot be considered by us, since there is substantial evidence to support the findings of the jury. The strength or weakness of identification, incompatibility of and discrepancies in testimony, if any, and the uncertainty of witnesses in giving testimony are matters solely for the consideration of the triers of fact in the first instance and for the consideration of the trial judge on a motion for a new trial.

[8] Defendant's second proposition is also untenable. The law is established that the question of whether or not defendant has established his alibi is one of fact, the determination of which upon conflicting evidence, as in the instant case, will not be disturbed on appeal. (People v. Krug, 10 Cal.App.2d 172, 175, 51 P.2d 445.)

[9] Relative to defendant's third proposition, four guns found in defendant's apartment at the time of his arrest were received in evidence and at the time they were offered in evidence defendant objected to their reception. The district attorney then stated:

"Well, I do not claim or contend or will state, at any time claim or contend in any manner that these four guns were used at the death of Bruneman or the death of Greuzard or injury to Miss Ingram. They are certainly different guns."

To the district attorney's statement the court remarked:

"With that explanation I do not think it is necessary for the court to advise the jury any further. All right; that is all, officer."

It may be conceded, in view of the holding in People v. McCall, 10 Cal.App.2d 503, 505, 52 P.2d 500, and People v. Yee Fook Din, 106 Cal. 163, 166, 39 P. 530, that such evidence was inadmissible; however, from an examination of the record and particularly in view of the fact that the district attorney stated in the presence of the jury that he conceded that the guns were not the ones used in the murders, we are of the opinion that the reception of such evidence did not result in prejudice to defendant. Therefore, we may not reverse the judgment because of the alleged error, since the state Constitution provides that no judgment shall be reversed because of the erroneous reception of evidence, unless after an examination of the record the appellate court shall be of the opinion that the error resulted in a miscarriage of justice. (Art. VI, sec. 4½ of the Constitution.)

[10, 11] Defendant's fourth proposition (a) is without merit. The trial court refused to permit the defendant to prove that the witness Dean Farris had testified before the grand jury that he was unable to describe or identify the second man involved in the murder of decedent. This ruling was correct. Such inquiry was directed to immaterial and collateral matter and was, therefore, inadmissible under the rule that a witness may not be impeached upon irrelevant and collateral matter. (People v. Factor, 125 Cal.App. 618, 621, 13 P.2d 984; People v. Pollock, 31 Cal.App.2d 747, 757, 89 P.2d 128; see, also, 27 Cal.Jur., [1926] 152, sec. 125, note 14.)

One of the issues in the present case was whether defendant participated in the murder and it was entirely immaterial for the purpose of this trial, assuming that the evidence disclosed that he did, who his partner in crime might be.

[12] The trial court's ruling of which defendant complains in his fourth proposition (b) was correct, for the reason that the witness Smith admitted that prior to the trial she had made statements to other persons, which were contradictory to the testimony she gave at the time of the trial. This being true, there was no reason for introducing the alleged impeaching testimony.

[13] The instruction set forth in paragraph (a) of defendant's fifth proposition was a correct statement of the principles of law embodied in it and was not erroneous, because of the inclusion therein of the word "willfully". (See People v. Sprague, 53 Cal. 491, 493; People v. Clark, 84 Cal. 573, 582, 24 P. 313.)

[14, 15] The instruction set forth in paragraph (b) of defendant's fifth proposition was correct. The insertion of the word "attempted" therein did not fairly make the instruction susceptible of the inference that the court was instructing the jury that defendant had attempted but was not able to impeach the witnesses. This is particularly true, in view of the fact that the instructions must be read as a whole, and among other instructions given to the jury by the court was the following:

"With the facts the Court has nothing to do. I have not expressed, nor intend to express, nor have I intimated or intend to intimate, any opinion as to what witnesses are, or are not, worthy of credence, what facts are, or are not, established, or what inferences are to be drawn from the evidence adduced. If any expression of mine has seemed to indicate an opinion relating to any of these matters, such expressions must be entirely disregarded by you."

[16, 17] The instruction set forth in paragraph (c) of defendant's fifth proposition was free from error and did not deprive the jury of their right to determine whether or not defendant had committed the crime (People v. Watts, 198 Cal. 776, 801, 247 P. 884). It was likewise proper for the court under the facts of this case to limit the jury to a verdict finding the defendant either not guilty or guilty of murder in the first degree. (People v. Watts, supra, 198 Cal. 793, 247 P. 884; People v. Perkins, 8 Cal.2d 502, 516, 66 P. 2d 631).

[18] The instruction set forth in paragraph (d) of defendant's fifth proposition was a correct statement of the principles of law therein stated. (People v. Jones, 160 Cal. 358, 369, 117 P. 176).

[19–22] The instructions set forth in paragraphs (e) and (f) of defendant's fifth proposition were likewise properly read to the jury. From the evidence in the present case it appears that two or more persons participated in the murders of which defendant stands convicted. The court, therefore, properly gave an instruction in the language of section 971 of the Penal Code, for it may be that the jury believed from the evidence that defendant did not fire the shot which killed decedent Greuzard but that one of the other participants in the crime did so, and that defendant aided and abetted in the commission of the offense.

[23, 24] The instruction set forth in paragraph (g) of defendant's fifth proposition was a correct statement of law (sec. 1127c of the Penal Code). It was unnecessary to give any other instruction upon the doctrine of flight (section 1127c, Pen. Code). People v. Goodwin, 1927, 202 Cal. 527, 540, 261 P. 1009; People v. Sainz, 1912, 162 Cal. 242, 246, 121 P. 922; People v. Jones, 160 Cal. 358, 117 P. 176, upon which defendant relies were all decided prior to the adoption by the legislature in 1929 of section 1127c of the Penal Code and such cases are, so far as the point here involved is concerned, superseded by the code section.

[25] Defendant on his motion for a new trial alleged that the witness Farris' wife would upon a retrial testify that said witness had stated to her that he could not identify "those fellows", referring to the men who had murdered the decedents. This alleged newly-discovered evidence is purely of an impeaching nature and, therefore, is not ground for granting a motion for a new trial. (People v. Snyder, 36 Cal.App.2d 528, 535, 97 P.2d 976).

[26] Defendant's final contention is without merit. While the jury in the present case was deliberating and before they had returned a verdict, the trial of defendant was commenced in the same court on another indictment which had been returned against him. Defendant has failed, in fact he has not attempted to point out wherein any prejudice resulted to him from the trial court's following this procedure. Therefore, even though it be assumed that an error existed in such procedure, we

would be required to disregard the same under the mandate of Article VI, section 4½ of the Constitution of the State of California.

For the foregoing reasons the judgments and orders are and each is affirmed.

We concur: MOORE, P. J.; WOOD, J.

In re MARRE'S ESTATE. *

PIUMA v. MINETTI et al.

Civ. 12699.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1940.

Rehearing Denied Jan. 28, 1941.

Hearing Granted Feb. 27, 1941.

1. **Wills 🔑619**

The provision of a will stating that testamentary trustees should, after making certain specified payments, pay out of net income of trust estate or out of corpus, if necessary, such part thereof as trustees should in their sole judgment deem advisable to or for proper care, maintenance, support, and education of testatrix' grandson, did not create an "annuity" in absence of a bequest of a certain or definite sum to grandson.

See Words and Phrases, Permanent Edition, for all other definitions of "Annuity".

2. **Wills 🔑684(7)**

Under will provision stating that testamentary trustees should, after making certain specified payments, pay out of net income of trust estate or out of corpus, if necessary, such part thereof as trustees should in their sole judgment deem advisable to or for proper care, maintenance, support, and education of testatrix' grandson, testatrix intended that payments should not be made to grandson until after distribution of her estate to trustees, and grandson was not entitled to payments commencing as of date of testatrix' death, in absence of express direction to trustees to make such payments.

3. **Wills 🔑684(9)**

Where a testamentary trust is created and will does not create an annuity or direct executor or trustee to make payments to beneficiary before decree of final distribution, beneficiary is entitled to receive only such payments as are provided in the trust.

Appeal from Superior Court, San Luis Obispo County; Ray B. Lyon, Judge.

Proceeding in the matter of the estate of Angela L. Marre, deceased, wherein Stephen Milton Piuma filed a petition seeking, among other things, that Henry L. Minetti and another, trustees, be directed to pay him certain sums of money for his care and maintenance covering a period subsequent to decedent's death and before the entry of the decree of final distribution. From an order directing the trustees to pay petitioner further sums of money, Henry L. Minetti and another appealed to the Supreme Court, and that court transferred the appeal to the District Court of Appeal for decision pursuant to article 6, § 4c of the Constitution.

Reversed.

See, also, 108 P.2d 693.

Dockweiler & Dockweiler, of Los Angeles, for appellants.

Canepa & Castruccio, of Los Angeles (Horace W. Danforth, of Los Angeles, of counsel), for respondent.

McCOMB, Justice.

This appeal, transferred from the Supreme Court to this court for decision, pursuant to the provisions of article VI, section 4c of the Constitution of the State of California, is from an order of the superior court sitting in probate, directing the trustees of a testamentary trust to pay petitioner further sums of money for his maintenance covering a period subsequent to decedent's death and prior to the entry of the decree of final distribution.

After directing distribution to Henry L. Minetti and Isidore B. Dockweiler of all of the rest, residue, and remainder of her estate in trust, the will of decedent contained, among others, the following provisions:

"(c) From the rents, issues, profits, interest and dividends of said trust estate said trustees shall pay all taxes, assessments and other charges imposed by public authority on the property of said trust estate or any part thereof, all income taxes on the income thereof, all expenses of upkeep, maintenance, protection and insurance of said property, and all other proper costs and expenses of the administration of said trust; and all income remaining after such payments is hereinafter designated 'net income'.

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* Subsequent opinion 114 P.2d 586.

"(d) Said trustees shall during the existence of said trust, either monthly, quarterly or semi-annually, as the circumstances and conditions of said trust estate will the most conveniently permit, but in any event annually, distribute and pay out of the net income of said trust estate such part thereof as said trustees shall in their sole judgment deem advisable to or for the proper care, maintenance, support and education of my said grandson Stephen Milton Piuma so long as, in their sole judgment, his education is incomplete, and the balance, if any, of said net income to my daughter Rosa J. Marre Piuma; and when, in the sole judgment of said trustees, the education of my said grandson is complete, then said net income shall be distributed and paid out as follows: One-half (½) to or for the proper care, maintenance and support of my said grandson Stephen Milton Piuma, and one-half (½) to or for the proper care, maintenance and support of my said daughter Rosa J. Marre Piuma; provided, that if my said daughter Rosa J. Marre Piuma should die * * *

"(e) In the event that said net income be at any time insufficient for the proper care, maintenance, support and education of my said grandson Stephen Milton Piuma, or for his proper care, maintenance and support, or for the proper care, maintenance and support of my said daughter Rosa J. Marre Piuma, then I hereby authorize, empower and direct my said trustees hereunder to use from time to time so much of the principal of said estate as may in their sole judgment be necessary or proper for such care, maintenance, support and education or such care, maintenance and support of my said grandson, or for such proper care, maintenance and support of my said daughter."

The final decree of distribution was entered December 21, 1937. Respondent March 6, 1939, filed a petition seeking, among other things, that the trustees be directed to pay him certain sums of money for his care and maintenance subsequent to decedent's death and prior to the entry of the final decree of distribution. It is from the order allowing this portion of respondent's petition that the present appeal is taken by the trustees.

This is the sole question necessary for us to determine:

Where a will bequeaths and devises "the rest, residue, and remainder" of decedent's estate in trust as to both net income and corpus for the proper "care, maintenance, support and education" of a minor grandson, and the will provides for no specific cash legacy to such grandson, are necessary expenses incurred by said beneficiary for his care, maintenance, and support before the final decree of distribution is entered properly payable by the trustees of such trust after distribution, in the absence of a provision in the will either (1) directing the executors or trustees to make such payments or (2) creating an annuity?

[1-3] This question must be answered in the negative. The will did not expressly direct the executors or trustees to make payments to the beneficiary commencing as of the date of the death of decedent, nor does the will create an annuity, for the reason that there was not a bequest of a certain or definite sum to respondent. Estate of Watson, 32 Cal.App.2d 594, 599, 90 P.2d 349; Clayes v. Nutter, 49 Cal.App. 148, 151, 192 P. 870. Likewise the will provided that "from the rents, issues, profits, interest, and dividends of said trust estate" said trustees should, after making specified payments on account of taxes, etc., "pay out of the net income of said trust estate such part thereof as said trustees" should "in their sole judgment deem advisable to or for the proper care, maintenance, support, and education" of respondent.

From the foregoing it is clear that it was the intention of the testatrix that payments from the fund which she directed to be created were not to be made to respondent until after distribution of her estate to appellants as trustees thereof. It needs no citation of authorities to sustain the proposition that, where a testamentary trust is created and the will does not create an annuity or direct the executor or trustee to make payments to the beneficiary prior to the decree of final distribution, the beneficiary is entitled to receive only such payments as are provided in the trust. In the present case, since neither of the conditions above mentioned existed, respondent was entitled to receive money for his care, maintenance, and support from the trustees subsequent to the date of the decree of final distribution and not before.

The facts in the present case are analogous to those in the cases of Clayes v. Nutter, supra, and Estate of Watson, supra, wherein it was held that payments to a beneficiary of trusts created for their care and maintenance commence not at the date of the death of decedent but after final distribution of the decedent's estate to the trustees and the creation of the trust.

For the reasons stated in the cases just mentioned, which it would serve no useful purpose to here repeat, the probate judge was in error in making the allowances from which an appeal has been taken. Estate of Dare, 196 Cal. 29, 235 P. 725, and other cases relied upon by respondent are each factually different from the instant case and, therefore, inapplicable to the problem here presented.

The portion of the order here appealed from is reversed, appellants to recover their costs.

We concur: MOORE, P. J.; WOOD, J.

In re MARRE'S ESTATE. *

PIUMA v. MINETTI et al.

Civ. 12700.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1940.

Rehearing Denied Jan. 28, 1941.

Hearing Granted Feb. 27, 1941.

Wills ⇐684(7, 9)

Under will provision stating that testamentary trustees should, after making certain specified payments, pay out of net income of trust estate or out of corpus, if necessary, such part thereof as trustees should in their sole judgment deem advisable to or for proper care, maintenance, support, and education of testatrix' grandson, grandson was not entitled to any payments before date of decree of final distribution, nor was he entitled under will to attorney's fees incurred in an endeavor to collect such payments.

Appeal from the Superior Court, San Luis Obispo County; Ray B. Lyon, Judge.

Proceeding in the matter of the estate of Angela L. Marre, deceased, wherein Stephen Milton Piuma filed a petition for an order against Henry L. Minetti and another, trustees, allowing him attorney's fees as part of his proper care, maintenance, and support under the provisions of a testamentary trust. From an order denying his petition, petitioner appealed to the Supreme Court, and that court transferred the appeal to the District Court of Appeal for decision pursuant to article 6, § 4c of the Constitution.

Affirmed.

Canepa & Castruccio, of Los Angeles (Horace W. Danforth, of Los Angeles, of counsel), for appellant.

Dockweiler & Dockweiler, of Los Angeles, for respondents.

McCOMB, Justice.

This appeal, transferred from the Supreme Court to this court for decision, pursuant to the provisions of article VI, section 4c of the Constitution of the State of California, is from an order of the superior court sitting in probate, denying appellant's petition for an order allowing him attorney's fees as part of "his proper care, maintenance, and support" under the provisions of a testamentary trust.

The essential facts are:

After directing distribution to Henry L. Minetti and Isidore B. Dockweiler of all of the rest, residue, and remainder of her estate in trust, the will of decedent contained, among others, the following provisions:

"(c) From the rents, issues, profits, interest and dividends of said trust estate said trustees shall pay all taxes, assessments and other charges imposed by public authority on the property of said trust estate or any part thereof, all income taxes on the income thereof, all expenses of upkeep, maintenance, protection and insurance of said property, and all other proper costs and expenses of the administration of said trust; and all income remaining after such payments is hereinafter designated 'net income'.

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* Subsequent opinion 114 P.2d 591.

"(d) Said trustees shall during the existence of said trust, either monthly, quarterly or semi-annually, as the circumstances and conditions of said trust estate will the most conveniently permit, but in any event annually, distribute and pay out of the net income of said trust estate such part thereof as said trustees shall in their sole judgment deem advisable to or for the proper care, maintenance, support and education of my said grandson Stephen Milton Piuma so long as, in their sole judgment, his education is incomplete, and the balance, if any, of said net income to my daughter Rosa J. Marre Piuma; and when, in the sole judgment of said trustees, the education of my said grandson is complete, then said net income shall be distributed and paid out as follows: One-half (½) to or for the proper care, maintenance and support of my said grandson Stephen Milton Piuma, and one-half (½) to or for the proper care, maintenance and support of my said daughter Rosa J. Marre Piuma; provided, that if my said daughter Rosa J. Marre Piuma should die * * *

"(e) In the event that said net income be at any time insufficient for the proper care, maintenance, support and education of my said grandson Stephen Milton Piuma, or for his proper care, maintenance and support, or for the proper care, maintenance and support of my said daughter Rosa J. Marre Piuma, then I hereby authorize, empower and direct my said trustees hereunder to use from time to time so much of the principal of said estate as may in their sole judgment be necessary or proper for such care, maintenance, support and education or such care, maintenance and support of my said grandson, or for such proper care, maintenance and support of my said daughter."

The sole question necessary for us to determine is:

Under the provisions of decedent's will above quoted, should the trial court have allowed appellant a reasonable sum as attorney's fees incurred subsequent to decedent's death and prior to the decree of final distribution, which fees were incurred in an endeavor to collect sums of money he claimed to be due him under the terms of decedent's will?

This question must be answered in the negative. In a companion appeal to this case entitled In the Matter of the Estate of Angela F. Marre, Piuma v. Minetti et al., 108 P.2d 691, which we have this day decided, we held that appellant herein was not entitled under the provisions of the will to any payments prior to the date of the decree of final distribution. Such being the case, it is obvious that he is not entitled under the terms of the will to attorney's fees incurred in an endeavor to collect such payments.

For the foregoing reasons the portion of the order here appealed from is affirmed, respondents to recover their costs.

We concur: MOORE, P. J.; WOOD, J.

42 Cal.App.2d 237

BENNETT et al. v. STEIN et al.

Civ. 12758.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1940.

1. Automobiles 🔑244(7, 35)

Evidence that a motorist, traveling at about 20 miles an hour and seeing that the street was clear for several blocks, looked at several of his friends on the left side of the street and then again observed that the street was clear, and that as he glanced to the left a second time plaintiffs' child skated down a private driveway directly in front of the automobile, *held* to sustain the trial court's finding that the motorist was not negligent.

2. Appeal and error 🔑996

Where either of two inferences reasonably may be drawn from the evidence, the one accepted by the trial court to support a finding of fact in a case tried without a jury will not be disturbed on appeal.

◆

Appeal from Superior Court, Los Angeles; Dudley S. Valentine, Judge.

Action by Samuel Bennett and another against William I. Stein and another, for the wrongful death of plaintiffs' minor son who was struck by an automobile driven by defendant named. From a judgment for defendants after trial before the superior court without a jury, plaintiffs appeal.

Affirmed.

Harry B. Ellison, of Los Angeles, for appellants.

C. F. Jorz, of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial before the court without a jury in an action to recover damages for the wrongful death of plaintiffs' minor son, plaintiffs appeal.

Viewing the evidence most favorable to the defendants (respondents), the essential facts are:

January 10, 1939, defendant William I. Stein, with the knowledge and consent of his father Charles S. Stein, was driving an automobile at about 20 miles per hour in a westerly direction on Elevado Street in the city of Beverly Hills. He looked in the direction in which his automobile was traveling and observed that there was neither vehicular traffic nor any pedestrians in front of him for several blocks. He then observed several of his friends on the south side of the street. He looked at them, looked ahead of him again, saw that the street was clear, and glanced at his friends a second time. The minor child of plaintiffs, as defendant Stein looked to the left the second time, skated down a private driveway and into the street directly in front of the automobile which said defendant was operating, with the result that the car struck the child, causing him injuries from which he subsequently died.

[1, 2] This is the sole question necessary for us to determine:

Was there substantial evidence to sustain the trial court's finding that defendant William I. Stein (and necessarily his codefendant) did not operate the car which he was driving in a negligent manner, and thus cause the unfortunate accident?

This question must be answered in the affirmative. The law is established in California that, when from the evidence either of two inferences reasonably may be drawn, the one accepted by the trial court to support a finding of fact will not be disturbed by an appellate court (Hamilton v. Pacific Elec. Ry. Co., 12 Cal.2d 598, 602, 86 P.2d 829). Applying this rule to the facts of the instant case, it is evident that the trial court believed that the unfortunate accident resulted without negligence upon the part of defendant William I. Stein, and that in operating the automobile he did so as a reasonably prudent man under similar circumstances would have done.

For the foregoing reasons, the judgment is affirmed.

We concur: MOORE, P. J.; WOOD, J.

42 Cal.App.2d 239

LOS ANGELES COUNTY v. EMME (CITY OF LOS ANGELES, Intervener).

Civ. 12706.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1940.

1. Fines 🔑20

The statute providing that all fines collected by county probation officer in any of the courts of the state as a condition of granting of probation shall be paid into the county treasury is applicable to the municipal court. Pen.Code, § 1203.1.

2. Criminal law 🔑1001

A sentence providing for suspension thereof and placing of defendant under supervision of probation department on payment of specified sum to clerk of court had the legal effect of granting probation.

3. Fines 🔑20

The statute providing that all fines collected by county probation officer in any of the courts of state as condition of granting of probation shall be paid into county treasury is clear and unambiguous, and could not be construed in any other manner than that collection by county probation officer was essential to entitle county to the fine. Pen.Code, § 1203.1.

4. Statutes 🔑206

If possible, effect must be given to each sentence, word, and phrase of a statute.

5. Statutes ⚷202

Unless the exigencies of a situation from a consideration of a statute imperatively demand that some word, phrase, or sentence thereof be disregarded, rendered useless, or deprived of meaning, no such word, phrase, or sentence should be considered unnecessary or surplusage.

6. Fines ⚷20

Under statute providing that all fines collected by county probation officer as condition of granting of probation or as a part of terms of probation shall be paid into county treasury, fines paid to clerk of municipal court of city of Los Angeles in cases where portion or all of sentence of court had been suspended without referring the case to probation officer of Los Angeles county were not required to be paid into treasury of county of Los Angeles, since county probation officer did not collect fine, and therefore a condition precedent to their being paid to county was absent. Pen.Code, § 1203.1.

7. Fines ⚷20

The statute providing that all fines collected by county probation officer in any of courts of state as condition of granting of probation, or as part of terms of probation shall be paid into county treasury, does not indicate purpose of legislature to provide that all fines paid as condition of probation were to be paid to county probation officer and sent to county treasury. Pen.Code, § 1203.1.

8. Evidence ⚷42

It is a matter of common knowledge that judges frequently in granting probation require a defendant to pay a sum of money to a third party as reimbursement for an injury suffered as a result of wrongful act of the defendant.

◆

Proceeding by the County of Los Angeles against Urban Emme, Clerk of the Municipal Court of the City of Los Angeles, for writ of mandate to require the respondent to pay into the county treasury amounts collected as fines, payment of which were conditions precedent to suspension of sentences imposed by Municipal Court of City of Los Angeles, wherein the City of Los Angeles intervened.

Writ denied.

J. H. O'Connor, Co. Counsel, and J. F. Moroney, Deputy Co. Counsel, both of Los Angeles, for petitioner.

Ray L. Chesebro, City Atty., W. Jos. McFarland, Asst. City Atty., and John L. Bland, John A. Dundas, and Wm. U. Handy, Deputy City Attys., all of Los Angeles, for respondent.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and John L. Bland and Bourke Jones, Deputy City Attys., all of Los Angeles, for intervener.

McCOMB, Justice.

This is an original application for a writ of mandate to require respondent (clerk of the Municipal Court of the City of Los Angeles) to pay into the county treasury of petitioner (County of Los Angeles) $3,441.50 collected by respondent as fines, the payment of which were conditions precedent to the suspending in part or in toto of sentences imposed by the Municipal Court of the City of Los Angeles.

The undisputed facts are: Respondent has collected from various defendants a sum totaling $3,441.50, which he now retains as fines, pursuant to judgments rendered by the Municipal Court, of which the following are typical examples:

"(a) It is ordered and adjudged by the court that said Jesse Thompson be imprisoned in the City Jail of Los Angeles City for the term of ninety days and the said defendant be discharged at the expiration of said term.

"The foregoing sentence is suspended and defendant placed in the custody and under the supervision of the probation department for six months on the following conditions:

"1. That on or before the 15th day of April, 1940, he pay the sum of $50.00 to the clerk of this court:

"2. That his driver's license be forwarded to Sacramento and suspended for thirty days:

"3. That he report as directed to the probation officer."

"(b) That said Leonard Sarselli be fined in the sum of $25.00 and that in default of the payment of said fine on or before 5:00 p. m. of April 4, 1940, that said Leonard Sarselli be imprisoned in the City Jail of said Los Angeles City in the proportion of one day's imprisonment for every $5.00 of said fine until said fine be wholly satisfied, not exceeding five days, and that the defendant be discharged on payment of such portion of said fine as shall not have been satisfied by imprisonment at the rate above prescribed—$1.00 of said sentence suspended."

"(c) That the said Theodore F. Pierce be imprisoned in the City Jail of Los Angeles City for the term of ten days and the said defendant be discharged at the expiration of said term.

"Sentence suspended on condition that defendant pay $2.00 or serve one day."

"(d) That defendant (John Doe) is sentenced to 180 days in the City Jail and to pay a fine of $50.00; twenty-five days suspended if the fine is paid."

"(e) It is ordered and adjudged that upon Count 1 of the complaint (defendant) is sentenced to pay a fine of $100 or serve fifty days, and that upon Count 2 (defendant) pay a fine of $100 or serve thirty days.

"The fine imposed under Count 2 is suspended."

"(f) The defendant is sentenced to pay a fine of $100.00 or serve 50 days in jail and leave the state upon the payment of the fine or upon completion of the jail sentence (or perform some other condition). The county probation officer is directed to see that the defendant leaves the state (or performs other conditions of probation) in accordance with the terms of the sentence."

This is the sole question necessary for us to determine:

Are fines paid to the clerk of the Municipal Court of the City of Los Angeles in cases where a portion or all of the sentence of said court has been suspended without referring the case to the probation officer of Los Angeles County, required to be paid into the treasury of the County of Los Angeles by virtue of the provision in section 1203.1 of the Penal Code reading thus: " * * all fines collected by a county probation officer in any of the courts of this State, as a condition of the granting of probation, or as a part of the terms of probation, shall be paid into the county treasury and placed in the general fund, for the use and benefit of the county." ?*

[1, 2] This question must be answered in the negative. We assume that (a) the provisions of section 1203.1 of the Penal Code are applicable to the Municipal Court (In re Herron, 217 Cal. 400, 403, 19 P.2d 4; People v. Wallach, 8 Cal.App.2d 129, 132, 47 P.2d 1071), and (b) the forms of sentences set forth above had the legal effect of granting probation to the various defendants involved. In re Herron, 217 Cal. 400, 404, 19 P.2d 4.

Section 1203.1 of the Penal Code reads in part thus: "Any other provision of law to the contrary notwithstanding, all fines collected by a county probation officer in any of the courts of this State, as a condition of the granting of probation, or as a part of the terms of probation, shall be paid into the county treasury and placed in the general fund, for the use and benefit of the county." Deering's California Codes, General Laws, and Constitution, 1939 Supplement p. 165.

[3-5] The language used by the legislature in the foregoing provision of the Penal Code is clear and unambiguous. It states unequivocally that fines *collected by a county probation officer* as a condition of probation shall be paid into the county treasury. To attempt to construe the provision in question in any other manner would be to violate the established rule of statutory construction in this state that, if possible, effect must be given to each sentence, word, and phrase thereof and that unless the exigencies of a situation from a consideration of a statute or charter as a whole imperatively demand that some word, phrase, or sentence thereof be disregarded, rendered useless, or deprived of meaning, no such word, phrase, or sentence should be considered unnecessary or surplusage. Davidson v. Burns, 38 Cal.App.2d 188, 191, 100 P.2d 1105, 101 P.2d 568.

[6] Therefore, since under the undisputed facts the probation officer of petitioner did not collect any of the fines which are the subject of the present litigation, a condition precedent to their being paid to petitioner is absent and respondent is entitled to retain them.

[7, 8] We find no merit in the contention of the petitioner that it was the purpose of the legislature to provide that all fines paid as a condition of probation were to be paid to the county probation officer and thence to the county treasury. On the contrary it is a matter of common knowledge that judges frequently in granting probation require a defendant to pay a sum of money to a third party as reimbursement for an injury suffered as a result of the wrongful act of the defendant. In the instant case it is very possible that the

various judges of the Municipal Court in imposing sentence were of the opinion that as a condition of granting probation the City of Los Angeles should be reimbursed by the defendant for the expense to which the city had been placed in arresting, prosecuting and convicting him.

In view of our conclusions it is unnecessary for us to discuss the other arguments raised by counsel. Suffice it to say that the various judgments pronounced, of which we have set forth some examples above, are not models to be followed in the future.

For the foregoing reasons a writ of mandate is denied and the alternative writ of mandate heretofore issued is quashed.

We concur: MOORE, P. J.; WOOD, J.

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42 Cal.App.2d 192

BETHLEHEM STEEL CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 12751.

District Court of Appeal, Second District, Division 2, California.

Dec. 30, 1940.

1. Workmen's compensation 🔑2001

Where Industrial Accident Commission's referee, hearing injured employee's petition for award of compensation in addition to amount previously awarded him by another such referee for permanent disability, set aside such referee's findings and award and made new fact findings and award without examining transcript of record containing evidence considered by him, award of additional compensation exceeded commission's power and should be annulled.

2. Workmen's compensation 🔑1778, 1820

When Industrial Accident Commission adopts fact findings of, and award recommended by, its duly authorized referee, who heard evidence in workman's compensation proceeding, commission need not review record, but, if commission disregards referee's findings and recommendations and makes different findings and award or subsequent referee modifies prior referee's findings and award, the commission or subsequent referee must first review evidence.

Proceeding by the Bethlehem Steel Company, employer, for a writ to review an award of the Industrial Accident Commission, increasing an award of compensation under the Workmen's Compensation Act to one Foy, employee, for permanent disability.

Award of increased compensation annulled.

Richard L. Oliver, of Los Angeles, for petitioner.

Everett A. Corten and Dan Murphy, Jr., Asst. Atty., both of San Francisco, for respondents.

McCOMB, Justice.

This is an application for a writ to review an order of the Industrial Accident Commission increasing an award for permanent disability from $2,500.80 to $5,105.80 predicated upon a finding rating respondent Foy's permanent disability as 61¼ per cent in place of a prior finding of 31¼ per cent permanent disability.

The essential facts are:

August 19, 1937, respondent Commission found that respondent Foy was totally disabled from an industrial accident from November 5, 1935, until July 1, 1936, and partially disabled thereafter until the date of the award. Petitioner made payments to respondent Foy in accordance with such award to and including August 15, 1938. On the latter date it filed a petition with the Commission to terminate its liability as of August 15, 1938. No objection being made to the petition, on September 14, 1938, respondent Commission made an order terminating petitioner's liability. October 17, 1938, there came on for hearing before Referee Claud M. Dunn of respondent Commission respondent Foy's application for a reopening of the case, and, after receiving evidence consisting, among other things, of conflicting medical reports, Referee Dunn made findings holding that respondent Foy had sustained a permanent injury, as a result of his prior industrial accident, of 31¼ per cent and awarding him the sum of $2,605. Petitioner at that time had paid said respondent, pursuant to prior awards, $1,887.87 and was required, pursuant to the last order, to make a payment to said respondent of an additional sum of $717.13, which was done.

Ten months later respondent Foy again petitioned respondent to reopen his case, claiming a new and further disability. The matter was set for hearing January 18, 1940, before Referee W. Bond. (It is to be noted that this is not the same referee who formerly had handled the hearing in this particular case.)

Referee Bond listened to the testimony of respondent Foy and a report of Dr. Chapman, which was the same as that which he had given at a prior hearing, with this addition thereto: "Present Conclusion and Impression: Virtually the same as that of April 14, 1937, and that present complaints are still due to the injury of November 5, 1935." Referee Bond also received reports on behalf of petitioner showing that respondent Foy had fully recovered from his injury and was without any permanent disability. Then without reading the testimony taken at the previous hearings in the case which included, among other evidence, motion pictures taken of respondent Foy when he was unaware thereof showing him engaged in activities which tended to disprove any permanent disability on his part, the referee made an order changing the former findings and award by increasing respondent Foy's permanent disability from 31¼ per cent to 61¼ per cent and awarding to said respondent the total sum of $5,105.80. The findings of fact thus made were adopted by the Commission and the award approved by it.

[1, 2] This is the sole question necessary for us to determine:

Was the last award of the Commission in excess of its power?

This question must be answered in the affirmative. The rule is established that when the Industrial Accident Commission adopts the facts found and the award recommended by its duly authorized referee who has heard the evidence, then the Commission is not required to review the record, but that, if the Commission disregards the findings and recommendations of its referee and makes different findings and award, the Commission must itself review the evidence. Taylor v. Industrial Acc. Com., 38 Cal.App.2d 75, 81, 100 P.2d 511. This rule is obviously applicable to the act of a subsequent referee in modifying findings and award of a prior referee. Applying it to the facts of the present case, we find that Referee Bond set aside the findings and award made previously by Referee Dunn and issued new findings of fact and made a new award without examining the transcript of the record containing the evidence considered by Referee Dunn in making his findings and award.

For the foregoing reasons the last award of respondent Commission dated April 4, 1940, should be and it is hereby annulled.

We concur: MOORE, P. J.; WOOD, J.

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42 Cal.App.2d 187

PECKHAM et al. v. WARNER BROS. PICTURES, Inc., et al.

Civ. 12776.

District Court of Appeal, Second District, Division 2, California.

Dec. 30, 1940.

Hearing Denied Feb. 24, 1941.

1. Appeal and error ⚷1097(1)

Decision of the District Court of Appeal on first appeal became the "law of the case", and question presented on the first appeal upon same evidence which was before the court on a subsequent appeal could not be relitigated.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case".

2. Appeal and error ⚷216(1)

In action for false arrest and false imprisonment, defendant who did not request trial court to instruct jury upon certain questions of law could not on appeal raise objection that the trial court failed to instruct jury concerning such questions.

3. Appeal and error ⚷216(1)

In a civil case, a party may not successfully urge that it was error for trial court to fail to submit instructions, in absence of a request therefor by such party.

4. Appeal and error ⚷1004(1)

A jury's verdict will not be set aside on appeal on ground that damages are exces-

sive, unless the verdict is so outrageously excessive as to suggest at the first blush, passion, prejudice or corruption.

5. False Imprisonment 🔑36

In action for false arrest and false imprisonment, award of $3,000 compensatory damages and $500 punitive damages to one plaintiff and $5,000 compensatory damages and $500 punitive damages to the other plaintiff who were incarcerated for over a day and received much unfavorable publicity in local press were not excessive.

◆

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Ralph E. Peckham and others against Warner Bros. Pictures, Inc., and others for false arrest and false imprisonment. From judgments for the plaintiffs, defendant Blayney Matthews appeals.

Affirmed.

Hearing denied; EDMONDS, J., dissenting.

Freston & Files, by Ralph E. Lewis, all of Los Angeles, for appellant.

Bautzer & Ryan, Gregson Bautzer, and G. Bentley Ryan, all of Hollywood (William H. Ernst, of Hollywood, of counsel), for respondents.

McCOMB, Justice.

From judgments in favor of plaintiffs after trial before a jury in an action to recover damages for false arrest and false imprisonment, defendant Matthews appeals.

This case was formerly before us upon an appeal from judgments in favor of defendant predicated upon the granting of his motion for a judgment notwithstanding the verdict of the jury. This court reversed the judgment, and subsequently a petition for a hearing before the Supreme Court was denied (Peckham v. Warner Bros. Pictures, Inc., 36 Cal.App.2d 214, 97 P.2d 472). The present appeal is from the judgments based upon the verdicts of the jury as subsequently reduced in denying a motion for a new trial by the trial judge whereby he allowed the plaintiff Peckham $5,000 compensatory damages and $500 punitive damages and the plaintiff Sorrell $3,000 compensatory damages and $500 punitive damages.

Since the facts are identical with those presented to us on the previous appeal, it would serve no useful purpose to here repeat them. Reference is made to the statement thereof in Peckham v. Warner Bros. Pictures, Inc., supra, 36 Cal.App.2d page 215, 97 P.2d 472.

Defendant Matthews here contends that:

First: He was not liable for the detention of the plaintiffs, whether or not they were taken before a magistrate within a reasonable period after their arrest.

Second: The trial court did not fully instruct the jury upon certain questions of law involved in the trial of the present action.

Third: The amount of the damages awarded by the jury and as subsequently reduced by the trial court as a condition of denying defendant's motion for a new trial is excessive.

[1] Defendant's first contention is without merit. The question which is here presented by defendant was before us on the former appeal upon the same evidence. In our former opinion we held adversely to defendant's contention (Peckham v. Warner Bros. Pictures, Inc., supra, 36 Cal.App.2d page 218, 97 P.2d 472), and, since our former ruling has become final, the views expressed in the majority opinion concurred in by Mr. Presiding Justice Moore constitute the law of the case.

[2, 3] Defendant may not properly urge his second contention at this time, for the reason that he did not request the trial court to instruct the jury upon the phases of the law which he now urges were not called to the attention of the jury. The rule is established that in a civil case a party may not successfully urge that it was error for the court to fail to submit instructions to a jury in the absence of a request therefor by the complaining party (Rogers v. Interstate Transit Co., 212 Cal. 36, 44, 297 P. 884; Hiatt v. Brockman, 7 Cal.App.2d 88, 90, 45 P.2d 411).

[4, 5] Defendant's final contention is likewise without merit. The law is established that a jury's verdict will not be set aside on appeal on the ground that the damages are excessive, unless the verdict is so outrageously excessive as to suggest at the first blush, passion, prejudice or corruption (Corvin v. Hyatt, 10 Cal.App.2d 107, 108, 51 P.2d 176). Applying the rule just stated, the verdicts in the present case are not in our opinion excessive. Plaintiffs were incarcerated for over a

day and received much unfavorable publicity in the local press. We are satisfied that the judgments find substantial support in the evidence.

For the foregoing reasons the judgments are and each is affirmed.

I concur: MOORE, P. J.

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42 Cal.App.2d 301

GRACE v. CARPENTER.

Civ. 12194.

District Court of Appeal, Second District, Division 1, California.

Jan. 3, 1941.

1. **Paupers** 🔑37(2)
   Witnesses 🔑54

   In action by mother against married daughter for support, requiring daughter's husband to testify against daughter without her consent, and to give evidence regarding his financial position, income, occupation and property was improper. Civ.Code, § 206; Code Civ.Proc. § 1881.

2. **Paupers** 🔑37(1)

   A husband need not support his wife's relations, in absence of statutory obligation. Civ.Code, § 206.

3. **Paupers** 🔑37(1)

   Community property, with possible exception of wife's earnings, may not be applied to support of wife's mother without husband's consent. Civ.Code, §§ 172, 172a, 206.

4. **Husband and wife** 🔑269
   Paupers 🔑37(1)

   Community property cannot be segregated and applied by an order or judgment of the court so as to hold the wife's interest in the community property in liquidation of her liability to support her mother. Civ.Code, §§ 172, 172a, 206.

5. **Appeal and error** 🔑1050(1)

   In action by mother against married daughter for support, admission of evidence as to husband's earnings and as to other community property was prejudicial. Civ. Code, §§ 172, 172a, 206.

◆

Appeal from Superior Court, Los Angeles County; Ben B. Lindsey, Judge.

Action by Barbara Grace against Sophia K. Carpenter to recover support from a married daughter under Civil Code § 206. Judgment for plaintiff, and defendant appeals.

Reversed.

John L. Flynn, of Los Angeles, for appellant.

No appearance for respondent.

DORAN, Justice.

This is an action brought under section 206 of the Civil Code wherein a mother sought support from a married daughter. The court below awarded judgment to the mother, ordering the daughter to pay a specified monthly sum for support, from which judgment the daughter has appealed.

The record reveals the daughter to be dependent upon her husband, without earnings of her own, leading the life and pursuing the duties of a housewife.

Over objection, evidence was admitted as to the husband's occupation and his income and earnings and the husband was required to testify against the wife and give evidence as to his financial position, income, occupation and property. The income, property and earnings in question appear to be all community property.

[1, 2] The trial court committed error, both in requiring the husband to testify against his wife without her consent, sec. 1881, Code Civ. Proc., and in receiving any evidence with regard to the husband's ability to help his wife's mother. Unless imposed by statute, there is no obligation on the part of a husband to support his wife's relations (see 46 C.J. 1281, § 78), and California has imposed no such statutory obligation.

[3, 4] It is equally clear that, with the possible exception of the earnings of a wife, the community property may not be applied to such a purpose without the husband's consent. Section 172 of the Civil Code provides: "The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate

estate * * *", and section 172a thereof gives him management and control of the community real property. Moreover, the community property cannot be segregated and applied by an order or judgment of the court, as in this case, to hold the wife's interest in the community property in liquidation of her liability to support her mother. The law of this state does not provide such a method for division of community property. Smedberg v. Bevilockway, 7 Cal.App.2d 578, 581, 46 P.2d 820.

[5] It follows, therefore, that in an action such as the instant one evidence as to the husband's earnings and as to other community property, with the one possible exception above noted, would be irrelevant, and having been here received by the court it must be assumed that such evidence was taken into account in the court's determination of the issues involved. The error in admitting such evidence is necessarily prejudicial.

For the foregoing reasons, the judgment is reversed.

We concur: YORK, P. J.; WHITE, J.

WEST KEY NUMBER SYSTEM

42 Cal.App.2d 226

DAY v. WESTERN LOAN & BLDG. CO. et al.

Civ. 11248.

District Court of Appeal, First District,
Division 1, California.
Dec. 31, 1940.

Rehearing Denied Jan. 30, 1941.

Hearing Denied Feb. 27, 1941.

1. Limitation of actions 🔑127(2)

If original complaint defectively states a cause of action, it may be amended after running of statute of limitations as long as the cause of action stated in the amended pleading can trace its descent from the original pleading.

2. Automobiles 🔑242(6)

In order to invoke doctrine of "respondeat superior", plaintiff, seeking to recover for injuries sustained in automobile accident, must prove that employee was under control of alleged employer at time of injury.

See Words and Phrases, Permanent Edition, for all other definitions of "Respondeat Superior".

3. Limitation of actions 🔑121(2)

In action arising out of automobile accident, where original complaint in addition to alleging cause of action against driver of automobile also stated a cause of action against fictitious defendants, alleging that plaintiff did not know their true names, but if it so developed that any of fictitious defendants was owner of automobile and controlled it at time injuries were sustained their true names would be inserted, word "controlled" implied that plaintiff was seeking a recovery against any fictitiously named defendant if such defendant was employer of driver, and hence permitting plaintiff to amend complaint by naming company which allegedly was employer of driver after statute of limitations had run, was not error. Code Civ.Proc. §§ 340, subd. 3, 474.

4. Limitation of actions 🔑127(1)

A bona fide attempt to state a cause of action against a party which fails by reason of some imperfections may be remedied by amendment so that the amended pleading will relate back to the date of the filing of the original defective pleading and avoid the running of statute of limitations in the interim.

5. Master and servant 🔑328
Parties 🔑95(3)

Under statute authorizing naming of fictitious defendant in complaint and providing for amendment to show his true name when it is discovered, plaintiff could name a fictitious person as employer of a named defendant, even though plaintiff did not know that in fact any relation of respondeat superior existed when he filed the complaint, and insert the true name when that fact was ascertained. Code Civ.Proc. § 474.

6. Appeal and error 🔑959(1)

Under statute authorizing naming of fictitious defendant in complaint and providing for amendment to show his true name when it is discovered, such matters as good faith of plaintiff in naming a fictitious defendant and whether pleadings should subsequently be amended to show true name rest primarily with trial court. Code Civ.Proc. § 474.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Louis H. Day against James E. McWilliams, H. W. Rickman, and the Western Loan & Building Company, for injuries received in an automobile accident. From a judgment for plaintiff, the defendant Western Loan & Building Company alone appeals.

Affirmed.

Charles V. Barfield, John J. Healy, Jr., Charles B. Morris, and Emery F. Mitchell, all of San Francisco, for appellant.

Pierce & Sherwin, of Oakland, for respondent.

PETERS, Presiding Justice.

Based upon a jury verdict, plaintiff secured judgment for $10,000 against defendants James E. McWilliams, H. W. Rickman, and Western Loan & Building Co., for injuries received in an automobile accident. From this judgment defendant Western Loan & Building Co. alone appeals. Appellant contends that the trial court erred in permitting respondent to amend his complaint by naming appellant as a party after the statute of limitations had run, and that, in any event, the second amended complaint first joining it as a party stated a new cause of action from that stated against it in the earlier complaints.

The accident upon which this action is predicated occurred on January 9, 1937. The complaint was filed on March 22, 1937. It named "James E. McWilliams, First Doe, Second Doe, Third Doe, and Black and White Company" as defendants, charged that McWilliams was driving the automobile, and that the accident occurred as a result of his negligence. In addition, the complaint contained the following two paragraphs:

"II. That the plaintiff is informed and on information and belief states that the defendant, James E. McWilliams, was the owner of and was at the time plaintiff sustained the injuries complained of actually operating the automobile which struck plaintiff.

"III. That plaintiff has joined the other defendants above named for the reason that he does not know their true names and if it so develops that they or any of them and not James E. McWilliams was the owner of said automobile and controlled same at the time said injuries were sustained that plaintiff may when the true names of said defendants be ascertained insert said true names in his Complaint with apt and proper words to charge said defendants."

On January 7, 1938, just before the statute of limitations would have run (§ 340, subd. 3, Code Civ.Proc.), an amended complaint was filed, adding H. W. Rickman to the above-named defendants. This amended complaint joined Rickman as the alleged owner of the car, alleged that he loaned the car to McWilliams, and that at the time of the accident the latter was operating it with the knowledge and consent of Rickman. This amended complaint contained the following allegation concerning the fictitiously named defendants:

"That plaintiff has joined the other defendants above named for the reason that he does not know their true names and if it so develops that they or any of them and not H. W. Rickman was the owner of said automobile and controlled same at the time said injuries were sustained that plaintiff may when the true names of said defendants be ascertained insert said true names in his Complaint with apt and proper words to charge said defendants."

On November 17, 1938, respondent applied for, and was granted, permission to file a second amended complaint. No notice of this motion was given to appellant, it not having, on that date, appeared in the action. The motion was made upon the ground that the amended pleading should be filed in the interests of justice, and was accompanied by affidavits charging that respondent had not sooner discovered appellant's connection with the case because of certain misrepresentations alleged to have been made by appellant's counsel. On December 15, 1938, appellant moved to strike the second amended complaint from the files on the ground that the action as to it was barred by the statute of limitations. This motion was denied. Thereafter the appellant demurred on the ground the action was barred. The demurrer was overruled. The same defense was pleaded in the answer, was urged on motions for nonsuit, directed verdict, and judgment notwithstanding the verdict. On each occasion the point was decided in favor of respondent. Thus, three different judges on five different occasions determined that the second amended complaint was filed in time. On two occasions respondent sought leave to amend the second amended complaint to allege the fraud charged in the affidavits above mentioned in order to plead facts sufficient to toll the statute within the rule of Kimball v. Pacific Gas & Elec. Co., 220 Cal. 203, 30 P.2d 39. On each occasion the trial court ruled that it would not permit the amendment, inasmuch as it was of the opinion that, independently of such charged fraud, the second amended complaint was not barred by the statute of limitations.

This second amended complaint named McWilliams and Rickman as defendants, continued to name First Doe, Second Doe and Third Doe as fictitiously named defendants, dropped Black and White Company as a fictitiously named defendant, and, in its place substituted the appellant. This complaint continued to name McWilliams as the driver of the car and Rickman as the owner, and charged that McWilliams was driving with the consent and knowledge of Rickman. The complaint contains these two allegations:

"III. That plaintiff has joined the defendants First Doe, Second Doe, and Third Doe for the reason that he does not know their true names and if it develops that they or any of them were the owners of said automobile or controlled same at the time said injuries were sustained, that plaintiff may when the true names of said defendants be ascertained insert said true names in his complaint with apt and proper words to charge said defendants.

"III-A That plaintiff is informed and believes and therefore alleges that Western Loan & Building Co. is now and at all times herein mentioned was a corporation authorized to do business in the State of California; that at the time of the accident hereinafter mentioned defendant James E. McWilliams was in the employ of said corporation and was acting in the course and scope of his said employment."

As already indicated, it is the theory of appellant that the trial court committed error in allowing respondent to amend its complaint and name it as a party defendant after the statute of limitations had run, and, that in any event, the second amended complaint stated a new and different cause of action against appellant after the statute had run.

The real question presented is whether the John Doe and Black and White Company allegations in the original and amended complaints indicated, with reasonable certainty, that respondent was seeking relief against any employer of McWilliams, whoever he or it might be. If so, the substituting of the name of appellant after the statute of limitations had run, and the insertion of the proper charging allegations, was proper. Section 474 of the Code of Civil Procedure provides:

"When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly."

In Hoffman v. Keeton, 132 Cal. 195, 64 P. 264, the plaintiff brought an action against Keeton and John Doe to foreclose a mortgage. Before the commencement of the action Keeton had conveyed an undivided half of the mortgaged premises to Sinsheimer. After the note and mortgage were barred by the statute of limitations, the name of Sinsheimer was substituted for that of John Doe. Sinsheimer pleaded the statute, and appealed. The court stated the rule applicable as follows (page 196 of 132 Cal., page 265 of 64 P.): "The claim that the action was barred by the statute is based on the assumption that the defendant Sinsheimer became party only at the date of the order substituting his name for that of John Doe, which was more than four years after the note and mortgage became due. But this assumption is incorrect. He was sued by the name of John Doe, and 'was a party to the action from its commencement.' Farris v. Merritt, 63 Cal. [118] 119. There is nothing to show that the plaintiff knew the true name of the fictitious defendant sued, nor can the objection that he might have learned by searching the records be entertained. Irving v. Carpentier, 70 Cal. [23] 25, 27, 11 P. 391."

[1] But appellant urges that the first two complaints charged McWilliams as driver, and Rickman as owner, while the second amended complaint for the first time sought to allege against it a cause of action based on the doctrine of respondeat superior. It is urged, therefore, that this second amended complaint states a new and different cause of action from that contained in the earlier complaints. Before directly discussing this question, the general rules concerning the filing of amended pleadings after the statute of limitations has run should be mentioned. It is well settled that, where the original com-

plaint has been filed within the statutory period, an amended complaint may be filed after the statute has run as long as it does not state a new or different cause of action from that appearing in the original complaint. Stated another way, if the original complaint defectively states a cause of action, it may be amended after the running of the statute as long as the cause of action stated in the amended pleading can trace its descent from the original pleading.

In the leading case of Frost v. Witter, 132 Cal. 421, 64 P. 705, 84 Am.St.Rep. 53, the original complaint set up a cause of action upon a promissory note. After the statute of limitations had run, the plaintiff was permitted to amend to plead the existence of a mortgage and to request its foreclosure. It was held that this did not change the cause of action. After pointing out that "great liberality" should be used by the courts in allowing amendments, and citing many cases where such liberality had been exercised, the court stated (page 424 of 132 Cal., page 706 of 64 P., 84 Am. St.Rep. 53): "And it is obvious that the unqualified way in which the rule is sometimes stated—i. e. that a new or different cause of action cannot be introduced by amendment—cannot be accepted; for the most common kinds of amendments are those in which complaints are amended that do not state facts sufficient to constitute a cause of action, and in these, *and often in the case of new parties, a new cause of action is in fact for the first time introduced.* All that can be required, therefore (to use the language of Mr. Pomeroy), is that 'a wholly different cause of action' shall not be introduced; or, as said by the court in Shields v. Barrow, supra [17 How. 129, 15 L.Ed. 158], that 'a complaint (is not) at liberty to abandon the entire case made by his bill, and make a new and different case by way of amendment,' or 'to strike out the entire substance and prayer of his bill, and insert a new case by way of amendment'; or, as expressed by this court in an early case, the matter of the amendment must not be 'entirely foreign to the original complaint.' [Nevada County, etc.] Canal Co. v. Kidd, 28 Cal. [673] 681." (Italics added.) See, also, Ruiz v. Santa Barbara Gas, etc., Co., 164 Cal. 188, 128 P. 330; Wells v. Lloyd IV, 6 Cal.2d 70, 56 P.2d 517; Meraviglia v. Bovee, 113 Cal.App. 752, 298 P. 1040; Woods v. Cook, 14 Cal.App.2d 560, 58 P.2d 965.

[2, 3] In the instant case, the first amended complaint, filed within the statutory period, alleged a cause of action against McWilliams as the driver of the car, and against Rickman as the owner thereof. But it did not stop there. As against the fictitious defendants, it alleged that plaintiff did not know their true names, but if it so develops that any of the fictitious defendants "was the owner of said automobile *and controlled same* at the time said injuries were sustained" their true names with apt and proper words to charge them be inserted. In other words, the first amended complaint, as well as the original complaint, sought recovery against the driver of the car and those who owned and *controlled* it. The word "controlled" clearly implies that respondent was seeking a recovery against any fictitiously named defendant if that defendant was the employer of the driver, and if the latter was acting in the course and scope of his employment at the time the injuries were received by respondent. In order to invoke the doctrine of respondeat superior the plaintiff must prove that the employee was under the control of the defendant at the time of the injury. Barton v. Studebaker Corp. of America, 46 Cal.App. 707, 189 P. 1025; Brown v. Industrial Acc. Comm., 174 Cal. 457, 163 P. 664; Callan v. Bull, 113 Cal. 593, 45 P. 1017. Of course, alleging that the defendant controlled the automobile at the time of the accident is but another way of charging that the defendant controlled the person driving it. We think that the word "controlled" sufficiently disclosed the basis of respondent's cause of action so that the trial court acted properly in permitting the amended pleading containing full allegations against appellant to be filed.

The case of Woods v. Cook, supra [14 Cal.App.2d 560, 58 P.2d 966], sustains this conclusion. In that case the original complaint charged that plaintiff was injured "when the defendant G. H. Cook, an employee of the defendants George J. Cook and Connie Cook, was driving and operating an auto truck, the property of the said defendants, George J. Cook and Connie Cook", and operated it so negligently that it injured plaintiff. It will be noted that there is no allegation that the employee was acting in the course of his employment, or that the owners and employers knew he was operating the car or gave him their consent to drive it. The complaint is totally defective in that it cannot be told therefrom whether the plaintiff was seeking to impose upon the Cooks liability predicated upon the doctrine of respondeat superior or sought to plead the owner's liability imposed by section 402 of the Vehicle Code, St.1935, p. 153. After the statute of limitations had run, the plaintiff was permitted to amend to properly allege a cause of action under the provisions of section 402, supra, by inserting allegations that Grace was driving with the consent of the Cooks. Relying upon Frost v. Witter, supra, and, after quoting at length from that case, the court held that the amendment was properly allowed, and stated (page 564 of 14 Cal.App.2d, page 967 of 58 P.2d): "The allowance of amendments to conform to the proof rests in the discretion of the trial court and the utmost liberality is allowed in upholding orders made by the trial court permitting amendments for this purpose. 21 Cal.Jur., p. 209, and cases there cited. In section 475 of the Code of Civil Procedure it is provided that no judgment shall be reversed by reason of any error unless the party appealing suffers substantial injury. The appellants herein have suffered no injury and have not been misled by the ruling of the court. A reversal of the judgment would result in a miscarriage of justice." A similar situation exists in the instant case.

[4] Appellant relies on two cases as supporting its contentions—Gates v. Wendling Nathan Co., 27 Cal.App.2d 307, 81 P.2d 173, and McKnight v. Gilzean, 29 Cal.App.2d 218, 84 P.2d 213. In the first of these cases, an employee was killed when a load of lumber delivered to his employer slipped off a delivery truck. The original complaint named as defendants the corporation seller of the lumber, the corporation on whose truck it was delivered to decedent's employer, and the two men in charge of the truck. By amendment filed after the one-year statutory period, it was sought to bring in other defendants who were, if at all, independently liable, including a corporation at whose terminal the lumber had been loaded, the manager of the terminal company, the parent corporation of which the terminal company was a subsidiary, and the president of the parent corporation. In the original complaint there were five fictitiously named defendants. The original complaint made no attempt at all to state a cause of action against the fictitiously named defendants, nor did it disclose on what theory it hoped to hold them, simply alleging that their true names were not known to plaintiff, and requesting that when ascertained the true names might be inserted together with proper charging allegations. The appellate court held that a nonsuit was properly granted based on the theory that the completely new cause of action as to the defendants brought in by amendment was barred. The court held that as to these defendants [27 Cal.App.2d 307, 81 P.2d 177], "no attempt whatever was made to state a cause of action against all or any of them" until after the statute had run. This case differs fundamentally from the instant one in that in the Gates case the original complaint did not disclose that plaintiff was seeking any recovery at all against those subsequently named, while in the instant case the original and amended complaints did disclose, defectively it is true, that plaintiff was seeking recovery not only against the driver, but also against all who "owned" and "controlled" the car. The Gates case recognized that under such circumstances the amendment is proper. At page 315 of 27 Cal.App.2d, at page 177 of 81 P.2d it is stated: "We are not, of course, unmindful of the settled rule that a bona fide attempt to state a cause of action against a party, which fails by reason of some imperfections, may be remedied by amendment so that the amended pleading will relate back to the date of the filing of the original defective pleading and avoid the running of the statute of limitations in the interim. (Ruiz v. Santa Barbara Gas & Elec. Co., 164 Cal. 188, 194, 195, 128 P. 330; Rauer's Law, etc., Co. v. Leffingwell, 11 Cal.App. 494, 105 P. 427), but we have yet to read of a case where the running of the statute has been held to be avoided by filing a complaint wherein a defendant is designated by a fictitious name and the only allegations as to him are that the plaintiff is ignorant of the defendant's true name and, when he knows it, will amend by substituting it, and at that future time make some charge against such defendant."

McKnight v. Gilzean, supra, the other case relied upon by appellant for a reversal, is equally not in point. In that case, in the original complaint, Gilzean was sued as driver of a car, and his employers were also named as defendants, it being alleged that Gilzean was acting in the scope of his employment in driving the car. In other words, so far as the employers were concerned, the cause of action pleaded in the original complaint was based on the doctrine of respondeat superior. After the statute had run, plaintiffs amended by adding a separate cause of action against the employers based on the statutory owner's liability created by section 402 of the Vehicle Code, but retaining the original cause of action based on the doctrine of respondeat superior. The appellate court held that the trial court properly sustained a demurrer to the cause of action first pleaded in the amended complaint based on section 402 of the Vehicle Code. The court distinguished Woods v. Cook, supra, at page 222 of 29 Cal.App.2d at page 215 of 84 P.2d, on the ground that in that case the original complaint contained "but one cause of action, imperfectly stated, and the amendment merely added matters necessary to make the original cause of action complete in itself". It pointed out that in the case before it the original complaint was based on the doctrine of respondeat superior, while the amended complaint retained that cause of action, but added an entirely new and different one as well. In the instant case a new cause of action is not added by the amended pleading—a defective imperfectly stated cause of action is perfected.

[5, 6] The only other contention of appellant is that section 474 of the Code of Civil Procedure, supra, does not permit the naming of a fictitious defendant in a situation where the plaintiff does not know that anyone other than the named defendant is liable, but joins fictitiously named defendants against the contingency of later discovering that someone else is liable. The leading case advocating such a theory is Town of Hancock v. First National Bank of Oxford, 93 N.Y. 82, which undoubtedly held that the fictitious defendant statute of New York could not be used for the above purpose. However, as has been pointed out in a note in 22 Cal.Law Review, 685, at p. 689, that case was interpreting a New York statute which expressly required the plaintiff, when suing a fictitious defendant, to give a description identifying the person intended to be sued —a requirement which does not exist in this state. While it may be true that there are some limitations on the right conferred by section 474 of the Code of Civil Procedure, certainly it should not be held that when an employer is sued under a fictitious name, even though the plaintiff did not know that in fact any relation of respondeat superior existed when he filed the complaint, that when that fact is ascertained the true name may not be inserted. That is obviously one of the purposes of the section. Such matters as the good faith of the plaintiff, and whether amendments to pleadings should be allowed should rest primarily with the trial court.

The judgment appealed from is affirmed.

We concur: KNIGHT, J.; WARD, J.

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42 Cal.App.2d 178

DUKE v. JUSTICE'S COURT OF CITY OF BERKELEY et al.

Civ. 11209.

District Court of Appeal, First District, Division 1, California.

Dec. 30, 1940.

1. Prohibition 🔑1

A writ of "prohibition" may be resorted to only as a method of restraining the exercise of judicial functions, that is, to prevent the commission of a future act, and it cannot be used to serve the purpose of a writ of "certiorari" for the review and nullification of a judicial act already performed.

See Words and Phrases, Permanent Edition, for all other definitions of "Prohibition" and "Certiorari".

2. Prohibition 🔑1

A writ of "prohibition" is not obtainable to prevent the commission of an act which is merely ministerial. Code Civ.Proc. § 1102.

3. Prohibition 🔑5(2)

Where motion was filed to have justice's court judgment enforced and carried into execution, the judicial function the justice's court was called on to exercise was to hear and determine the motion, and when the court entered its order granting the motion, the judicial function was fully exercised and the issuance of writ of execution on following day was a "ministerial act" so that application for writ of prohibition was properly denied, especially where writ of execution had been issued before respondents were aware of pendency of prohibition proceeding. Code Civ.Proc. §§ 81, 685, 1102.

See Words and Phrases, Permanent Edition, for all other definitions of "Ministerial Act".

4. Prohibition ⚷3(5)

A writ of "prohibition" will not lie where there is a plain, speedy, and adequate remedy by way of appeal.

5. Prohibition ⚷3(5)

Remedy by way of appeal from order of justice's court granting motion to have judgment enforced and carried into execution was plain, speedy, and adequate so as to preclude resort to writ of prohibition. Code Civ. Proc. §§ 685, 975, 978.

6. Justices of the peace ⚷135(2)

Where on June 5, 1933, a money judgment was entered in justice's court having territorial jurisdiction extending over entire city of Berkeley, which had population of more than 30,000, and on March 14, 1939, judgment creditor presented a motion to have judgment enforced and carried into execution, the justice's court continuously from the time of the rendition of the judgment to and including time of granting motion was vested with full statutory authority to exercise the powers and grant relief embodied in statute permitting judgment to be enforced and carried into execution after lapse of five years from date of its entry by leave of court. Code Civ.Proc. §§ 34, 81, 685, 831d, 831h, 901.

◆

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Proceeding in prohibition by George E. Duke against the Justice's Court of the City of Berkeley, County of Alameda, State of California, and the Honorable Oliver Youngs, Justice of the Peace, to restrain the enforcement of a money judgment against plaintiff. From a judgment denying a peremptory writ of prohibition, the plaintiff appeals.

Affirmed.

Charles H. Seccombe, of Oakland, for appellant.

Nathan G. Gray, of Berkeley, for respondents.

KNIGHT, Justice.

Plaintiff appeals from a judgment entered after trial on the merits denying him a peremptory writ of prohibition. The appeal was taken on the judgment roll, and the facts appearing therefrom are these: On June 5, 1933, a money judgment was entered against appellant in the Justice's Court of the City of Berkeley, from which no appeal was taken; and on March 14, 1939, the judgment creditor presented a motion based on section 685 of the Code of Civil Procedure to have said judgment enforced and carried into execution. Appellant contested the motion, and at the conclusion of the hearing the motion was granted. On the following day, March 15, 1939, appellant instituted this proceeding in prohibition to restrain said justice's court and the presiding justice thereof from taking any further proceedings in the matter; but on the same day also, said justice's court, pursuant to the order granting said motion, issued a writ of execution, which was still outstanding at the time of the trial herein. The writ was issued, so the trial court found, without knowledge of the pendency of the prohibition proceeding.

Respondent, Justice's Court of the City of Berkeley, is a justice's court of class A, sec. 81, Code Civ.Proc. Its territorial jurisdiction extends over the entire city, which at all times herein mentioned had a population of more that 30,000; and section 685 of the Code of Civil Procedure provides as follows: "In all cases the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, and after due notice to the judgment debtor accompanied by an affidavit or affidavits setting forth the reasons for failure to proceed in compliance with the provisions of section 681 of this code. * * *" The theory upon which appellant sought to obtain the writ of prohibition was that said justice's court was without jurisdiction to entertain or grant a motion under the provisions of the foregoing section.

[1-3] We are of the opinion that the trial court's decision denying the writ is sustainable on any one of three grounds: First, a writ of prohibition may be resorted to only as a method of restraining the exercise of judicial functions; that is, to prevent the commission of a future act. It cannot be used to serve the purpose of

a writ of certiorari for the review and nullification of a judicial act already performed. Moreover, it is not obtainable to prevent the commission of an act which is merely ministerial. Dunn v. Justice's Court, 136 Cal.App. 269, 28 P.2d 690; Valentine v. Police Court, 141 Cal. 615, 75 P. 336; Donner Finance Co. v. Municipal Court, 28 Cal.App.2d 112, 81 P.2d 1054; sec. 1102, Code Civ.Proc.; 21 Cal.Jur., p. 581. Here the judicial function the justice's court was called upon to exercise was to hear and determine the motion to enforce the judgment and carry it into execution; and that function was fully exercised and completed on March 14, 1939, when said court entered its order granting the motion. The issuance of the writ of execution on the following day was a ministerial act (Donner Finance Co. v. Municipal Court, supra; Dunn v. Justice's Court, supra); and in fact such act had been fully performed before respondents were aware of the pendency of the prohibition proceeding. Therefore, in that state of the record, it would have been idle to grant a peremptory writ of prohibition, because there was no judicial function about to be exercised by respondents which the writ could have restrained.

[4, 5] Secondly, a writ of prohibition will not lie where there is a plain, speedy and adequate remedy by way of appeal (Dunn v. Justice's Court, supra; Valentine v. Police Court, supra; Plocher v. Superior Court, 135 Cal.App. 337, 26 P.2d 841); and obviously appellant was afforded such remedy by sections 975 and 978 of the Code of Civil Procedure. The former section provides that a party dissatisfied with any special order made after judgment in a civil action in a police or justice's court may appeal therefrom in the manner provided in the preceding section; and section 978 declares that when an appeal is taken from an order made after judgment "the perfecting of the appeal from such order stays proceedings in a justice's or police court upon said order".

[6] Thirdly, by virtue of the provisions of section 34 of the Code of Civil Procedure, as re-enacted in 1933, effective August 21, 1933, said section 685 is made applicable to all trial courts. In terms it provides: "The provisions of this code relating to the commencement and prosecution of, and the practice, procedure, *and enforcement of judgments* and decrees in, actions and proceedings in trial courts, shall apply to all such courts, except where special provision is made for particular courts, or where a general provision is not applicable by reason of jurisdictional limitations." And prior to the effective date of the foregoing section the provisions of section 685 were made available to municipal courts and to justices' courts in cities having a population of 30,000 or more, by virtue of sections 831d and 831h of said Code. The former, with certain exceptions not pertinent here, provided: "The rules of pleading and practice applicable to the prosecution of civil actions *and enforcement of judgments* in the superior court of this state shall apply to and govern the prosecution and maintenance of civil actions *and enforcement of judgments* in the municipal courts of this state * * *"; whereas section 831h, governing justices' courts in cities having a population of 30,000 or more, in turn provided: "* * * the rules of pleading and practice applicable to the prosecution of civil actions *and enforcement of judgments* in the municipal courts of this state shall apply to and govern the prosecution and maintenance of civil actions *and enforcement of judgments* in said justices' courts." (All italics ours.) From the foregoing it will be seen that the Justice's Court of the City of Berkeley continuously from the time of the rendition of the judgment against appellant to and including the time of the granting of the order in question was vested with full statutory authority to exercise the powers and grant the relief embodied in said section 685. The case of Teel v. Justice's Court, 134 Cal.App. 109, 24 P.2d 899, relied on by appellant, was decided September 6, 1933, and dealt with the law as it stood prior to the reenactment of said section 34 and the repeal of Part 2, Title XI of the Code of Civil Procedure, which included section 901, upon which the decision in that case turned; and nothing appears in the decision therein indicating that, as here, the judicial township of the justice's court there involved had a population of 30,000 or more, so as to bring it within the purview of section 831h as in force prior to its repeal in 1933. It is apparent, therefore, that the decision in that case is not here controlling.

For the reasons and upon the grounds stated, the judgment is affirmed.

We concur: PETERS, P. J.; WARD, J.

12 Cal.App.2d 243

DORMAX OIL CO. et al. v. BUSH, State Oil and Gas Supervisor.

Civ. 12669.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1940.

1. Mandamus 🔑163

The District Court of Appeal, in determining sufficiency of petition for writ of mandate, must accept allegations of the petition as true.

2. Mandamus 🔑68

Mandamus will not lie against an officer to compel performance of an act which the law does not specifically enjoin him to perform.

3. Mandamus 🔑87

Owner and lessee of lots located in oil field which was producing oil on August 14, 1931, were not required to obtain permit from state oil and gas supervisor before drilling oil wells on the lots, but all that was necessary for them to do was to file notice of intention to commence drilling together with bond required by statute, and hence mandamus would not lie at instance of owner and lessee to compel supervisor to issue a permit, notwithstanding that after drilling a well they might be met with litigation contesting their claim that oil field was an oil field producing oil on or before August 14, 1931. St.1939, pp. 1118, 1119, 1141 §§ 3203, 3204, 3605.

◆

Original proceeding in mandamus by the Dormax Oil Company and others against R. D. Bush, State Oil and Gas Supervisor, to issue to the named petitioner a permit to drill for oil on certain lots in Los Angeles county.

Writ denied; alternative writ theretofore issued quashed.

Reynolds & Painter and Willard W. Wallace, all of Los Angeles, for petitioners.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

John C. Gillham, Finlayson, Bennett & Morrow, and Frank G. Finlayson, all of Los Angeles, amici curiæ for respondent.

McCOMB, Justice.

This is an original application for a writ of mandate to require respondent State Oil and Gas Supervisor to issue petitioner Dormax Oil Co. a permit to drill for oil on lots 83 and 84 of Licensed Surveyor's Map recorded in book 16, page 2, Records of Surveys of Los Angeles County (located in the Rosecrans Oil Field).

Petitioners allege in their application for a writ of mandate that petitioner Warden is the owner of the above-mentioned lots and that he has executed a lease in favor of petitioner Dormax Oil Co. for the purpose of drilling for oil and gas upon said property; that on February 21, 1940, petitioner Dormax Oil Co. filed with respondent a notice of intention to drill a well on said lots; that March 15, 1940, respondent disapproved said notice of intention to drill; that the property upon which petitioner desires to drill is located in the Rosecrans Oil Field, which has continued to produce oil since 1924 and was producing oil on August 14, 1931; and that the Public Resources Code does not apply to fields producing oil or gas on August 14, 1931, (Sec. 3605, Public Resources Code, St.1939, p. 1141).

Respondents first confront us with the proposition *that the petition does not state facts sufficient to entitle petitioners to the relief which they seek.*

[1-3] This proposition is tenable. We must for the purpose of determining the sufficiency of the petition, accept the allegations therein as true. The petition alleges that the Rosecrans Oil Field, in which petitioners' lots are located, was an oil field drilling and producing oil on and prior to August 14, 1931. Therefore, petitioners were not required to obtain a permit from respondent before commencing the drilling of oil wells on their property. All that was necessary for them to do was to file a notice of intention to commence drilling together with the bond as required by sections 3203 and 3204 of the Public Resources Code. There is no provision in the Public Resources Code or otherwise authorizing respondent to issue a permit upon a state of facts such as is alleged in the petition. Therefore, under the well-established rule that a writ of mandate will not issue against an officer where the law does not specifically enjoin performance of the act which it is sought to compel him to

perform (sec. 1085, Code Civ. Proc.; City of Napa v. Rainey, 59 Cal. 275, 276; Davis v. Porter, 66 Cal. 658, 659, 6 P. 746; Albori v. Smith, 18 Cal.App.2d 615, 618, 65 P.2d 81), petitioners have failed to allege facts sufficient to entitle them to the relief which they seek.

There is no merit in petitioners' contention that they will be required to expend sums of money in drilling a well and may subsequently be met with litigation contesting their claim that the oil field in which they desire to drill was an oil field producing oil on or before August 14, 1931. This is merely one of the incidents which attaches to the privilege of living in a free country. Each citizen is continually called upon to determine at his peril the extent of the use which he can make of his own property, real and personal, without violating the law.

For the foregoing reasons the application for a writ of mandate is denied and the alternative writ of mandate heretofore issued is quashed.

We concur: MOORE, P. J.; WOOD, J.

42 Cal.App.2d 296

WESTERN MACHINERY CO. v. GRAETZ et al. (PLACER COUNTY TITLE CO. et al., Interveners).

Civ. 6303.

District Court of Appeal, Third District, California.

Dec. 31, 1940.

Rehearing Denied Jan. 30, 1941.

1. Sales 🔑454

Where lessor of mining machinery under written rental agreement subsequently informed lessee that selling price of machine was $700, and that lessor would allow, as a credit, 100 per cent. of initial payment, and 75 per cent. of other rentals, if lessee desired to purchase machinery, and lessee failed to make payments equal to agreed purchase price, a "conditional sales contract" did not exist between parties, so as to require recordation of the agreement. Civ. Code, §§ 1698, 2980.

See Words and Phrases, Permanent Edition, for all other definitions of "Conditional Sales Contract".

2. Fixtures 🔑9

Where mining machinery leased under written rental agreement was to be attached to land and would become part of realty but for provisions of lease, rental agreement was within scope of statute authorizing recording of any "instrument affecting title to or possession of real property". Civ.Code, § 1158.

See Words and Phrases, Permanent Edition, for all other definitions of "Instrument Affecting Title to or Possession of Real Property".

3. Fixtures 🔑9

Where lease of personal property to be attached to realty was unrecorded, fact of nonrecordation would not of itself be a defense to a bona fide incumbrancer as would be the situation were a conditional sales contract involved, but proof of the existence of notice would still be necessary. Civ.Code, § 1158.

4. Fixtures 🔑9

Where plaintiff leased mining machinery to be attached to realty under written rental agreement to mining company, subsequently owners of realty on which machinery was placed took machinery from mining company and executed a deed of trust covering real property, together with "all mining machinery, equipment and fixtures, in or about said real property", and grantees in deed of trust had no knowledge of plaintiff's claim to machinery, by recorded notice or otherwise, plaintiff's title to machinery would be subject to lien created by the deed of trust. Civ.Code, § 1158.

5. Fixtures 🔑15

Where owners of realty leased it to mining company, and mining company subsequently attached to realty, machinery leased by it under written rental agreement providing that property would retain its character of personal property, machinery, though affixed to realty, remained "personalty" in hands of owners of realty the same as while in possession of lessee mining company. Civ.Code, § 1158.

See Words and Phrases, Permanent Edition, for all other definitions of "Personalty".

6. Action ⚷63

The defense of laches will not lie in an action of law.

Appeal from Superior Court, Placer County, J. B. Landis, Judge.

Action by the Western Machinery Company to recover mining machinery leased to a mining company under an unrecorded lease, against Ray Graetz and others, owners of the land on which mining company had operated, who had obtained a judgment quieting title to the land and mining machinery, wherein the Placer County Title Company and others, who had made a loan to defendants secured by a deed of trust covering the land and mining machinery, intervened. From a judgment in favor of defendants and interveners, the plaintiff appeals.

Reversed, with instructions.

Arthur P. Shapro and Harry A. Block, both of San Francisco, for appellant.

Floyd H. Bowers, of Roseville, for respondents.

G. L. JONES, Justice pro tem.

Plaintiff, in July, 1937, leased to The Mack Mining Company a certain piece of mining machinery known as a "classifier", the lease or "Rental Agreement", as it was headed, being in writing, but not recorded.

It was specified in the document that the classifier was "to be used at the Mack Mining Company property" situate in Placer county, the property belonging to the defendants herein and then in possession of the mining company under a bond and lease. The rental rate of the classifier was fixed as $275 for the first month and $150 for each subsequent month.

After the execution of the lease, a conversation was held between the representatives of the plaintiff and of the mining company, in which the representative of the plaintiff informed the mining company's agent that it was the policy of the plaintiff, after rentals had been paid on a machine and "the rentals were paid right up to date" to allow, as credit, 100 per cent of the initial payment, then 75 per cent of the other rentals paid, if it was desired to purchase the machinery. The selling price of the machine was given as $700. No testimony was given as to any reply by the mining company's agent, or of any notice given by that company, showing an intent to purchase the machinery on the terms and conditions stated.

The initial payment of $275 was paid, followed later by a payment of $150, and then, on November 16, 1937, and after a lapse of two months, the sum of $300 was remitted, making a total of $725, which would have created a credit of $612.50 in favor of the mining company if it desired to purchase the property, leaving a balance of $87.50 still to be credited on the next monthly rental to be paid. Neither the next rental payment nor the sum of $87.50 was paid.

The machinery was placed and used on the real property. By the terms of the lease, the machinery would retain its character of personal property, notwithstanding the manner in which it might be annexed to realty.

On October 29, 1937, the owners of the real property, being the defendants in this action, brought an action against the lessees of the premises to quiet their title to the land and to the mining machinery situate on it. The machinery company was not made a party to this action, but in the following month, knowledge that such an action had been commenced was acquired by the company. In April, 1938, the owners of the premises were given judgment quieting their title to the land and to the mining machinery located on it.

In the latter part of March, 1938, demand for the classifier was made upon defendants in this action by plaintiff, and in April following, two further demands were made. On May 6, 1938, a loan for $2,020 was negotiated between these defendants and the interveners, and, as security, a deed of trust covering the real property, together with "all mining machinery, equipment and fixtures, in or about said real property" was executed by defendants, granting the property to the Placer County Title Company, as trustee—the Finance Company of Nevada and Placer Counties being designated as the beneficiary. The loan was made without knowledge on the part of interveners of plaintiff's claim to the classifier.

This action brought by plaintiff to recover the machinery was commenced on July 8, 1938.

In the trial court it was decreed (1) that the plaintiff is not the owner of and is not entitled to the possession of the machinery, (2) that the rights of the interveners are superior to those of plaintiff and that the "classifier" is a part of the real property.

[1] Assuming that the conversation concerning the purchase of the classifier constituted an offer on the part of the plaintiff to sell it to the mining company, did the offer ripen into an agreement binding on the plaintiff? The written contract between the plaintiff and the mining company was the rental agreement, and, without question, this contract was not abrogated or terminated by any of the language used in the conversation—in fact, any right to purchase depended on the continuance of the lease. This latter right, if given, would have resulted in a modification of the rental agreement, but not in a novation. That agreement could have been "altered by a contract in writing, or by an executed oral agreement, and not otherwise". Sec. 1698, Civ.Code. In its findings, the trial court found that there was "still due under the oral sale contract" the sum of $87.75. It must, therefore, be conceded that the alleged oral agreement was not fully executed, was not therefore legally effective, and the rental agreement stands without alteration. The contention of the respondents to the effect that there existed a conditional sales contract between the parties cannot therefore be sustained, and the rental agreement, alone, is to be considered in determining the contractual relations of the parties who executed it, or the rights of others, which rights may have arisen in the course of its execution.

Not being a conditional sales contract, recordation of the agreement was not required by the provisions of section 2980 of the Civil Code. In that section, no reference is made to "leases" of mining machinery, but it is specifically provided that "every conditional sales contract of equipment and machinery used or to be used for mining purposes, must be acknowledged * * * and must be recorded".

[2] We have, however, in this case, a situation in which there existed a lease of personal property of a character which called in effect for its placement and use on land worked as a mine. But for the provisions of the lease, it would become a part of the realty when so placed and used. Section 1158 of the Civil Code provides that "any instrument * * * affecting the title to or possession of real property may be recorded under this chapter". This lease is one coming within the scope of section 1158, for recordation of such an agreement would be for the protection not only of the owner leasing the personal property, but also of the innocent encumbrancer. Bell v. Mortgage Guar. Co., 109 Cal.App. 203, 292 P. 660.

The failure to include "leases" of mining machinery in the provisions of section 2980 of the Civil Code does not mean that the legislature was changing the rule enunciated in effect in the case of Oakland Bank of Savings v. California P. B. Co., 183 Cal. 295, 191 P. 524. While, in that case, a conditional sale was involved, yet the doctrine announced would apply to a lease of the character here under consideration.

[3, 4] In case of an unrecorded lease of personal property to be attached to realty, then the fact of nonrecordation would not of itself be a defense to a bona fide encumbrancer as would be the situation were a conditional sales contract involved, but the proof of the existence of notice would still be necessary. The interveners are found to have had no knowledge of plaintiff's claim, by recorded notice or otherwise, and we would hold that, the personalty having been affixed to the realty, the title of the plaintiff would be subject to the lien of the interveners created by the deed of trust taken by them in good faith and without notice of the lease.

[5] As to the owners of the land upon which the machinery was placed, their position differs from that of interveners. No interest in the affixed property is shown to have been gained by them and its character as personal property continued as to them. Byron Jackson Iron Works v. Hoge, 49 Cal.App. 700, 194 P. 45.

[6] The defense of laches pleaded by the respondents will not lie, as this action is one of law. Brownrigg v. De Frees, et al., 196 Cal. 534, 238 P. 714.

We deem unnecessary a discussion of other questions presented, as a review of them would not result in a change of the conclusions we have indicated.

The judgment is reversed, with instructions to the trial court to adjudge plaintiff to have the title to the machinery, subject to the rights of interveners by virtue of their deed of trust. Each party to pay its own costs.

We concur: PULLEN, P. J.; THOMPSON, J.

42 Cal.App.2d 303

BROYLES et al. v. STATE PERSONNEL BOARD et al.

Civ. 12754.

District Court of Appeal, Second District, Division 2, California.

Jan. 3, 1941.

Rehearing Denied Jan. 31, 1941.

Hearing Denied March 3, 1941.

1. Mandamus 🔑77(4)

Failure of State Personnel Board to adopt a ruling providing for the showing of reports of performance to employees, and subsequent failure of appointing authority to show performance reports to petitioners who, during probationary period, were dismissed from position of senior interviewer in division of employment agencies, department of employment of the Unemployment Reserves Commission, did not justify judgment commanding board and commission to reinstate petitioners. Gen.Laws 1937, Act 1404, §§ 122, 123, 141, 142.

2. Officers 🔑72(2)

Where petitioners, who were dismissed from position of senior interviewer in division of employment agencies, department of employment of the Unemployment Reserves Commission, appealed to State Personnel Board, and board investigated petitioners' performance reports, and rendered decision that petitioners were lawfully rejected during their probationary periods of employment, board's decision was final. Gen.Laws 1937, Act 1404, §§ 122, 123, 141, 142.

3. Mandamus 🔑168(4)

In action to compel State Personnel Board and Unemployment Reserves Commission to reinstate petitioners in positions in the state service and to pay petitioners salaries allegedly due after petitioners, who had taken civil service examinations, were dismissed during probationary period from position of senior interviewer in division of employment agencies, department of employment of the Unemployment Reserves Commission, evidence sustained finding that petitioners were dismissed for failure to demonstrate merit, efficiency and fitness. Gen. Laws 1937, Act 1404, §§ 122, 123.

4. Officers 🔑69

Petitioners who were dismissed during their six months' probationary period from position of senior interviewer in division of employment agencies, department of employment of the Unemployment Reserves Commission, could not claim to be "permanent employees" on ground that during the six months of their employment petitioners were required to perform work in excess of regular schedule of hours established by their employing authority. Gen.Laws 1937, Act 1404, §§ 122, 123.

See Words and Phrases, Permanent Edition, for all other definitions of "Permanent Employees".

5. Mandamus 🔑168(4)

In action to compel State Personnel Board and the Unemployment Reserves Commission to reinstate petitioners in positions in the state service after petitioners, who had taken civil service examinations, were dismissed during probationary period from position of senior interviewer in division of employment agencies, department of employment of the Unemployment Reserves Commission, evidence sustained findings adverse to petitioners' contention that notice of rejection was not filed within proper time, that no sufficient reasons for dismissal were given, and that action respecting dismissal was not taken by proper authorities. Gen.Laws 1937, Act 1404, §§ 122, 123.

6. Limitation of actions 🔑46(7)

Where petitioners were properly dismissed on March 31, 1938, from position of senior interviewer in division of employment agencies, department of employment of the Unemployment Reserves Commission, and petitioners' action to compel State Personnel Board and Unemployment Reserves Commission to reinstate petitioners in their positions and pay petitioners' salaries allegedly due was not commenced until December 19, 1938, petitioners' claim, if any, for overtime services, was barred by statute. Gen.Laws 1937, Act 1404, §§ 52, 122, 123.

7. Limitation of actions 🔑106

Where petitioners who were dismissed from positions of senior interviewer in division of employment agencies department of employment of the Unemployment Reserves Commission appealed to State Personnel Board, time for filing action for compensation allegedly due petitioners for their services was not extended by delay caused by appeal. Gen.Laws 1937, Act 1404, §§ 52, 122, 123.

8. Officers 🔑76

Where petitioners who had been appointed to position of senior interviewer in division of employment agencies, department of

employment of the Unemployment Reserves Commission, were dismissed by commission during petitioners' six months' probationary period, the State Personnel Board did not have power to reinstate petitioners in their former positions. Gen.Laws 1937, Act 1404, §§ 122, 123.

9. Officers ⚷76

Under the State Civil Service Act, after an investigation of reasons for rejection of a probationary employee, the State Personnel Board has power to restore employee to eligible list for certification to another position, but board cannot order that employee be reinstated to position held during probationary period. Gen.Laws 1937, Act 1404, §§ 122, 123.

◆

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Marshall E. Broyles and others against the State Personnel Board of the State of California and others, to compel respondents to reinstate petitioners in their positions in the state service and to pay petitioners salaries claimed to be due. From a judgment denying their petition, petitioners appeal.

Affirmed.

Kimpton Ellis, of Los Angeles, for appellants.

Earl Warren, Atty. Gen., Bayard Rhone, Deputy Atty. Gen., for respondents.

WOOD, Justice.

Petitioners commenced this action to compel the State Personnel Board, the Unemployment Reserves Commission, and various state officers to reinstate them in their positions in the state service and to pay them salaries claimed to be due. They have appealed from a judgment denying their petition.

After taking a civil service examination petitioners were on October 1, 1937, appointed to the position of senior interviewer, division of employment agencies, department of employment of the Unemployment Reserves Commission of the state of California at a salary of $160 per month. The trial court found that in March, 1938, and during their six months' probationary period petitioners were dismissed "for reasons relating to the qualifications of each and for the good of the service and for failure to demonstrate merit, efficiency, and fitness; that notice of such action accompanied by a statement of the specific reasons therefor, truthful within the knowledge of the division of employment agencies or other person in charge of the respective petitioners, was filed by the division of employment agencies with the State Personnel Board, and a copy thereof was served upon each of the petitioners previous to the 31st day of March, 1938". On April 21, 1938, petitioners appealed to the State Personnel Board and thereafter the matter was referred to a referee to hear the evidence and report to the board. The referee conducted a hearing and filed a report upholding the dismissals. Petitioners excepted to the referee's report and on November 17, 1938, the State Personnel Board rendered its decision that each petitioner "was lawfully rejected during his probationary period". The board did not restore petitioners to the eligible list for certification to any other position.

The law governing the present appeal is to be found in the state Civil Service Act, Act 1404, Deering's Gen.Laws, 1937. Sections 122 and 123 of this act provide the reasons for and the method of the dismissal of employees during the probationary period. These sections are as follows: "§ 122. Any probationer may be rejected by the appointing authority during the probationary period for reasons relating to the probationer's qualifications or the good of the service, or failure to demonstrate merit, efficiency, fitness and moral responsibility. Notice of such action accompanied by the statement of the specific reasons therefor, truthful within the knowledge of the appointing power or other officer or person in charge of the employee, shall be filed by the appointing power with the board and a copy served upon the probationer to give effect to the rejection. § 123. After investigation of the reasons for rejection of a probationer, the board may restore such rejected probationer to the eligible list for certification to any position within the class other than the position from which he was rejected."

[1, 2] Petitioners complain that they were not shown the performance report concerning their own service and were not allowed to discuss such reports with the appointing power. Section 141 of the act provides that the board "shall establish standards of performance for each class of position and a system of performance ratings based upon such standards". Sec-

tion 142 of the act provides: "Performance reports shall be filed by appointing powers at such intervals as the board may by rule provide. The rules shall provide that employees be shown the performance report covering their own service and shall be privileged to discuss it with the appointing power before it is filed." Before the dismissal of petitioners the State Personnel Board had not adopted a rule providing that employees be shown their reports of performance before the reports were filed. We are satisfied that the failure of the board to adopt a rule providing for the showing of reports of performance to employees and the subsequent failure of the appointing authority to show the performance reports to petitioners do not justify a judgment commanding respondents to reinstate petitioners. In section 141 of the act it is provided that the board "shall administer the system and shall have the power to investigate all performance reports and to make its own reports. In case of disagreement, or upon appeal of an employee, the decision of the board shall be final". It appears that the board did in fact investigate the performance reports of petitioners and, as provided in the act, the decision of the board is final.

[3] Petitioners assert that the reports of performance "were not properly rated and were manifestly arbitrary, capricious and unreasonable". The trial court found that petitioners were dismissed for failure to demonstrate merit, efficiency and fitness. We are satisfied that the evidence is sufficient to sustain this finding. Concerning one of the petitioners this comment appears in the report: "This employee has had a great deal of experience which should be beneficial to him in this work. However, we have proved he must have constant supervision or he makes many mistakes. He is never content to do the work assigned him; for any long period of time, irrespective of the nature of the work. His interests appear to lie in other fields of endeavor." The comment concerning the other petitioner was similar in many respects. The appointing power must necessarily be allowed to exercise discretion and personal judgment in determining whether a probationary employee shall acquire permanent status.

[4] Petitioners claim that they were in fact permanent employees by reason of the fact that during the six months of their employment they were required to perform work in excess of the regular schedule of hours established by their employing authority. We find no merit in this contention. The act does not provide that the probationary period shall be for any given number of hours but it does provide that the probationary period shall be six months.

[5] Petitioners also assert that the notice of rejection was not filed within the proper time, that no sufficient reasons were given and that the action was not taken by the proper authorities. The trial court found adversely to the contentions of petitioners on these points and the evidence is ample to sustain the findings. It was shown by a resolution of the Unemployment Reserves Commission and by the testimony of its chairman that the authority to reject probationary employees was delegated by the commission to Arthur St. Clair. It also appears that Arthur St. Clair executed the reports of performance and of separation in the case of each of the petitioners. From the petitions filed herein it appears that the reports of performance and of separation were filed with the State Personnel Board on March 21, 1938. A copy of the appropriate report was mailed to each petitioner on March 17, 1938, with a letter informing him that his services would be terminated on March 31, 1938.

[6-9] The trial court found that the petitioners' alleged claims in so far as they relate to compensation are barred by the provisions of section 52 of the State Civil Service Act. Since petitioners were legally rejected from the service and are not in position to demand reinstatement it is manifest that they cannot compel respondents to pay them salaries for the period after March 31, 1938. As regards any claim they might make for overtime services the court properly held that such a claim is barred by section 52 of the act, which provides that no "person [shall] be compensated for the time subsequent to the date" when a cause of action arose unless such action be filed and served within 90 days "after the same arose". In accordance with this provision it was necessary for petitioners to file their action for overtime compensation not later than 90 days after March 31, 1938. The present action was commenced on December 19, 1938. The time for filing the action for compensation was not extended by the delay caused by the appeal to the State

Personnel Board. No power vested in the board to reinstate petitioners after their rejection by the Unemployment Reserves Commission during the probationary period. In section 123 of the Act it is provided that after an investigation of the reasons for the rejection of a probationary employee the board has the power to restore the employee to the eligible list for certification to another position but it cannot order his reinstatement to the position held during the probationary period. Stephenson v. Unemployment R. Comm., 34 Cal.App.2d 19, 92 P.2d 931; Neuwald v. Brock, 12 Cal.2d 662, 86 P.2d 1047.

The judgment is affirmed.

We concur: MOORE, P. J.; McCOMB, J.

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42 Cal.App.2d 251

In re SHERMAN'S GUARDIANSHIP.
JONES v. THOMAS.

Civ. No. 12834.

District Court of Appeal, Second District, Division 2, California.
Dec. 31, 1940.

1. Guardian and ward 🔑25

A guardian who has been appointed can be removed only upon a finding by the trial court of the existence of one of the causes listed in statute as grounds for removal of guardian. Probate Code, § 1580.

2. Insane persons 🔑38

In proceeding to remove guardian of incompetent, trial court's finding as to incompetent's attitude of suspicion and distrust toward guardian did not constitute a finding of cause for removal of guardian contemplated by statute listing the grounds for removal. Probate Code, § 1580.

3. Insane persons 🔑38

Where none of grounds for removal of guardian of incompetent found by trial court constituted ground for removal contemplated by statute, the finding did not support conclusions of law upon which order removing guardian was predicated, and, therefore, the order of removal was reversed. Probate Code, § 1580.

4. Insane persons 🔑38

The estate of an incompetent is liable for the reasonable value of attorneys' fees for services rendered to the incompetent in proceedings appertaining to the appointment or removal of a guardian.

5. Guardian and ward 🔑25

The allowance of attorneys' fees out of guardianship estate for services rendered in proceedings appertaining to the appointment or removal of a guardian and the amount of such fees rest in the sound discretion of the trial court, and in absence of abuse thereof, the trial court's finding in such respect will not be disturbed upon appeal.

6. Insane persons 🔑38

An allowance of attorney's fees in the amount of $150 for services rendered in handling proceeding for the removal of guardian of an incompetent was not an abuse of trial court's discretion.

◆

Appeal from Superior Court, Los Angeles County; Georgia P. Bullock, Judge.

Proceeding in the matter of the guardianship of the person and estate of Emma Sabin Sherman, incompetent, by Fannie L. Thomas for the removal of Rosalind S. Jones as guardian of the incompetent. From orders removing her as guardian and allowing Fannie L. Thomas' attorneys a fee for handling the proceeding, Rosalind S. Jones appeals on the judgment roll.

Reversed in part and affirmed in part.

Haight, Trippet & Syvertson, of Los Angeles, for appellant.

Le Roy Anderson, of Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal from orders (1) removing appellant as guardian of the person and estate of Emma Sabin Sherman, and (2) allowing respondent's attorneys a fee for handling the proceedings leading to the removal of appellant. The appeal is on the judgment roll alone.

The essential facts are:

In 1939 appellant was appointed the guardian of the person and estate of Emma Sabin Sherman, a lady of eighty-seven years of age. Three months after the appointment of appellant as guardian of the incompetent, respondent filed a petition for the removal of the guardian and sought to have Rudolph R. Mueller appointed as guardian of the incompetent. After a hearing the court made findings of fact, so far as material here, as follows:

(1) That appellant had not neglected her duties nor mismanaged the person or estate of the incompetent;

(2) That appellant at all times provided the incompetent with adequate food, lodging, and money and had made it possible for the incompetent to go to all reasonable places at reasonable times;

(3) That the mental and physical condition of the incompetent had improved under the guardianship, and that the acts of appellant as guardian had not been detrimental to the incompetent.

In addition to the foregoing findings the court found:

(a) "Said incompetent exhibits an irritable and suspicious attitude toward the guardian, Rosalind S. Jones, and an unhappy state of mind exists at present toward the guardian, Rosalind S. Jones, which keeps the incompetent in a disturbed condition and renders friendly relations and cooperation between the guardian, Rosalind S. Jones, and the incompetent difficult."

(b) "That if Rudolph R. Mueller is appointed guardian of the person this resentment and antagonism [toward the appellant] may be removed."

These are the questions presented for our determination:

First: Did the findings of the trial court support the conclusions of law upon which the order removing appellant as guardian of incompetent's person was predicated?

Second: Did the trial court abuse its discretion in allowing respondent's attorney a fee from the estate of the incompetent?

[1] The first question must be answered in the negative. The law is established in California that once a guardian has been appointed such guardian can be removed only after a finding by the trial court that one of the causes listed in section 1580 of the Probate Code exists. (Guardianship of Sturges, 30 Cal.App. 2d 477, 489, 86 P.2d 905.)

Section 1580 of the Probate Code provides that the following are grounds for the removal of a guardian:

"(1) **For waste or mismanagement of the estate, or abuse of his trust;**

"(2) For failure to file an inventory or to render an account within the time allowed by law, or for continued failure to perform his duties;

"(3) For incapacity to perform his duties suitably;

"(4) For gross immorality;

"(5) For having an interest adverse to the faithful performance of his duties;

"(6) For removal from the state;

"(7) In the case of a guardian of the property, for insolvency; or,

"(8) When it is no longer necessary that the ward should be under guardianship."

[2, 3] It is apparent from the findings of the trial court as above stated that none of the grounds for removal of appellant as guardian of the incompetent listed in section 1580 of the Probate Code were found by the trial court to exist. Therefore, the findings do not support the conclusions of law upon which the order removing appellant as guardian was predicated. Findings (a) and (b), supra, stressed by respondent, fall within the foregoing category.

It is a matter of common knowledge that in a large number of cases where guardians are appointed for incompetents, particularly after a contest, the incompetent is suspicious of the guardian, antagonistic to such person, and frequently in a very unhappy state of mind because of the appointment of the guardian. Such a situation is unfortunate but is due to the frailties of human nature and is frequently caused by the fact that the incompetent is unable to care for his or her person and estate. The resentment is frequently directed to the person who is following a course best calculated to protect the rights and interests of the incompetent.

[4-6] The second question must likewise be answered in the negative. It is the law in California that the estate of an incompetent is liable for the reasonable value of attorneys' fees rendered to the incompetent in proceedings appertaining to the appointment or removal of a guardian (Estate of Doyle, 126 Cal.App. 646, 647, 14 P.2d 920; Stone v. Conkle, 31 Cal.App. 2d 348, 351, 88 P.2d 197). In such a case the allowance of attorneys' fees and the amount thereof rests in the sound discretion of the trial court, and, in the ab-

sence of an abuse thereof, the trial court's finding will not be disturbed upon appeal. In the present case we are of the view that there was no abuse of the trial court's discretion in allowing respondent's attorney a fee in the sum of $150 for his services in the present matter.

For the foregoing reasons the order removing appellant as guardian of the person of the incompetent and appointing respondent in appellant's place and stead is reversed and the order allowing a fee to respondent's attorney for his services is affirmed.

We concur: MOORE, P. J.; WOOD, J.

GOES v. PERRY et al.*

BAUMANN v. GOES et al.

Civ. 12661.

District Court of Appeal, Second District, Division 2, California.

Dec. 30, 1940.

Rehearing Denied Jan. 28, 1941.

Hearing Granted Feb. 27, 1941.

Appeal and error 🔑187(4), 236(1)

In absence of an objection to the filing of a complaint in intervention, either by demurrer, motion to strike, or other appropriate proceeding, a party may not for the first time on appeal raise the objection that the order of the trial court permitting the intervention was improper. Code Civ.Proc. § 387.

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Action by B. W. Goes against Will H. Perry and others to recover possession of certain personalty, wherein Anna Baumann was permitted to file a complaint in intervention against B. W. Goes and others, and wherein a receiver was appointed. From the order appointing the receiver, Will H. Perry appeals.

Order affirmed.

G. E. Spencer, of Los Angeles, for appellant.

Thomas F. McCue, of Los Angeles, for respondent.

McCOMB, Justice.

From an *ex parte* order appointing a receiver predicated upon a complaint in intervention and an accompanying affidavit, defendant Perry appeals.

The essential facts are:

In April, 1937, plaintiff Goes commenced an action to recover possession of certain personal property. September 3, 1937, the trial court permitted respondent Baumann to file a complaint in intervention and appointed a receiver for the personal property which was the basis of plaintiff Goes' action. It is from this latter order that defendant Perry appeals, claiming that plaintiff in intervention Baumann was improperly permitted to intervene in the present action, as there was no showing that he had an interest in the subject of the litigation as required by section 387 of the Code of Civil Procedure.

This is the sole question necessary for us to determine:

In the absence of an objection to the filing of a complaint in intervention either by demurrer, motion to strike, or other appropriate proceedings, may a party for the first time on appeal raise the objection that the order of the trial court permitting the intervention was improper?

This question must be answered in the negative. The law is established in California that in the absence of an objection in the trial court to an order permitting the filing of a complaint in intervention, a party may not urge error in the making of such order for the first time on appeal. (People v. Reis, 76 Cal. 269, 273, 18 P. 309; Smith v. Penny, 44 Cal. 161, 164; McKenty v. Gladwin, Hugg & Co., 10 Cal. 227, 228; County of Yuba v. Adams & Co., 7 Cal. 35; Carlin v. Masten, 118 Cal.App. 373, 375, 5 P.2d 65). Since it appears that defendant Perry failed by motion to strike, or otherwise to raise the objection in the trial court which he is now presenting in this court, the above rule is applicable, and he is foreclosed from urging alleged error of the trial court in permitting the complaint in intervention to be filed.

For the foregoing reasons the order is affirmed.

We concur: MOORE, P. J.; WOOD, J.

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* Subsequent opinion 115 P.2d 441.

42 Cal.App.2d 246

In re WINZELER'S ESTATE.

WINZELER v. CASTORINA (two cases).

Civ. 12698.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1940.

Hearing Denied Feb. 27, 1941.

1. Appeal and error 🔑931(1)

In reviewing evidence on appeal from a judgment on ground that evidence is insufficient to sustain a finding of fact, all conflicts must be resolved in favor of respondent and all legitimate and reasonable inferences indulged in support of finding.

2. Appeal and error 🔑996

When two or more inferences can be reasonably deduced from facts, appellate court is without power to substitute its deductions for those of trial court.

3. Appeal and error 🔑1011(1)

Direct evidence of one witness who is entitled to full credit is sufficient to prove any fact, except perjury or treason, and is sufficient to create a substantial conflict in evidence, regardless of inferences supporting testimony to contrary.

4. Appeal and error 🔑989

The power of appellate court begins and ends with a determination as to whether there is any substantial evidence contradicted or uncontradicted which will support finding of facts.

5. Evidence 🔑16

It is common knowledge that expressions referring to a place as one's "home" indicate merely that speaker is referring to place of his origin and that such expressions do not mean place which speaker considers his present domicile and residence.

See Words and Phrases, Permanent Edition, for all other definitions of "Home".

6. Wills 🔑300

Evidence sustained finding that decedent was a resident of Los Angeles county at time of death, notwithstanding that decedent had frequently referred to a place in Ohio as his "home", and that decedent owned a large interest in a going business in Ohio, and hence decedent's will was properly admitted to probate as an original will in Los Angeles county.

7. Appeal and error 🔑1011(1)

Trial court's determination under conflicting evidence was binding.

8. Wills 🔑334

Where material fact in dispute in petitions for admission of decedent's will to probate was question as to place of decedent's residence at time of death, and if appellant's contention was true, will should have been admitted to probate as a foreign will, and if respondent's contention was true, will should have been admitted to probate as an original will, it was proper for trial court to make a finding on issue as to decedent's residence at time of death.

◆

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Proceeding in the matter of the estate of Henry S. Winzeler, deceased, wherein Howard W. Winzeler filed a petition for probate of deceased's will as a foreign will and S. Castorina filed a petition for the admission of deceased's will to probate as an original will. From a decree of the superior court granting the petition of S. Castorina and denying the petition of Howard W. Winzeler, Howard W. Winzeler appealed to the Supreme Court which transferred the case to the District Court of Appeals for decision pursuant to provisions of the Constitution, article 6, section 4c.

Affirmed.

Burr & Smith, of Los Angeles, for appellant.

Michael F. Shannon and Thomas A. Wood, both of Los Angeles, for respondent.

McCOMB, Justice.

This appeal, transferred from the Supreme Court to this court for decision pursuant to the provisions of Article VI, section 4c of the Constitution of the State of California, is from a decree of the superior court granting the petition of respondent for the admission of decedent's will to probate as an original will, upon the ground that decedent was a resident of Los Angeles County at the time of his death, and also from the decree denying the petition of appellant for probate of decedent's will as a foreign will.

These are the sole questions necessary for us to determine:

First: Was there substantial evidence to sustain the trial court's finding "that decedent [*Henry S. Winzeler*] *was at the time of his death a resident of the county of Los Angeles, State of California"?*

Second: Did the trial court err in making a finding as to the residence of decedent, Henry S. Winzeler, at the time of his death?

[1-4] The first question must be answered in the affirmative and is controlled by the following pertinent rules of law:

(1) In reviewing the evidence on appeal from a judgment on the ground that the evidence is insufficient to sustain a finding of fact, all conflicts must be resolved in favor of the respondent and all legitimate and reasonable inferences indulged in support of the finding (Raggio v. Mallory, 10 Cal.2d 723, 725, 76 P.2d 660).

(2) When two or more inferences can be reasonably deduced from the facts, the appellate court is without power to substitute its deductions for those of the trial court (Bellon v. Silver Gate Theatres. Inc., 4 Cal.2d 1, 14, 47 P.2d 462).

(3) Direct evidence of one witness who is entitled to full credit is sufficient to prove any fact except perjury or treason and is necessarily sufficient to create a substantial conflict in evidence regardless of inferences supporting testimony to the contrary (Estate of Filippi, 9 Cal.App.2d 407, 410, 49 P.2d 892).

(4) The power of the appellate court *begins* and *ends* with a determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact (Raggio v. Mallory, supra, 10 Cal.2d 725, 76 P.2d 660).

There was received in evidence an application of decedent dated February 18, 1937, to become a member of the Los Angeles Athletic Club, wherein appeared the following questions and answers thereto by decedent:

"Resided in Los Angeles district, how long? A visitor for ten years. In Southern California? Five years. Previous Residence? Bryan, Ohio."

There was also received in evidence a lease dated September 25, 1936, between the Pacific Mutual Life Insurance Company and Craftsman Studios, Inc., of which decedent was the sole stockholder, covering a lease on premises at 501 West Sixth Street in Los Angeles for a period of ten years beginning January 1, 1937, at a rental of $1,500 per month. On the property covered by the lease just mentioned decedent opened a store and operated the same, having at one time an inventory stock of approximately $60,000 in value.

Decedent swore to an affidavit of merits in connection with a motion for a change of venue, wherein he made the following statement:

"Affiant further says that he was, at the time of the commencement of the above-entitled action and ever since has been and is now, a resident of the City of Laguna Beach, County of Orange, State of California."

In addition there was received in evidence (1) a transfer of a motor vehicle owned by the deceased in April, 1935, transferring the registration of the automobile from the State of Ohio to a resident registration in the State of California, and (2) subsequent registrations, in the State of California of automobiles purchased later by decedent, wherein decedent appeared as a resident of California.

Also there was received in evidence a lease between the Biltmore Hotel, Los Angeles, and decedent and appellant commencing on November 15, 1938, with a rental of $300 per month.

[5] Appellant's contention that decedent frequently referred to Bryan, Ohio, as his "home" is not controlling. Most of the residents of California, certainly of Southern California, other than native sons or those who were brought to the state prior to the age when they were able to receive and retain impressions refer to some other section of the United States or some other country as their "home" or "old home". It is a matter of common knowledge that such expressions are indicative of nothing but that the speaker is referring to the place of his origin and does not mean the place which he considers his present domicile and residence.

[6, 7] The foregoing evidence and reasonable inferences which may be drawn therefrom, coupled with the fact that decedent had spent most of his time in Southern California for ten years preceding his death and had engaged in business

in the city of Laguna Beach, California, and in Los Angeles, California, substantially support the trial court's finding that decedent was a resident of Los Angeles County at the time of his death. Under the rules of law above stated, the power of this court to inquire further into the evidence is ended. The fact that decedent owned a large interest in a going business in Bryan, Ohio, paid the expenses on the home in which he formerly lived, which was occupied by his daughter and son-in-law and where he stayed when visiting in the city of Bryan, raised at the most a conflict in the evidence of which the trial court's determination binds us.

[8] The second question must be answered in the negative. Respondent's petition for the probate of decedent's will alleged that decedent was a resident of Los Angeles County at the time of his death. This appellant denied. In the petition filed by appellant for the probate of decedent's will he alleged that decedent was a resident of Ohio at the time of his death. This was denied by respondent. It thus appears that the material fact in dispute in both petitions was the question as to the place of decedent's residence at the time of his death. If appellant's contention was true, the will should have been admitted as a foreign will. If respondent's contention was true, the will should have been admitted to probate as an original will. Therefore, the trial court properly made a finding on the material issue in dispute as to the residence of decedent at the time of his death.

Estate of Reynolds, 217 Cal. 557, 20 P.2d 323, is not in point, for the reason that in the Estate of Reynolds, there was only a petition for the probate of a foreign will and, though the court sustained an objection to evidence offered to show that decedent was a resident of California at the time of his death and the order from which an appeal was taken was affirmed, our Supreme Court held that the sustaining of the objection was erroneous (see 217 Cal. page 560, 20 P.2d 323, Estate of Reynolds, supra), but, in view of the fact that there had been no petition filed seeking to have the will admitted to probate in California as an original will, the error in sustaining the objection to the proffered evidence could be cured by striking the finding as to the place of residence of decedent at the time of his death and leaving the matter for future determination in an appropriate proceeding, should occasion arise (see 217 Cal. page 562, 20 P.2d 323, Estate of Reynolds, supra.)

The conclusions which we have reached render it unnecessary for us to consider the other arguments presented by appellant.

For the foregoing reasons the orders are and each is affirmed.

We concur: MOORE, P. J.; WOOD, J.

BAUMANN et al. v. BEDFORD et al.*

Civ. 12663.

District Court of Appeal, Second District, Division 2, California.

Dec. 30, 1940.

Rehearing Denied Jan. 28, 1941.

Hearing Granted Feb. 24, 1941.

1. Courts 🔑475(5)

A court has no power to appoint a receiver where one has already been appointed by another court of equal co-ordinate jurisdiction, and that receiver has possession of the property which is the subject of the dispute.

2. Courts 🔑475(5)

In partition action, the trial court exceeded its jurisdiction in appointing a receiver where it appeared that in another action a receiver had been appointed for the same realty, and it did not appear from the record that the prior receivership had been terminated.

3. Courts 🔑481

An ex parte order appointing a receiver in action for partition of realty did not have the effect of vacating an order entered in a prior action appointing a receiver for the same realty where the orders were made in entirely independent and separate actions.

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Action for partition of realty by Anna Baumann and others against Henry G.

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* Subsequent opinion 115 P.2d 437.

Bedford and others. From an ex parte order appointing a receiver and directing him to take possession of the realty involved, defendants appeal.

Reversed.

C. E. Spencer, of Los Angeles, for appellants Perry.

Henry O. Wackerbarth, of Los Angeles, for appellants Townsend, Bedford, Nottashed and Poorman.

Thomas F. McCue, of Los Angeles, for respondents.

McCOMB, Justice.

From an *ex parte* order appointing a receiver and directing him to take possession of certain real property in an action for partition of the same, defendants appeal.

The essential facts appearing from the complaint and affidavit accompanying the application for a receiver are:

That plaintiffs and defendants are holders of notes aggregating $500,000 secured by a trust deed on a parcel of land in Los Angeles improved with a thirteen-story building; that the property in question is in the possession of receivers appointed in another action; and that on December 10, 1937, the court in the action just mentioned made an order directing the receivers to surrender the property held by them to certain holders of bonds which were a lien against the property in question.

This is the sole question for us to determine:

Did the trial court exceed its jurisdiction in appointing a receiver in the present action, for the reason that it appears from the record that a receiver had been appointed in another action for the property which is the subject of the present receivership?

[1, 2] This question must be answered in the affirmative. The law is established that a court has no power to appoint a receiver where one has already been appointed by another court of equal coordinate jurisdiction, and such receiver has possession of the property which is the subject of the dispute. Fischer v. Superior Court, 110 Cal. 129, 138, 42 P. 561. In the instant case it appears that in another action a receiver had been appointed for the very property which is here in question, and it does not appear from the record that the prior receivership had been terminated. The order of December 10, 1937, above mentioned did not terminate the receivership but merely directed the prior receivers to surrender the property to designated parties. There is a total absence of any showing in the record that this order had been complied with.

[3] The case of Hibernia Sav. & Loan Soc. v. Belcher, 4 Cal.2d 268, 48 P.2d 681, is not here in point, for the reason that in the case just cited the court had made an order vacating the appointment of the prior receiver. Nor is there any merit in plaintiffs' contention that the present order had the effect of vacating the previous receivership order, for the reason that the orders were made in entirely independent and separate actions.

For the foregoing reasons, the order is reversed.

We concur: MOORE, P. J.; WOOD, J.

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42 Cal.App.2d 190

PACIFIC CONST. FINANCE CO., Ltd., v. KRAMER.

Civ. 12787.

District Court of Appeal, Second District, Division 2, California.

Dec. 30, 1940.

Hearing Denied Feb. 24, 1941.

1. Venue ⚷7

Under statute, action wherein one count of complaint was for breach of contract and the other count was predicated upon defendant's failure to pay commission allegedly due under the contract was triable in county where contract was made rather than county of defendant's residence or of location of realty, title to which would become an issue. Code Civ.Proc. §§ 392, 395, subd. 1.

2. Venue ⚷45

Where action was based upon contract and was, therefore, triable in county where contract was made, that the complaint was allegedly subject to demurrer did not justify change of venue to county of defendant's residence, where any objection to complaint could have been cured by amendment. Code Civ.Proc. § 395, subd. 1.

3. Venue ⚷5(1)

Under statute, court cannot change venue to county where realty involved in the action is located unless it appears that title to the realty will be directly affected by the judgment, and it is not sufficient that the title to the realty is incidentally, collaterally or even necessarily inquired into, where the judgment can be satisfied by payment of money. Code Civ.Proc. § 392.

◆

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action on a contract by the Pacific Construction Finance Company, Limited, against Samuel E. Kramer, etc. From an order granting defendant's motion for a change of venue, plaintiff appeals.

Reversed, with directions.

See, also, 106 P.2d 634.

Ira Ratner, of Los Angeles, for appellant.

T. H. Canfield, of Santa Barbara, for respondent.

McCOMB, Justice.

From an order granting defendant's motion for a change of venue of an action from Los Angeles County to Santa Barbara County on the ground that defendant was a resident of the latter county, plaintiff appeals.

The complaint in two counts alleged that plaintiff and defendant had entered into a contract in the city of Los Angeles. The first cause of action is predicated upon defendant's failure to pay plaintiff a commission alleged to be due, pursuant to the contract, and the second cause of action is for damages resulting from breach of the alleged contract by defendant.

[1-3] This is the sole question necessary for us to determine:

Under section 395, subsection 1 of the Code of Civil Procedure, was the venue of the action in Los Angeles county where the contract, which was the basis of the suit, was alleged to have been made?

This question must be answered in the affirmative. Section 395, subsection 1 of the Code of Civil Procedure provides that the proper county for the trial of an action founded on an obligation predicated upon a contract is, among others, the county "in which the contract in fact was entered into". Since it is a conceded fact in the present case that the contract which is the basis of the instant action was in fact entered into in Los Angeles County, such county was the proper county for the trial of the suit.

There is no merit in defendant's contention that the complaint was vulnerable to a demurrer, and that, therefore, the motion for a change of venue to the county of his residence was properly granted, since any objection thereto could have been cured by amendment to the complaint (Miratti v. Banca Popolare Fugazi, 99 Cal.App. 1, 7, 277 P. 905). Nor do we find any merit in defendant's contention that Santa Barbara County was the proper county for the trial of the action, for the reason that in the determination of the present action title or an interest in real property located in Santa Barbara County would necessarily become an issue in the case.

The rule is established that the trial court has no power under section 392 of the Code of Civil Procedure to change the place of trial to a county where real property is located, unless it appears that title to the land will be directly affected by the judgment of the court. It is not sufficient for the title to the land to be incidentally, collaterally, or even necessarily inquired into if a judgment, if any, as in the present case, can be satisfied by the payment of money (Work v. Associated Almond Growers, 76 Cal.App. 708, 711, 245 P. 790).

For the foregoing reasons the order is reversed and the action is ordered retransferred to Los Angeles county for the purpose of trial.

We concur: MOORE, P. J.; WOOD, J.

42 Cal.App.2d 166

BAYLEY et al. v. SOUZA et al.

Civ. 11276.

District Court of Appeal, First District, Division 1, California.

Dec. 30, 1940.

Rehearing Denied Jan. 29, 1941.

Hearing Denied Feb. 24, 1941.

1. Appeal and error ⇨204(1)

Parties not objecting to admission of evidence during the trial were thereby precluded from doing so on appeal.

2. New trial ⇨163(1)

Prior to 1939 amendment, the requirement of statute that order granting new trial on ground of insufficiency of evidence should specify that order was granted on that ground only applied to orders granting new trial after verdict by jury and not after decision by court. Code Civ.Proc. § 657, and subd. 6.

3. New trial ⇨163(1)

Under statute requiring that order granting new trial on ground of insufficiency of evidence shall so specify, trial court is not required to use statutory language, but, if language of order is susceptible of reasonable interpretation that trial court intended to include insufficiency of evidence, it must be so interpreted. Code Civ.Proc. § 657, and subd. 6.

4. New trial ⇨163(1)

An order for new trial providing simply that a new trial is granted does not include insufficiency of evidence as one of grounds. Code Civ.Proc. § 657, and subd. 6.

5. Appeal and error ⇨901, 933(1)

All presumptions are in favor of order granting new trial, and burden is on party appealing from order to show error. Code Civ.Proc. § 657.

6. New trial ⇨163(1)

An order in negligence case stating that motion for new trial was granted on all issues sufficiently specified that insufficiency of evidence was one of grounds on which new trial was granted. Code Civ.Proc. § 657, and subd. 6.

7. New trial ⇨70

Where there was substantial evidence in record which would justify a jury in finding that plaintiffs were not negligent and that automobile accident was either caused by negligence of defendant, who had obtained favorable verdict, or by concurring negligence of defendant and another, granting or denying plaintiffs' motion for new trial on ground of insufficiency of evidence was within trial court's discretion. Code Civ.Proc. § 657, and subd. 6.

8. New trial ⇨163(1)

Where 1939 amendment to new trial statute, making conclusive presumption previously existing that order not specifying that it was based on insufficiency of evidence was not based upon that ground, did not become effective until after entry of order granting new trial, amendment had no application to appeal involving question of whether order did or did not specify that insufficiency of evidence was one of grounds therefor. Code Civ.Proc. § 657, and subd. 6.

WARD, J., dissenting.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Robert Bayley and another against George A. Souza and others, to recover for damages sustained in an automobile accident. From an order granting plaintiffs' motion for a new trial after a verdict and judgment in favor of the named defendant, the named defendant appeals.

Order affirmed.

Rehearing denied; WARD, J., dissenting.

Hearing denied; GIBSON, C. J., and EDMONDS. J., dissenting.

Hoge, Pelton & Gunther, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for appellant.

O'Brien, Dibert & Acton and Arthur F. Edwards, Jr., all of San Francisco, for respondents.

PETERS, Presiding Justice.

Defendant Souza appeals from an order of the trial court granting plaintiffs' motion for a new trial after a verdict and judgment in favor of defendant Souza. The sole question necessary to be decided on this appeal is whether the motion was granted on the ground of insufficiency of the evidence to justify the verdict. If so, the appeal is without merit.

Robert Bayley and his wife Florence Bayley brought this action, for damages sustained in an automobile accident, against Ethel Ewing, Audrey Wheeler (now Audrey Bates), and appellant Souza. A verdict was returned in favor of defendant Souza, and in favor of plaintiffs against

Ethel Ewing and Audrey Bates in the sum of $1,500. These two last-mentioned defendants moved for a new trial, and plaintiffs moved for a new trial against all defendants. In plaintiffs' notice of intention to move for a new trial one of the grounds specified was "insufficiency of the evidence to justify the verdict". Upon the hearing of the motions the trial court ordered that "the motion for a new trial be granted as to defendants Ethel Ewing and Audrey Bates, and the motion for new trial as to defendant George A. Souza be continued" to a later date. Several days later plaintiffs' motion for a new trial against Souza was granted, the order reading in part as follows: "It is ordered by the Court that plaintiffs' motion for new trial as to defendant George A. Souza be and the same is hereby granted on all issues."

[1] In his opening brief appellant proceeds upon the assumption that the motion for a new trial was granted solely because the trial court concluded that a certain statement, presumably inconsistent, as appellant contends, with other evidence of an impeaching character, had been erroneously admitted into evidence. Appellant argues that such evidence was admissible; that the motion for a new trial should have been denied, and that the order of the court should now be reversed. Respondents ignore this point, and argue that under the phraseology of the ruling of the trial court upon the motion, insufficiency of the evidence was the ground or included within the grounds upon which the motion was granted. It will not be necessary to consider the question of the admissibility of the evidence referred to by appellant. The respondents did not object to the admission of the evidence during the trial and are therefore precluded from doing so on appeal. In re Estate of Russell, 189 Cal. 759, 210 P. 249; Supreme Grand Lodge, etc., v. Smith, 7 Cal.2d 510, 61 P.2d 449; 46 C.J., p. 129, sec. 84; p. 131, sec. 85. The objection was interposed by some of the defendants who are not parties to this appeal.

Respondents do not argue that any error of law occurred during the trial, but depend solely upon the contention that the order above quoted was based upon insufficiency of the evidence. Code of Civil Procedure, section 657, enumerates the grounds for granting a new trial on all or part of the issues. Subdivision 6 thereof, as it read at the period applicable to this case specified insufficiency of the evidence to justify the verdict. The section also provided: "When a new trial is granted, on all or part of the issues, upon the ground of the insufficiency of the evidence to sustain the verdict, the order shall so specify; otherwise, on appeal from such order it will be presumed that the order was not based upon that ground." Prior to an amendment making the presumption conclusive (Stats.1939, chap. 713, p. 2234), which amendment became effective after the entry of the order here appealed from, the section simply provided that in the absence of the designation of the ground of insufficiency of the evidence it would be presumed that the order was not based upon that ground.

[2, 3] The limitation contained in the section requiring a specification where a new trial is granted on insufficiency of the evidence, prior to the 1939 amendment, supra, only applied to orders granting a motion for a new trial after a verdict by a jury, and did not require such specification in an order granting a new trial after a decision by the court. Gruben v. Leebrick & Fisher, 32 Cal.App.2d Supp. 762, 84 P.2d 1078. Prior to 1919 the section did not require the trial court to specify insufficiency of the evidence in its order granting a new trial after a jury verdict. The quoted provision of the statute requiring such specification was added in that year. Stats.1919, p. 141. Under the 1919 amendment the cases have established the construction that it is not necessary for the trial court to use the exact language contained in section 657 of the Code of Civil Procedure—that if the language used in granting the motion for a new trial after a jury verdict is susceptible of the reasonable interpretation that the trial court intended to include insufficiency of the evidence, it must be so interpreted. Secreto v. Carlander, 35 Cal.App.2d 361, 363, 95 P.2d 476; Lewis v. Southern California Edison Co., 116 Cal.App. 44, 2 P.2d 419. The only question presented, therefore, is whether the language "on all issues" can be reasonably interpreted to include insufficiency of the evidence.

[4, 5] Many cases have considered the question as to whether the particular language there used could be interpreted as including insufficiency of the evidence. It is well settled that when the order provides simply that a new trial is granted, such order is a general one and does not include insufficiency of the evidence. Tasker v.

Cochrane, 94 Cal.App. 361, 271 P. 503. In such case there is nothing to interpret. There is no language that can be interpreted as complying with the provisions of section 657 of the Code of Civil Procedure. But when the trial court goes beyond such general order, and uses any language that can reasonably be interpreted as including insufficiency of the evidence, the appellate courts have uniformly interpreted the language as including that ground. It must be remembered that all presumptions are in favor of the order and that the burden is on the appellant to show error. 2 Cal.Jur., p. 887, sec. 522.

In Lewis v. Southern California Edison Co., supra [116 Cal.App. 44, 2 P.2d 421], a new trial after a jury verdict was granted, the order reading: "* * * it is ordered that the said motion be granted on all the grounds stated in the notice of intention to move for a new trial." It was held that, inasmuch as the notice of intention specified insufficiency of the evidence, the order included that as one of its grounds.

In Griffey v. Pacific Electric Co., 58 Cal. App. 509, 209 P. 45, the order recited that it was granted "on the ground of excessive damages". The court held that this language was (page 513 of 58 Cal.App., page 46 of 209 P.) "tantamount to a specification that the new trial was granted on the ground of the insufficiency of the evidence * * *".

In Secreto v. Carlander, supra [35 Cal. App.2d 361, 95 P.2d 477], the order granting the new trial after a jury verdict provided that if the defendant filed a consent to increase the judgment in a specified amount, "the motion for a new trial will be denied; otherwise the motion will be granted". It was held that the order included insufficiency of the evidence because it indicated that the trial court believed the verdict was not adequate.

In Lucerne Country Club v. Beal, 21 Cal. App.2d 121, 68 P.2d 408, 409, the order read that the new trial was granted "as to all issues made by the said cross-complaint of the said R. J. Palmer and the answer thereto". The appellate court erroneously treated the case as if it involved the granting of a new trial after a jury verdict. It discussed at some length the requirement of section 657 of the Code of Civil Procedure, and held that the order, properly interpreted, did include insufficiency of the evidence. After quoting from Lewis v. Southern California Edison Co., supra, the court stated (page 126 of 21 Cal.App.2d, at page 411 of 68 P.2d): "The order in the instant case is likewise not a general order. While it does not directly refer to any of the six grounds upon which the motion for a new trial was based, it does grant a new trial as to all the issues made by the cross-complaint and the answer thereto. All of the issues made by the cross-complaint and the answer thereto, and all the facts involved or tendered by the pleadings mentioned, which necessarily includes whatever testimony may be offered to support the issues there tendered and the facts to be determined by the trial court which, as has been determined in a case about to be cited, is tantamount to granting a new trial on account of the insufficiency of the testimony to support the facts as theretofore found upon the issues tendered by such pleadings."

[6] These cases demonstrate that the order here involved, granting the new trial "on all issues", is susceptible of the reasonable interpretation that the trial court intended by that language to include insufficiency of the evidence. What else can the expression "on all issues" mean? It must mean either all issues presented by the pleadings, which would include the issues of negligence of appellant and contributory negligence of respondent, and the sufficiency of the evidence to support the implied finding of the jury on these issues, or it must mean all issues presented by the motion for a new trial, one of which was the sufficiency of the evidence. In either event, under the cases cited, such order is not a general order, but must be interpreted as including a reference to insufficiency of the evidence within the meaning of sec. 657 of the Code of Civil Procedure.

That this must have been the trial court's intention is demonstrated by the facts of the present case. The accident happened on a Sunday at about 6:30 p. m., on the Black Point cutoff in Marin county. There was a steady stream of westbound traffic on this two-lane highway at that time, and among the cars was one owned by defendant Ewing, and driven by her daughter, Audrey Bates; one driven by defendant Robert Bayley, who was accompanied by his wife, and one being driven by a Max D. Petroff. There is some conflict as to the order of these three cars in the line of traffic, but there is no doubt that plaintiffs' car was the third of that particular group.

Defendant Souza, traveling eastward, from which direction there was less travel, came in contact with the car driven by defendant Bates, and as a result of this collision the above three cars became involved in the accident. Both plaintiffs suffered certain injuries, and their car was damaged.

[7] The questions involved in the case were whether the accident was due solely to the negligence of respondents, or solely to the negligence of Souza, or solely to the negligence of Audrey Bates, or due to the concurring negligence of any two or more of them. There is substantial evidence in the record from which a jury would be justified in finding that respondents were not negligent and that the accident was either caused by the negligence of Souza, or by the concurring negligence of Souza and Bates. Under such circumstances it rested within the discretion of the trial court to grant or deny the motion for a new trial on the ground of insufficiency of the evidence. Lewis v. Southern California Edison Co., supra. Obviously, inasmuch as a new trial was granted as to the other defendants, the ends of justice will be served if the cause is retried on all the issues. That is very likely the reason why the trial court inserted in its order the words "on all issues".

[8] Some reference should be made to the 1939 amendment to sec. 657 of the Code of Civil Procedure, supra, even though the parties to this appeal place no reliance thereon. That amendment became effective some time after the entry of the order from which the appeal here involved was taken. Whatever may be the rule as to the retroactive effect of procedural amendments, that amendment, whatever its proper interpretation may be, can have no application to this appeal. We are here trying to ascertain what the trial court meant by certain language in the order. If that language meant and was intended to mean one thing when it was used by the trial court, then that meaning obviously could not be changed by a later amendment of the law.

The order appealed from is affirmed.

I concur: KNIGHT, J.

WARD, Justice (dissenting).

I dissent.

Ordinarily an order granting a motion for a new trial is presumed to be valid. Code Civ.Proc., sec. 1963. With respect to the order of the trial court on which this appeal is based, the presumption is overcome by the obvious noncompliance of the order with the terms of the statute. In no unmistakable terms the legislature has directed that an order granting a new trial on *"all * * * issues"* or *part of them* upon the ground of the insufficiency of the evidence, shall so specify, and that otherwise on appeal the order will be presumed not to be based upon that ground. (Emphasis added.) Code Civ.Proc., sec. 657, as amended by Stats.1919, Ch. 100, p. 141. Hence it is necessary "on appeal" to presume that the order is not based on the insufficiency of the evidence unless it so specifies. This view has been adopted by the Supreme Court of this state. In not one opinion rendered by the Supreme Court is there a departure from this rule except in the instance where it appears that the evidence is "insufficient in law, and without conflict in any material point". Biaggi v. Ramont, 189 Cal. 675, 677, 209 P. 892, 894. In no case called to my attention has any opinion been rendered by the Supreme Court wherein there has been the slightest variance from this rule, and in no case has the evidence been analyzed, indicating that it was "insufficient in law". The District Court of Appeal in a few cases, and evidently in the interest of justice, adopted a liberal interpretation of the provisions of the section.

An excellent analysis of the necessary specifications under the provisions of section 657 appears in an opinion, written by Judge Schauer, appellate department, Superior Court, county of Los Angeles, in the case of Gruben v. Leebrick & Fisher, 32 Cal.App.2d Supp. 762, 84 P.2d 1078, 1079, a portion of which opinion I adopt as expressing my views applicable to the precise question on appeal in the present case:

"1. The concluding paragraph of said section 657 by its terms provides only for the case where the new trial is granted upon the ground of the insufficiency of the evidence to sustain the *verdict*; it makes no reference to a case tried by the court without a jury where the motion is granted on the ground of insufficiency of the evidence to sustain a *finding*.

"2. Various sections in Part 2, Tit. 8, Chap. 7, Art. 2, of the Code of Civil Procedure, within which division we find said section 657, distinguish unmistakably between trials by a jury, which are resolved by verdict, and trials by the court without a jury, which are determined by the court's Findings of Fact and Conclusions of Law, sometimes termed the Decision.

"In this respect said section 657 itself recognizes the distinction; it reads: 'The *verdict* may be vacated and *any other decision* may be modified or vacated, * * * and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party: * * *

"'6. (The precise subdivision here involved.) *Insufficient evidence.* Insufficiency of the evidence to justify the *verdict* or *other decision,* or that it is against law.' [Emphasis added.]

* * *

"As we have heretofore suggested, the amendment of 1919 by its terms creates the requirement for specification of the ground in the order only where such ground is 'insufficiency of the evidence to sustain the verdict' and does not purport to make a similar statutory modification of the law applicable to an order based on insufficiency of the evidence to sustain the 'decision', which is specifically mentioned, separately and distinctly from 'verdict', in subdivision 6 of said section."

Subsequent to the decision in the Gruben case, the legislature amended section 657 by specifying that its provisions covered both verdict and decision, and further, that on appeal such an order is to be conclusively regarded as not based upon the ground of insufficiency of the evidence. Stats.1939, p. 2234, Chap. 713.

Lucerne Country Club v. Beal, 21 Cal. App.2d 121, 68 P.2d 408, cited in the majority opinion is not controlling in this case. There the issues upon which the motion for a new trial was granted were limited to the cross-complaint and the answer. In this case the order is general and applies to every issue appearing from the pleadings, which necessarily includes responsibility and liability for the accident, not only between the plaintiffs and the appealing defendant, but also liability as between this defendant and the other defendants not parties to this appeal. Nothing appears in the record and no contention is made that the evidence to sustain the verdict against the appealing defendant is insufficient in law. In Yoakam v. Hogan, 198 Cal. 16, 20, 243 P. 21, 23, the court said: "As the order granting the motion for a new trial was general and did not specify that it was granted because of the insufficiency of the evidence, it will be presumed on this appeal that the order was not based on that ground. Code Civ.Proc. § 657. We are precluded by the Code provision from considering the question whether or not the evidence is sufficient to sustain the verdict, unless it is insufficient in law, and without material conflict in any material point." Moreover, the appeal from the order granting the new trial in the Lucerne case was from a decision rather than from a verdict, and accordingly the decision in that case is not applicable in this matter.

However, in other cases wherein verdicts have been entered the District Court of Appeal has given a different interpretation to the section. For instance, if the order was granted upon the ground of excessive or inadequate damages, the question immediately arises whether or not the damages could be considered in a new trial without consideration of all the evidence in the case. Griffey v. Pacific Electric Ry. Co., 58 Cal.App. 509, 519, 209 P. 45; Secreto v. Carlander, 35 Cal.App.2d 361, 95 P.2d 476. The rule in the Griffey and Secreto cases seems to imply that if the order is tantamount to an order specifying insufficiency of the evidence and a new trial can not be had as to the parties directly concerned in the motion without a consideration of all the evidence, a new trial may be had as an unlimited trial de novo in the interest of justice. We are not confronted with that situation here. Neither excessive nor inadequate damages are enumerated in the notice of motion for a new trial. No judgment for damages was ever rendered in this case against Souza.

A jury has determined that defendants Ewing and Bates are responsible in damages, but that Souza is not. We are not concerned as to the form of the Ewing-Bates order; that is, whether it conformed to the provisions of section 657. It may have been that the court concluded the damages were inadequate or excessive, or that Ewing and Bates were not liable for the injuries sustained by plaintiffs. No appeal has been taken from the Ewing-Bates order. Here we are confronted with a general order in a jury case granting a new trial on "all issues". This is equivalent to an order simply stating "Motion granted". If the opinions of the Supreme Court, which make no exception, are to be followed, this order should be reversed.

Read v. Pacific Electric Ry. Co., 185 Cal. 520, 197 P. 791; Wilkinson v. United Railroads, 195 Cal. 185, 232 P. 131; Biaggi v. Ramont, supra; Yoakam v. Hogan, supra; Condon v. Ansaldi, 203 Cal. 180, 263 P. 198; Parker v. Southern Pacific Co., 204 Cal. 609, 269 P. 622; City and County of San Francisco v. Tillman Estate Co., 205 Cal. 651, 272 P. 585; Baroni v. Rosenberg, 209 Cal. 4, 284 P. 1111; Sheets v. Southern Pacific Co., 212 Cal. 509, 299 P. 71; Phillips v. Powell, 210 Cal. 39, 290 P. 441; Fennessey v. Pacific Gas & Electric Co., 10 Cal.2d 538, 76 P.2d 104.

The position adopted by the Supreme Court with respect to the rule that the presumption is against the validity of such an order is further strengthened by legislative action in reference to future cases involving this question. Stats.1939, chap 713. Likewise this is not a case wherein it may be claimed that the intent of the trial judge may be ascertained when the order is made on all grounds stated in the notice of intention to move for a new trial wherein it was possible to ascertain that insufficiency of the evidence was one of such grounds, as in Lewis v. Southern California Edison Co., 116 Cal.App. 44, 2 P.2d 419, 421. In that case the court specified the grounds by reference. The court held that it was not a general order. In this case no reference is made except to "all issues", which is general and is the exact subject matter, and in the exact language, of section 657, which precludes a new trial upon the ground of insufficiency of the evidence unless the order so specifies. The exception to this rule is when the evidence is "without material conflict in any material point".

The questions in this case are whether the accident was due solely to the negligence of Souza, or solely to the negligence of Audrey Bates in driving beyond the center line on the highway, or due to concurring negligence of both Souza and Bates. There is evidence in the record from which a jury would be justified in placing the liability upon defendant Bates and absolving defendant Souza; also evidence from which a jury could reasonably infer that liability could be placed upon defendant Souza; also evidence indicating concurring negligence of all defendants. There is evidence, irrespective of negligence on the part of defendants Bates and Ewing, from which a reasonable inference could be drawn absolving Souza from all liability. Without specifically relating the evidence indicating negligence on the part of defendants Bates and Souza, the transcript shows a material conflict of evidence. The weight of such evidence was a question of fact for the jury. No claim is made on appeal that plaintiffs were guilty of contributory negligence.

As I read the majority opinion, the affirmance of the order is predicated upon "interest of justice", supported by several (to my mind) inapplicable citations. It may be that Bates and Ewing would be better protected should Souza be forced to reappear as a defendant in this action wherein "justice", i. e., that he was not responsible for the accident, has already been determined by a jury. Justice demands that when a jury absolves one from liability in a trial fairly conducted, and without contention as herein of legal error, a defendant should not be harassed and annoyed by further litigation. In each of the cases cited in the majority opinion, there has been a departure from the clear mandate of the law makers, the interpretation in those cases tending to weaken the provisions of the code section that in a general order granting a new trial, it will be presumed "on appeal" that the order was not based on the ground of insufficiency of the evidence unless such ground is specifically stated in the order. The establishment of the rule adopted in the majority opinion is the last judicial step necessary to nullify the specific provision of the section here considered; and this in the face of the fact that the legislature subsequent to decisions above cited in the majority opinion has made this particular provision even more specific.

The only point urged on appeal is insufficiency of the evidence to sustain the verdict of the jury. Presumably, in the absence of any other error alleged in the motion for a new trial, none occurred. If the trial court intended to grant the motion on the ground of insufficiency of the evidence, an order in conformity with the direction of the legislature should have been made.

I conclude that the evidence is sufficient in fact and in law to sustain the verdict, and that there are material conflicts on material points which preclude the appellate court or the trial court from interfering with the verdict except by an express order granting the new trial upon the ground of the insufficiency of the evidence to sustain it.

The order appealed from, granting a new trial, should be reversed.

WILL et al. v. SOUTHERN PAC. CO. et al.*

Civ. 12670.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1940.

Hearing Granted Feb. 27, 1941.

1. Railroads ⚷307(6)

Railroad had burden only of using ordinary and reasonable care to keep railroad crossing signaling device in repair, and did not have absolute duty to do so.

2. New trial ⚷39

In action for death of motorist resulting from injuries sustained in collision between automobile and train at railroad crossing, giving of erroneous instruction that railroad was bound to keep signaling device which railroad maintained at the crossing in proper condition and repair was an "error of law" occurring during course of trial which authorized trial court to grant a new trial. Code Civ.Proc. § 377; § 657, subd. 7.

See Words and Phrases, Permanent Edition, for all other definitions of "Error of Law".

◆

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Larry Will and others against the Southern Pacific Company and others, to recover damages for wrongful death, pursuant to provisions of section 377 of the Code of Civil Procedure. From an order granting defendants' motion for new trial after trial before jury, the plaintiffs appeal.

Affirmed.

Frank J. Barry, of Los Angeles, Leonard W. Hartigan, of Glendale, and Patrick H. Ford, of Los Angeles, for appellants.

Frank Karr and W. I. Gilbert, both of Los Angeles, for respondents.

McCOMB, Justice.

From an order granting defendants' motion for a new trial after trial before a jury in an action to recover damages for wrongful death, pursuant to the provisions of section 377 of the Code of Civil Procedure, plaintiffs appeal.

So far as material here the facts are:

Plaintiffs recovered a verdict against defendant Southern Pacific Company for the death of Clayton Roy Will, who was the husband of plaintiff Audys Will and the father of the other plaintiffs. His death resulted from injuries received in a collision between his automobile, in which he was riding, and a train owned and operated by the appealing defendant. The trial court granted a motion for a new trial, among others, on the ground that an error of law occurred during the trial. Sec. 657, subd. 7, Code Civ.Proc.

This is the sole question necessary for us to determine:

Did an error of law occur during the trial?

This question must be answered in the affirmative. The following instruction was given at the request of plaintiffs:

"In order to charge a railroad company with negligence for a defect in a signaling device at a crossing, *which it is bound to keep in proper condition and repair,* it must be shown to you that the railroad company had notice of the defect and that it failed for a reasonable time thereafter to repair such signaling device. Such notice may be actual or constructive. Actual notice is that notice which is shown to be actually given to a party; constructive notice is that notice which is imputed in law by the long-continued existence of a defective condition, should you find from the evidence that it did so continue to exist." (Italics added.)

[1,2] The foregoing instruction contained an erroneous statement of the law in the portion which we have italicized. Defendant was not "bound to keep" the signaling device which it maintained at the crossing "in proper condition and repair". The law imposed upon defendant only the burden of using ordinary and reasonable care to keep the signaling device in repair. Since the instruction given at the request of plaintiff was erroneous, it was an error

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* Subsequent opinion 116 P.2d 44.

of law occurring during the course of the trial which sustains the order of the trial court in granting a motion for a new trial.

For the foregoing reasons the order is affirmed.

We concur: MOORE, P. J.; WOOD, J.

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42 Cal.App.2d 208

GREEN v. ELLIS.

Civ. 12877.

District Court of Appeal, Second District,
Division 2, California.
Dec. 30, 1940.

Appeal and error ⚿627(2)

Where examination of record and certificate of superior court clerk disclosed that neither a reporter's nor a clerk's transcript, as prescribed by statute, was filed in time in the District Court of Appeal or in the superior court, defendant's motion to dismiss an appeal transferred from the Supreme Court to the District Court of Appeal for decision pursuant to the Constitution was granted, and the appeal was dismissed. Code Civ.Proc. § 953a; Rules for the Supreme Court and District Courts of Appeal, rule I, § 1; Const. art. 6, § 4c.

◆

Action by Adam Green against Mildred Ellis. From the judgment, plaintiff appealed to the Supreme Court, and that court transferred the appeal to the district court of appeal for decision pursuant to article 6, section 4c, of the Constitution. On defendant's motion to dismiss the appeal.

Motion granted and appeal dismissed.

Gladys Towles Root, of Los Angeles, for appellant.

E. E. Hitchcock, of Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal transferred from the Supreme Court to this court for decision pursuant to the provisions of Article VI, section 4c, of the Constitution of the State of California.

Respondent moves to dismiss the appeal on the ground that a transcript has not been filed within the time prescribed by Rule I, section 1, Rules for the Supreme Court and District Courts of Appeal (213 Cal. XXXV).

An examination of the record and the certificate of the clerk of the superior court discloses that neither a reporter's nor a clerk's transcript, as prescribed by section 953a of the Code of Civil Procedure, has been filed in this court or in the superior court. Therefore, defendant's motion is well taken (Isett v. Frees, 25 Cal.App.2d 466, 467, 77 P.2d 873).

The motion is granted and the appeal is dismissed.

We concur: MOORE, P. J.; WOOD, J.

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42 Cal.App.2d 265

PEOPLE v. PIANEZZI et al.

Cr. 3353.

District Court of Appeal, Second District,
Division 2, California.
Dec. 31, 1940.
Hearing Denied Jan. 30, 1941.

1. Criminal law ⚿1144(13)

On defendants' appeals from convictions after trial before jury, evidence was viewed most favorable to the people.

2. Robbery ⚿24(3)

Evidence sustained convictions for first degree robbery as against contention that it was not established that defendants participated in the crimes.

3. Criminal law ⚿1159(2)

In a criminal case, strength or weakness of defendant's identification, the incompatibility of and discrepancies in testimony, if any, and uncertainties of a witness in giving testimony, are matters solely for consideration of triers of fact in first instance and for consideration of trial judge on a motion for new trial.

4. Criminal law ⚿1159(2)

Where evidence supported convictions for first degree robbery, defendants' argument that it was not established that defendants participated in robberies could not be considered by District Court of Appeals.

5. Criminal law ⚿404(3)

Where guns are used in commission of an offense, testimony that guns received in evidence in prosecution for the offense resemble those used by participants in crime is admissible.

6. Criminal law ⚿404(3)

Guns found in codefendant's apartment were admissible in evidence in prosecution for first degree robbery, where witnesses testified that guns were similar to those used in robberies.

7. Criminal law ⚿741(1)

In prosecution for first degree robbery, where guns found in codefendant's apartment were properly admitted in evidence, the weight to be given such evidence was for jury.

8. Criminal law ⚿721(1)

It is not error for district attorney to comment upon fact that defendant failed to take witness stand in his own behalf, or that defendant failed to deny incriminating evidence received against him.

9. Criminal law ⚿1173(1)

In prosecution for first degree robbery, refusal to give defendants' requested instruction that defendants not having taken witness stand to testify should be considered as a right that defendants had, and should not be considered against them, was not prejudicial.

10. Criminal law ⚿620(2)

Where defendants were charged with first degree robbery, defendant could not complain that he was not given a fair trial because he was forced to stand trial before same jury that tried codefendant, especially where record did not show that trial court abused its discretion in ordering cases consolidated for trial. Pen.Code, § 954.

◆

Appeals from Superior Court, Los Angeles County; A. A. Scott, Judge.

Peter Pianezzi and Martin E. McGowan were convicted of robbery in the first degree, and they appeal.

Affirmed.

Hearing denied; CURTIS, HOUSER, and CARTER, JJ., dissenting.

Nathan O. Freedman and Manuel M. Liodas, both of Los Angeles, for appellants.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

These are appeals by

(1) Defendant Peter Pianezzi from three judgments of guilty of robbery in the first degree and

(2) Defendant Martin E. McGowan from two judgments of guilty of robbery in the first degree, after trial before a jury.

There are also appeals from the orders denying their motions for a new trial.

[1] Viewing the evidence most favorable to the people (respondent), the facts are:

July 21, 1939, defendants Pianezzi and McGowan together with a third man held up and robbed the Hill and Atlantic Branch of the Security First National Bank at Long Beach, each of the robbers at the time being armed with a gun. The robbers took approximately $2,100 from Messrs. Maher and Powell in one cage of the bank and approximately $4,500 from Messrs. Nelmes and Braakenburg in another cage of the bank.

May 4, 1939, defendant Pianezzi and three other men held up and robbed the Yokohama Specie Bank in Los Angeles, defendant Pianezzi taking approximately $7,576 from a cage in the bank.

Defendants rely for reversal of the judgments against them on these propositions:

First: There is no substantial evidence to sustain the finding of the jury that defendants or either of them participated in the robberies of which they were convicted.

Second: The trial court committed prejudicial error in receiving in evidence four guns found in the apartment of defendant Pianezzi.

Third: The district attorney committed prejudicial error in his argument to the jury when he said:

*"They all say that Mr. Pianezzi was in that bank. Is there one word of evidence to the contrary? None. The defendant does not choose to testify. If a man is innocent of an offense what is more logical than for him to get up on the witness stand and deny that thing with which he has been charged. * * * What is an innocent*

man going to do? Is he going to say, members of the jury, I was not there, I was so and so; don't convict me of an offense which I did not commit. If that man were innocent he would scream as hard as he could proclaiming his innocence. Robbery is the thing for which Pianezzi has been identified on which he has not chosen to say one word. Why? Not one word from McGowan. Who knows better than the man who is charged whether he did it or not. Why no word? The answer is that the truest indication of guilt has been made manifest. I tell you in my opinion the refusal to testify is tantamount to a confession. The wilful election not to confront the witnesses and choosing not to give the jury the benefit of what they know is equivalent to a confession. As regards the depositions that Pianezzi was in Detroit May 4th and McGowan in St. Louis July 21, these men who knew best of all chose not to tell us one word about their movements and actions on those days, and they want us to believe them innocent after that. The defense went to zero when they did not take the stand. The guns are here and unexplainable. Pianezzi did not take the stand to enlighten the jury of the facts within their knowledge, a failure which is tantamount or equivalent to a confession. A defendant does not have to take the stand. Sure, that is right. He does not have to tell anything, no, he does not have to. That is correct. Counsel is dead right. Let these men sequester in their minds from now on what they know. But that is not why they did not take the stand. That is the evidence of identification which so far as these people are concerned is unanswered though McGowan's sisters say he was in St. Louis, because why? Because they don't have to testify. There is a probable reason why Mr. Pianezzi possessed 3 or 4 guns. They don't have to talk."

Fourth: The trial judge committed prejudicial error in refusing to give at defendants' request the following instruction:

"YOU ARE INSTRUCTED that the defendants not having taken the stand to testify should be considered as a right that the defendants have and it should in no way be considered against them."

Fifth: Defendant McGowan was not given a fair trial, because he was forced to stand trial before the same jury that tried his codefendant Pianezzi.

[2] Defendants' first proposition is devoid of merit. An examination of the record discloses substantial evidence taken together with inferences which the jury may reasonably have drawn therefrom to sustain each and every material finding of fact upon which the judgments were necessarily predicated, including the identity of defendants as the perpetrators of the crimes of which they were convicted. For example:

(a) As to the robberies occurring at the Security First National Bank in Long Beach, several witnesses testified that they had a side view of defendant Pianezzi's face and identified him as one of the participants in the robberies. Also a witness testified that defendant McGowan removed the handkerchief he was holding before his mouth and chin and that she saw his face and that said defendant participated in the robberies.

(b) Relative to the robbery of the Yokohama Specie Bank, a witness testified that she had a good close-up view of defendant Pianezzi's face and that his dark glasses kept slipping down, also that she noticed a line on his cheek and she identified him as one of the participants in this crime.

[3, 4] Strength or weakness of the identification, the incompatibility of and discrepancies in testimony, if any, and the uncertainties of a witness in giving testimony are matters solely for the consideration of the triers of fact in the first instance and for the consideration of the trial judge on a motion for a new trial. The argument which counsel has addressed to the court upon this subject was a proper argument to present to the trial jury, but cannot be considered by us, since there is substantial evidence to support the findings of the jury.

[5-7] Defendants' second proposition is also without merit. The law is established in California that, where guns are used in the commission of an offense, testimony that the guns resemble those used by the participants in the crime is admissible in evidence. People v. Ferdinand, 194 Cal. 555, 563, 229 P. 341. In the present case several witnesses testified that the guns received in evidence were similar to those used in the robberies. Therefore, the evidence was admissible. The weight to be given to such evidence was a matter to be determined by the trial jury.

[8] Defendants' third proposition is untenable. The law is established in this jurisdiction that it is not error for the district attorney to comment upon the fact that a defendant has failed to take the stand in his own behalf or that the defendant has failed to deny any of the incriminating evidence received against him. People v. Perry, 14 Cal.2d 387, 394, 94 P.2d 559.

[9] Defendants' fourth proposition is also untenable, in view of the decision in People v. Perry supra.

[10] Defendants' final proposition is without merit. Section 954 of the Penal Code vests in the trial court the discretion of ordering consolidated for the purpose of trial two or more indictments where the offenses, as in this case, are of the same class. An examination of the record in the instant case discloses the trial court did not abuse its discretion in making the order of consolidation. We are of the opinion that the defendants and each of them had a full, fair and impartial trial and that there is no error disclosed in the record.

For the foregoing reasons the judgments and orders are and each is affirmed.

We concur: MOORE, P. J.; WOOD, J.

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42 Cal.App.2d 220

COMMERCIAL DISCOUNT CO. v. MEHNE.

Civ. 11231.

District Court of Appeal, First District, Division 1, California.

Dec. 31, 1940.

1. Appeal and error 🔑931(1)

On appeal, conflicts in evidence must be resolved in favor of trial court's decision.

2. Sales 🔑480(4)

In action by finance company holding trust receipt to recover automobile purchased from retail dealer, evidence sustained finding for purchaser on ground he acted in good faith and without actual knowledge of company's interest and, therefore, under trust receipt law, was a "buyer in the ordinary course of trade" not affected by limitation on dealer's liberty of sale. Civ.Code, § 3013, subd. 1; § 3016.5(2)(a)(i, ii).

See Words and Phrases, Permanent Edition, for all other definitions of "Buyer in the Ordinary Course of Trade".

3. Sales 🔑473(1)

Where purchaser paid for automobile to be delivered in future and, after dealer disappeared, automobile upon which finance company held trust receipt was delivered to purchaser, the taking of the automobile in satisfaction of the pre-existing claim against dealer was "new value" within trust receipt law defining a "buyer in the ordinary course of trade" not affected by limitations imposed by trust receipt as a person to whom goods are sold and delivered for "new value". Civ.Code, § 3013, subds. 1, 7, 15; § 3016.5(2)(a)(i, ii).

See Words and Phrases, Permanent Edition, for all other definitions of "New Value".

4. Sales 🔑473(1)

Where purchaser paid for automobile to be delivered in future and, after dealer disappeared, automobile upon which finance company held trust receipt and which was same as automobile ordered except for color was delivered to purchaser, the purchaser took the automobile under a pre-existing mercantile contract with dealer to buy "goods delivered, or like goods" within trust receipt law making one who so takes a "buyer in the ordinary course of trade" not affected by limitations imposed by trust receipt. Civ. Code, § 3013, subd. 1; § 3016.5(2)(a)(i, ii).

5. Sales 🔑473(1)

Under trust receipt law, automobile dealer had liberty of sale and purchaser in good faith was unaffected by limitations imposed by trust receipt held by finance company, notwithstanding automobile delivered to purchaser was taken from dealer's stockroom or warehouse rather than from sales room. Civ.Code, § 3016.5(2)(c).

◆

Appeal from Superior Court, Santa Cruz County; James L. Atteridge, Judge.

Action by the Commercial Discount Company against R. E. Mehne, to recover possession of an automobile purchased by defendant from a retail dealer, to which automobile plaintiff claimed ownership by reason of a trust receipt. From judgment for defendant, plaintiff appeals.

Affirmed.

Robert G. Partridge, of San Francisco (Wallace O'Connell and Leo M. Cook, both of San Francisco, of counsel), for appellant.

Wyckoff, Gardner & Parker, of Watsonville, for respondent.

KNIGHT, Justice.

The defendant placed an order with a retail automobile dealer for the purchase of a car, and paid him the full amount of the purchase price therefor. Approximately two weeks later a car different in color from but of the same model as the one ordered was delivered to defendant; and subsequently plaintiff, claiming right of ownership superior to the buyer by reason of a trust receipt, brought this action to recover the possession of the car so delivered. The complaint was in two counts, the first in claim and delivery, and the second to quiet title. The trial court found in defendant's favor on all contested issues, and entered judgment accordingly, from which plaintiff appeals.

[1] Resolving all conflicts in the testimony in support of the trial court's decision, the transactions which led to the bringing of the action were as follows: Carl Shumate was a retail dealer in Oldsmobile automobiles in Watsonville, doing business under the name of Shumate Motor Co. He was financed by plaintiff in the purchase of all automobiles from the manufacturer by the use of trust receipts. Upon the delivery of the cars to Shumate he placed them in his stockroom or warehouse, about two blocks distant from his salesroom, and left them there until they were needed for sale or there was room for them in his salesroom; and when sold to the trade he would send plaintiff a check for the amount he owed on the car sold. On July 12, 1937, defendant placed his order with said company for a 1937 model Oldsmobile 6-cylinder 2-door sedan, in cream color, to be delivered to him on September 15, 1937, at the factory in Michigan; it being his intention to take delivery there and drive it back home. At the time of placing the order he turned in a used car as part payment at an agreed valuation of $350, and on July 21, 1937, he gave Shumate a check for $585.41 to cover the full balance of the purchase price; and the check was cashed. On Tuesday, August 3, defendant called at the motor company's place of business to inquire whether his car had been ordered, and he was informed by Harold McCoun, the sales manager, that Shumate had gone deer hunting the Friday before and had not returned. Shumate had in fact left town on the day stated, but he never did return, nor was he afterwards seen by any of the parties to this action. After being informed of Shumate's absence, defendant told McCoun, so defendant testified, that he was about to make reservations for his trip east, and wanted to be sure that the car had been ordered at the factory. After some discussion a phone call was made to the Oldsmobile plant in Oakland, and it was learned that the car had not been ordered; also that the factory had closed production on all 1937 models so that it was then too late to place the order. Defendant then stated to McCoun that he had paid for the car and he demanded delivery; whereupon a car identical with the one he had ordered, except it was maroon color, was taken out of the stockroom or warehouse by McCoun and other employees of the company, delivered to defendant and placed in the Resetar garage, which was connected with the hotel in which defendant was employed; and the garage claim check was given to defendant. The factory shipping wrappings were still on the car, and it had not yet been serviced. A "dealer's report of sale", unsigned, was given to defendant, which was later signed by McCoun, and the car registered in defendant's name. Defendant gave his check for $150.04, representing the charge for freight to Watsonville in excess of the price of a car in Michigan. Later certain off-sets for personal obligations between Shumate and defendant were deducted from this amount and the balance of $56.90 delivered to the sheriff after a levy of attachment in another action not connected with the present one. On the day following the delivery of the car to defendant, Shumate not having returned, McCoun requested plaintiff by phone at its San Francisco office to take charge of the Shumate business, which it did within the next few days. As above indicated, there is a conflict in the testimony on several points, some of which relates to the conversation which took place on August 3, 1937, and some to the circumstances attending the delivery of the car to defendant; but under well-

settled rules all such conflicts on appeal must be resolved in favor of the trial court's decision; and therefore it would serve no useful purpose to enter into greater detail in setting forth the conflicting testimony.

The car in question was covered by a trust receipt held by plaintiff. It was executed on July 28, 1937, and among other things provided that Shumate, as trustee, held the car in trust for plaintiff for the purpose of sale or exchange, and that "the Trustee may * * * sell any or all of said motor vehicles for cash, or on terms approved in advance by Entruster for not less than the amounts due Entruster hereunder on the motor vehicle or motor vehicles so sold. * * *"

The trust receipts law provides: "Where the trustee, under the trust receipt transaction, has liberty of sale and sells to a buyer in the ordinary course of trade * * * such buyer takes free of the entruster's security interest in the goods so sold * * *. No limitation placed by the entruster on the liberty of sale granted to the trustee shall affect a buyer in the ordinary course of trade, unless the limitation is actually known to the latter." Sec. 3016.5, subd. (2) (a), (i) and (ii), Civil Code. The trial court in the present case found that Shumate's possession of the car was for the purpose of enabling Shumate to sell the same; that plaintiff allowed Shumate to keep said automobile, and it was kept with the knowledge and consent of plaintiff in Shumate's "stock in trade". The court further found that defendant "acted in good faith and without actual knowledge of any interest of said plaintiff in said automobile or of any limitation on said Shumate's liberty of sale thereof and without knowledge of any facts which if pursued would have led him to the discovery of any interest of said plaintiff therein"; and as conclusions of law the court held that defendant purchased and Shumate sold the automobile referred to in the complaint "in the ordinary course of trade" and that defendant was the owner thereof.

[2] It is plaintiff's contention that the evidence "conclusively demonstrates" that defendant was not a "buyer in the ordinary course of trade" as defined in the trust receipts law. With this contention we cannot agree. The trust receipt law defines a "buyer in the ordinary course of trade" as "a person to whom goods are sold and delivered for new value and who acts in good faith and without actual knowledge of any limitation on the trustee's liberty of sale, including one who takes by conditional sale or under a pre-existing mercantile contract with the trustee to buy goods delivered, or like goods, for cash or on credit"; sec. 3013, subd. (1), Civil Code; and while there may be circumstances from which it can be argued that defendant did not act in good faith and without actual knowledge of plaintiff's interest in the car, the trial court found to the contrary, and defendant's testimony alone is legally sufficient to sustain such finding.

[3] Plaintiff further contends that defendant was not "a person to whom goods are sold and delivered *for new value*", and therefore was not a "buyer in the ordinary course of trade". (Emphasis added.) The trust receipts law defines "new value" as follows: "'New value' includes new advances or loans made, or new obligation incurred, or the release or surrender of a valid and existing security interest, or the release of a claim to proceeds under section 3016.6; but 'new value' shall not be construed to include extension or renewals of existing obligations of the trustee, nor obligations substituted for such existing obligations." Sec. 3013, subd. 7, Civil Code. The argument advanced by plaintiff in furtherance of its contention is that the automobile in question was sold and delivered for the pre-existing debt of Shumate; that therefore the transaction was within the exclusion "extension or renewals of existing obligations of the trustee"; furthermore, that the sale did not take place, or title pass, if it did pass, until defendant took possession of the car, and at that time no new value passed, and it is at the time of the sale that the purchaser must advance new value; that the $56.90 paid for freight did not approximate the full or fair value of the article purchased, and should not be treated as new value. On the other hand, defendant's position is that taking goods in satisfaction of a pre-existing claim is "new value" within the meaning of said act, because, while the section defining "new value" excludes "extension or renewals of existing obligations", it does not specifically exclude a situation where goods are taken in satisfaction of a pre-existing claim; and that this exact situation does come within the definition of "value" as set out in section 3013, subd. 15, of said

code: "'Value' means any consideration sufficient to support a simple contract. An antecedent or pre-existing claim, whether for money or not * * * constitutes value where goods * * * are taken * * * in satisfaction thereof * * *." Defendant's position is in our opinion not only sound but is fully supported by the law as laid down in the case of Colonial Finance Co. v. DeBenigno, 125 Conn. 626, 7 A.2d 841, which appears to have been cited on numerous occasions in connection with the Uniform Trust Receipts Law.

[4] Furthermore, and in any event, the act in its definition of a "buyer in the ordinary course of trade" expressly includes "one who takes * * * under a pre-existing mercantile contract with the trustee to buy goods delivered, or like goods, for cash or on credit"; and clearly defendant's status came squarely within this express provision and therefore he was a buyer in the ordinary course of trade within the meaning of said act, because of his pre-existing mercantile contract with the trustee, Shumate, to buy goods delivered or like goods. The contract between Shumate and defendant was for the purchase of an automobile, and it was contemplated by both parties that the purchaser would receive an automobile for the price paid; and it must also have been within the contemplation of the parties that if the exact car ordered could not be obtained, the purchaser would receive another or a similar car; and in fact the only difference in the automobile which defendant took and the one he ordered delivered to him at the factory was the color; therefore it must be considered "like goods". Plaintiff argues that the mere presence of a prior contract cannot expiate bad faith or lack of new value at the time title is purportedly transferred; in other words, that the elements of good faith and new value remain the basic tests of the buyer's protection. But there is nothing in the act to justify such a construction; nor upon the facts found can it be held as a matter of law that the trial court was in error in concluding that the defendant was a buyer in the ordinary course of trade.

[5] Nor is the situation altered by the fact that the car which was delivered to defendant was taken from the stockroom or warehouse rather than from the salesroom, for as provided in section 3016.5 (2) (c), "If the entruster consents to the placing of goods subject to a trust receipt transaction in the trustee's stock in trade or in his sales or exhibition rooms, or allows such goods to be so placed or kept, such consent or allowance shall have like effect as granting the trustee liberty of sale." The remaining points urged by plaintiff do not possess sufficient merit to require special attention.

The judgment is affirmed.

We concur: PETERS, P. J.; WARD, J.

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42 Cal.App.2d 195

BURKE v. JOHN E. MARSHALL, Inc., et al.

Civ. 12628.

District Court of Appeal, Second District,
Division 2, California.

Dec. 30, 1940.

Rehearing Denied Jan. 28, 1941.

Hearing Denied Feb. 24, 1941.

1. Automobiles 🔑155

A stevedore who was on dock at express invitation of corporation which was in possession and control of dock for purpose of performing services for corporation to help discharge a cargo of lumber from a steamship, was an "invitee" to whom corporation and stevedore's employer owed duty to exercise ordinary care in operation of the lumber carrier which was a four-wheeled vehicle equipped with rubber tires.

See Words and Phrases, Permanent Edition, for all other definitions of "Invitee".

2. Trial 🔑143

Where evidence in personal injury action was conflicting, it was duty of jury to weigh the evidence and resolve the conflict.

3. Appeal and error 🔑930(1)

On appeal from judgment in personal injury action wherein evidence was conflicting, it must be presumed that evidence which supported verdict was accepted by jury as being true.

4. Appeal and error 🔑930(1)

On appeal from judgment for plaintiff who sued for personal injuries the appellate court would view the evidence most favorably to the plaintiff.

5. Automobiles 🔑245(4)

In action for injuries to stevedore who was employed to help discharge a cargo of lumber from a steamship when he was struck by "lumber carrier" which was a four-wheeled vehicle equipped with rubber tires which could be driven over a pile of lumber, pick it up and transport it elsewhere on the dock, defendants' negligence was for jury.

See Words and Phrases, Permanent Edition, for all other definitions of "Lumber Carrier".

6. Automobiles 🔑155

Where driver of "lumber carrier" which was a four-wheeled vehicle equipped with rubber tires, which could be driven over a pile of lumber, pick it up and transport it elsewhere on the dock, was aware of presence of stevedores and did not sound his horn at any time or give any other warning as he approached a pile of lumber, such conduct constituted "active negligence" as distinguished from "passive negligence" as regards liability for injuries to stevedore who was struck by the carrier.

See Words and Phrases, Permanent Edition, for all other definitions of "Active Negligence" and "Passive Negligence".

7. Automobiles 🔑245(70)

In action for injuries to stevedore employed to help discharge a cargo of lumber from a steamship, when he was struck by "lumber carrier" which was a four-wheeled vehicle equipped with rubber tires which could be driven over pile of lumber, pick it up and transport it elsewhere on dock, and which had no fixed path, and whose driver knew of presence of stevedore and his coworkers, stevedore's contributory negligence was for jury.

8. Appeal and error 🔑1002

The jury's implied finding that plaintiff was free of contributory negligence, based upon conflicting testimony, may not be disturbed on appeal there being substantial evidence to support such finding.

9. Automobiles 🔑243(4)

In action for injuries to stevedore employed to help discharge a cargo of lumber from a steamship when he was struck by a lumber carrier which was a four-wheeled vehicle equipped with rubber tires, testimony of stevedore that during eight years of work on docks as a stevedore, it was custom of operators to blow the horn of lumber carriers when they were about 25 feet away from any men working on the dock, was properly admitted.

10. Negligence 🔑124(3)

Where issue is one of negligence in performance or failure to perform some act, evidence of ordinary practice and custom which is generally followed in performance of such act under same or similar circumstances is competent.

11. Trial 🔑260(1)

A trial court is not required to instruct jury in any particular language or phraseology requested by a party if subject matter of requested instruction is fully and fairly covered in other instructions given.

12. Trial 🔑260(8)

A requested instruction that contributory negligence "no matter how slight in character" would bar recovery was properly refused, where in other instructions jurors were informed that if they found that plaintiff was negligent and such negligence contributed "in some degree" or "in any degree" to happening of accident, it would bar recovery.

13. Trial 🔑260(8)

A requested instruction to effect that in determining whether plaintiff was guilty of contributory negligence, the jury was to consider nature and character of place where accident happened and plaintiff's familiarity with conditions and manner in which operations were carried on was properly refused, where subject matter of such instruction was covered by instructions informing jury that in determining whether there was negligence, conduct must be considered in light of all surrounding circumstances.

14. Trial 🔑252(8)

A requested instruction relative to unavoidable accident was properly refused where there was no evidence which would have warranted jury in making such a finding had they been so instructed.

15. Evidence 🔑376(1)

Before evidence of entries made in regular course of business may be admitted, it must be proved that such books are books of account kept in regular course of business, that business is of a character in which it is proper or customary to keep such books, that entries in such books are either original entries, or the first permanent entries of transactions, and that person making such entries had personal knowledge of transactions, or obtained such knowledge from a report regularly made to him by some other person employed in the business whose duty it was to make the report in regular course of business.

16. Evidence ⚷376(1)

In action for injuries to stevedore whose work had been obtained through association which was in nature of a hiring hall, testimony of association's auditor that association's books showed amount of money received by stevedore from his various employers, and that such information was obtained from pay rolls of stevedoring companies, was not admissible to prove amount of stevedore's earnings prior to accident under exception to "hearsay" rule which permits proof of book entries made in regular course of business, where there was no evidence that it was proper or customary for association to keep pay roll records of persons such as stevedore who were not employed by association, or that books contained original entries or first permanent entries, and such entries were made by auditor who had no personal knowledge of transactions represented thereby.

See Words and Phrases, Permanent Edition, for all other definitions of "Hearsay".

17. Appeal and error ⚷930(1)

In passing on contention that verdict for damages was excessive, appellate court must consider only testimony which is most favorable to plaintiff, disregarding the conflicting testimony offered by defendants.

18. Appeal and error ⚷1004(1)

The question of excessive damages is primarily directed to the trial court.

19. Appeal and error ⚷1004(1)

The power of appellate courts to reverse a judgment because of excessive damages exists only when facts are such as to suggest that verdict was the result of passion, prejudice, or corruption on part of jury.

20. Damages ⚷132(6)

$13,500 to 35 year old stevedore who for eight years prior to accident had been working generally as a stevedore, whose average earnings prior to accident had been $2,200 per year, whose medical and hospital expenses amounted to $791.61, who sustained a permanent injury by fracturing the tibia resulting in a flat, abnormal ankle, who suffered severe pain, and who was required to use crutches for six months after accident, thereafter using a cane, was not excessive.

21. Appeal and error ⚷204(1)

An objection to admission of testimony may not be made for the first time on appeal.

22. Appeal and error ⚷207

Where no request was made of trial court to instruct jury to disregard alleged misconduct on part of plaintiff's counsel, complaining party would be deemed to have waived any objection to such conduct.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Victor Burke against John E. Marshall, Inc., and others to recover for injuries sustained while employed as a stevedore. From a judgment for plaintiff, defendants appeal.

Affirmed.

Syril S. Tipton, of Los Angeles (John J. Ford, of Los Angeles, of counsel), for appellants.

Lasher B. Gallagher, of Los Angeles, for respondent.

PER CURIAM.

This action was commenced by plaintiff for the purpose of recovering damages for personal injuries resulting from the negligence of defendants. The first trial of the action resulted in a verdict in favor of plaintiff for $2,500. Plaintiff's motion for a new trial having been granted, the action was again tried before a jury which returned a verdict in favor of plaintiff for $13,500. From the judgment entered upon the second verdict defendants have appealed.

Plaintiff had been engaged in stevedoring work for eight years prior to May 31, 1938. On that date he was employed as a stevedore to help discharge a cargo of lumber from a steamship which was alongside a dock in the city of Long Beach. The dock was in the possession and under the control of John E. Marshall, Inc., and the ship was owned by plaintiff's employer, Sudden & Christensen. Plaintiff arrived at the dock at about 7:30 on the morning of May 31, at which time there were two partial loads of lumber on the dock abreast of gear No. 2, as well as other loads at various places on the dock. It was plaintiff's duty to work in connection with the operation of gear No. 2, one of the instrumentalities by which lumber was transferred from the ship to the dock. While waiting to go to work at 8 o'clock, plaintiff observed that one of the two loads of lumber abreast of gear No. 2 was removed by a lumber carrier, a four-wheeled vehicle equipped with rubber tires, which can be driven over a pile of lumber, pick it up and transport it elsewhere on the dock. The driver of such carrier sits on top on the left-hand side, several feet above the ground, where his forward vision is limited to persons and objects a considerable distance away. When called to work at 8 o'clock plaintiff went to his station at gear No. 2 and proceeded to line the gear up where the boom would come out to the dock. It was part of his duty to see that the boom and fall were lined up so that a load of lumber would be placed on the dock at the farthest distance from the ship. In performing this duty it was necessary for him to look upward and toward the ship. Within ten minutes after he commenced work plaintiff was struck by a lumber carrier which was driven by defendant John Doltar, an employee of defendant John E. Marshall, Inc.

The testimony concerning the manner in which the accident occurred is conflicting. According to plaintiff's version, he was lining up the gear immediately prior to the time when he was struck by the carrier. He did not hear any horn and had no warning of the carrier's approach until one wheel was on top of his foot. At the time he was struck he was near the corner of the remaining partial load of lumber at gear No. 2. The witness Janhune, who was standing beside plaintiff, was also struck but not injured by the carrier. He likewise testified that Doltar failed to blow the horn or give any other warning of his approach. Another witness who was at the scene of the accident testified that no warning of the carrier's approach was given. There was also testimony relating to Doltar's admission after the accident that the reason he failed to give any warning was that he did not see plaintiff in the path of the carrier.

Defendant Doltar testified that he knew the stevedores were on the dock for the purpose of unloading the lumber from the ship; that when he came to get the first load prior to 8 o'clock there were several men leaning against the load, "and when I came to the load nobody seemed to want to move so I had to get up and stand upon the carrier and holler down to them to get away from the load so I could get the lumber from the ship. That is the only reason I had to stop." The carrier was stopped 20 to 25 feet from the end of the load, and after making sure that no men were in the path of the machine Doltar continued on his course, picked up the first pile of lumber and took it away. As he returned for the second load after 8 o'clock he again observed several men around that pile of lumber. The carrier was then about 75 feet from the load, from which point, according to Doltar's testimony, he blew his horn continuously until he reached a point about 8 or 10 feet from the load, but did not stop and shout at the men as he had done prior to picking up the first load. He observed the men walking away from the load but testified that just before the accident he believed that he saw one fellow who had his back turned. Doltar did not see plaintiff when he started to go over the load and did not know that the carrier had struck plaintiff until after he had stopped "because somebody hollered". He stated that on many occasions when he was operating the carrier in front of ships or alongside of ships when the men were working cargo or getting ready to work cargo he stopped the carrier and shouted at the men to get out of the way.

[1-6] It is first urged that there is no evidence to show that defendants owed any duty of care toward plaintiff, or that if such duty did exist there was no proof of any violation thereof. In other words, defendants contend that plaintiff's evidence established only that the accident happened but failed to establish that it resulted from any negligence on the part of defendants. Plaintiff, being on the dock at the express invitation of John E. Marshall, Inc., for the purpose of performing services for such defendant, was an invitee and as such, defendants owed him the duty to exercise ordinary care in the operation of the lumber carrier. Yoshiko Yamauchi v. O'Neill, 38 Cal.App.2d 703, 102 P.2d 365; Wooll v. J. S. Shea Co., 214 Cal. 302, 5 P.2d 421. The evidence being conflicting in many respects, it was the duty of the jury to weigh the evidence and resolve the conflict, and on appeal it must be presumed that the evidence which supports the verdict was accepted by the jury as being true. Viewing the evidence most favorably to the plaintiff, we cannot say that the verdict is without support. The record

discloses that Doltar knew that plaintiff and other stevedores were on the dock for the purpose of unloading the ship; that under such circumstances he found it necessary on many occasions to stop his carrier and shout a warning to the men before proceeding to pick up a load of lumber; and that on the particular morning in question he had found it advisable to stop his carrier and shout a warning to several men before picking up the first load of lumber, but had not done so when returning to pick up the second load although he observed several men in the path of the vehicle. Furthermore, there was substantial testimony that at the time of the accident plaintiff was actively engaged in carrying out the duties for which he had been employed; that neither plaintiff nor any of the other men near the pile of lumber was aware of the approach of the carrier, and that defendant Doltar did not sound his horn at any time or give any other warning as he approached the pile of lumber. That such conduct constitutes active negligence is clear.

The case of Yoshiko Yamauchi v. O'Neill, supra, presents a very similar situation and it was there held at page 707 of 38 Cal.App.2d, at page 367 of 102 P.2d, that "* * * there can be no doubt whatever that the negligent operation of a moving vehicle in a place where the operator has good reason to expect the presence of licensees constitutes active negligence as distinguished from passive negligence. * * *" In that case the plaintiff was walking in a private driveway when she was run over without warning by the defendant's truck which was backing out of the driveway. Such driveway was commonly used by pedestrians going to and from a certain store. The driver of the truck looked back on the left side of the truck but not on the right were plaintiff was walking and did not sound his horn or give any warning to persons who might be in the path of the truck. It is pointed out that whether the plaintiff be considered as a licensee or an invitee, the defendants owed her the duty, in either event, not to injure her by such active negligence. In the instant case it will be noted that not only did defendant Doltar have good reason to expect the presence of invitees but he actually knew of their presence in the path of his machine.

Another case which is closely analogous is Lucas v. Walker, 22 Cal.App. 296, 134 P. 374, 379. There the plaintiff, who was employed by the company which was installing elevators in a new building, was at work in an elevator shaft when he was struck and injured by the movement of the elevator without warning. An employee of the defendant, the contractor who was erecting the building, moved the elevator suddenly without warning although he knew that the plaintiff was at work in the shaft. In holding the defendants liable the court observes at page 303 of 22 Cal.App., at page 378 of 134 P., concerning the conduct of the elevator operator: "As such operator, it was his duty to so operate the elevator as to avoid injuring any of such workmen while they were so employed. Knowing that plaintiff was lawfully at work in the elevator shaft, the plainest dictates of care required that he should give him warning before moving the elevator car * * *."

[7, 8] It is further claimed by defendants that plaintiff was guilty of contributory negligence as a matter of law. Warnke v. Griffith Co., 133 Cal.App. 481, 24 P.2d 583, the case principally relied upon by defendants, is to be distinguished on its facts. There a city street was being widened and it became necessary to remove certain electric light poles. Appellant was employed as a lineman's helper, it being his duty to remain on the ground near the pole on which the linemen were working and raise or lower materials to them by means of a pulley and hand line suspended from a crossbeam on the pole. Respondent Griffith Company was the contractor engaged in widening the street. In order to bring materials to a cement mixer used by the contractor it was necessary for his trucks to back up to the mixer. In doing this the trucks followed a fixed route marked by ruts in the dirt, backing in on an average of one every four or five minutes. Appellant knew of the route followed by the trucks and also was aware of the frequency with which they came. Notwithstanding this knowledge, he stationed himself in the path of the backing trucks and watched the linemen at work on a nearby pole but failed to maintain a lookout for approaching trucks. While in that position he was struck by a truck, receiving the injuries for which recovery was sought. The driver of the truck was unable to see appellant as he backed toward the mixer. In holding that appellant was not entitled to recover because of his contributory negligence, the

court states at page 490 of 133 Cal.App., at page 587 of 24 P.2d: "Appellant could just as well have watched the lineman tying the load on the line from a safe position. He was certainly not performing any part of the duty required of him by watching the lineman perform his duty, and, if he had glanced occasionally in the direction from which danger approached him, until the lineman gave the signal to lower the fuse box which it is evident he was waiting for, the deplorable accident could not have happened." The dissimilarity of the facts of that case and the present case is apparent. Here the lumber carrier followed no fixed path but could go anywhere on the dock and pick up any of the loads of lumber scattered about the dock. Doltar actually saw three men, one of whom was plaintiff, standing in the path of the lumber carrier. In standing where he was plaintiff was performing part of the duty required of him. Under such circumstances defendants' assertion that plaintiff was guilty of contributory negligence as a matter of law cannot be sustained. The question was properly submitted to the jury under appropriate instructions and the implied finding that plaintiff was free of contributory negligence, based upon conflicting testimony, may not be disturbed on appeal, there being substantial evidence to support such finding. The remaining cases cited by appellant are not in point.

[9, 10] During the course of the trial plaintiff was permitted to testify over objection that during his eight years of work on the docks as a stevedore it was the custom of the operators to blow the horn of the lumber carriers when they were about 25 feet away from any men working on the dock. The contention of defendants that the court committed prejudicial error in permitting such testimony as to custom cannot be sustained. Where the issue is one of negligence in the performance or failure to perform some act, it is clear that evidence of the ordinary practice and custom which is generally followed in the performance of such act under the same or similar circumstances is competent. Thomas v. Southern Pacific Co., 116 Cal. App. 126, 2 P.2d 544; Hennesey v. Bingham, 125 Cal. 627, 58 P. 200. In a recent case the plaintiff, a high school student, sought to recover for injuries received in an automobile mechanics class. Evidence as to custom was admitted and on appeal the same contention that is here made was raised by appellant. In disposing of such contention the court states: "We cannot sustain the claim of appellants that the reception of this evidence was prejudicially erroneous. In the first place, testimony as to the general custom and practice of other auto shops in schools was competent on the question of care and diligence exercised by those charged with a lack thereof in the instant case." Perumean v. Wills, 8 Cal.2d 578, 582, 67 P.2d 96, 98.

[11, 12] It is next asserted that the jury was not instructed that contributory negligence "no matter how slight in character" would bar recovery, and that the refusal of the court to give a requested instruction couched in such terms was error. No cases are cited to the effect that the refusal to give an instruction in that precise language is error. We know of no rule requiring a trial court to instruct a jury in any particular language or phraseology requested by a party if the subject matter of the requested instruction is fully and fairly covered in other instructions given to the jury. In other instructions the jurors were informed that if they found that plaintiff was negligent and such negligence contributed "in some degree" or "in any degree" to the happening of the accident it would bar recovery. No error in the use of such terms is pointed out. We conclude, therefore, that the jury was fully and correctly instructed on the subject and that the refusal of the court to give the requested instruction was not error.

[13] The further claim is made that the court erred in refusing a requested instruction to the effect that in determining whether or not plaintiff was guilty of contributory negligence the jury was to consider the nature and character of the place where the accident happened and the familiarity of plaintiff with the conditions and manner in which operations were carried on. We see no error in the court's action, for in several instructions dealing with the general subject of negligence the jury was clearly informed that in determining whether there was negligence the conduct in question must be considered in the light of all the surrounding circumstances. This adequately covered the subject matter of the requested instruction.

[14] The refusal of the court to give a requested instruction relative to unavoidable accident is next assigned as error. The instruction was properly refused, for there was no evidence which would have warranted the jury in making such a finding had they been so instructed. Riley v. Berkeley Motors, Inc., 1 Cal.App.2d 217, 36 P.2d 398.

In an effort to prove the amount of plaintiff's earnings prior to the accident, defendants produced a witness who was the auditor for the Waterfront Employers' Association, an association of the stevedoring steamship companies operating in the Los Angeles and Long Beach harbor. Plaintiff had testified that from January 1, 1938, to the date of the accident all of his work had been obtained through the association, which was in the nature of a hiring hall. The auditor testified that the books of the association showed the amount of money received by plaintiff from his various employers during that period, and that the information contained in such books was obtained from the pay rolls of the various stevedoring companies which were turned in to his office and were under his control. It further appeared that the auditor was not employed by Sudden & Christensen, plaintiff's employer at the time of the accident, nor by any other employer of plaintiff. The books kept by the auditor did not include pay roll data of all employers of stevedores and included no Sudden & Christensen pay rolls. The witness was then asked if his records showed the amount of pay received by plaintiff during the month of January, 1938. Plaintiff's objection to the admissibility of such testimony was sustained, the court's ruling now being assigned as error.

[15, 16] The claim that such evidence was admissible under the exception to the hearsay rule which permits proof of book entries made in the regular course of business is without merit. Before such evidence may be admitted it must be proved that such books are books of account kept in the regular course of business; that the business is of a character in which it is proper or customary to keep such books; that the entries in such books are either original entries or the first permanent entries of the transaction, and that the person making such entries had personal knowledge of the transactions or obtained such knowledge from a report regularly made to him by some other person employed in the business whose duty it was to make the report in the regular course of business. Kains v. First National Bank, 30 Cal.App.2d 447, 86 P.2d 935. In the present case there is no evidence that it was either proper or customary for the association to keep pay roll records of persons, such as plaintiff, who were not actually employed by it. Nor does it appear that the books in question contained either original entries or the first permanent entries. Finally, the entries were made by the auditor who had no personal knowledge of the transactions represented thereby, from reports submitted to him by persons not employed by the association. It is thus evident that defendants failed to lay a proper foundation for the admission of such testimony.

[17] It is next contended by defendants that the verdict for $13,500 damages is excessive. In passing upon such contention we must consider only the testimony which is most favorable to plaintiff, disregarding the conflicting testimony offered by defendants. Gackstetter v. Market Street Ry. Co., 10 Cal.App.2d 713, 52 P.2d 998. Plaintiff at the time of the accident was about 35 years of age and had for eight years prior thereto been working steadily as a stevedore. Before becoming a stevedore he had worked on various ships as a traveling longshoreman. His education terminated with the fifth grade of grammar school. As a result of the accident plaintiff received the following injuries: Fracture of the tibia, resulting in a flattened, abnormal ankle, a severe, crushing injury to the soft tissues, ligaments and blood vessels in the ankle, resulting in a permanent injury to the venous return of the circulatory system which causes swelling of the foot and ankle and restriction of motion in the ankle; the synovial fluid has formed a sac in the ankle joint, thus causing the joint to become arthritic; there is a lack of normal calcium or salt deposits in the bones of the foot and severe sprain of the back and knee. Because of such injuries plaintiff suffered and at the time of trial continued to suffer severe pain in his foot, ankle, leg and back, and his foot and ankle swell under any sort of tension or stress. Such condition will be permanent and plaintiff will be unable to perform his usual and ordinary work, it having been shown that a stevedore must be agile and quick in order to avoid being injured. Plaintiff was confined to the hospital for three weeks or a month and was required to use crutches for six months after the accident, thereafter using a cane. When he attempted to go back to work he could not do so because of the pain and swelling in his foot and ankle. From May 6, 1939, to the time of trial, December 4,

1939, plaintiff was able to work not more than nine hours a week. His average earnings prior to the accident had been $2,200 per year. Medical and hospital expenses amounted to $791.61. From such evidence, the jury would have been warranted in finding that plaintiff is permanently disabled and as a result unable to perform the heavy labor for which he was trained and fitted, and that his earning capacity has been permanently and materially decreased.

[18-20] The question of excessive damages is primarily directed to the trial court. Since defendants' motion for new trial was denied, it is manifest that the trial judge who heard the evidence and observed the witnesses found no impropriety in allowing the verdict to stand. The power of appellate courts to reverse a judgment because of excessive damages exists only when the facts are such as to suggest that the verdict was the result of passion, prejudice or corruption on the part of the jury. Adams v. Warren, 11 Cal.App.2d 344, 53 P.2d 780. We have found nothing in the record which suggests passion, prejudice, or corruption on the part of the jury in arriving at its verdict. The evidence discloses substantial injuries, permanent in character, considerable pain and suffering, which is likewise permanent, and a decrease in plaintiff's earning capacity.

[21] After having introduced evidence that plaintiff's average yearly earning capacity was $2,200, plaintiff introduced further evidence that he had received disability benefit payments of $1,911.22 from the insurance carrier for his employer since the date of the accident. No objection to the admission of this testimony was offered. Defendants' subsequent motion to strike from the record all testimony relating to plaintiff's earning capacity was voluntarily withdrawn without a ruling by the court. Relying upon section 3855 of the Labor Code, St.1937, p. 274, defendants now contend that the evidence as to loss of earning capacity may not be considered in support of the verdict; that the only evidence which is proper is that relating to payment of disability benefits. Section 3855 provides essentially that where an employee sues a third person, evidence of the amount of disability indemnity paid by the employer or evidence of loss of earning capacity by the employee shall be admissible, but not both. There is no merit in defendants' contention, for it is settled that an objection to the admission of testimony may not be made for the first time on appeal.

[22] It is unnecessary to consider the remaining contentions relating to misconduct on the part of plaintiff's counsel, for no request was made of the trial court to instruct the jury to disregard the matters relating thereto. Under such circumstances the complaining party must be deemed to have waived any objection to such conduct. Kershaw v. Tilbury, 214 Cal. 679, 9 P.2d 109; Olsen v. Standard Oil Co., 188 Cal. 20, 204 P. 393.

Judgment affirmed.

42 Cal.App.2d 258

NEWBURY v. CIVIL SERVICE COMMISSION OF CITY OF LOS ANGELES et al.

Civ. 12581.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1940.

As Modified on Denial of Rehearing Jan. 25, 1941.

Hearing Denied Feb. 27, 1941.

1. Appeal and error 🔑876

Where appeal was from order denying motion to vacate judgment, District Court of Appeal was confined in its review to a determination of whether the conclusions of law and judgment were consistent with and supported by the findings of fact. Code Civ. Proc. § 663.

2. Appeal and error 🔑1010(1)

The question of laches is in the first instance one for determination of the trial court, and its conclusion will not be set aside by an appellate court if such determination finds substantial support in the evidence.

3. Mandamus 🔑143(2)

Proceeding for writ of mandate to compel City Civil Service Commission to appoint petitioner senior accountant in office of City Controller was barred by "laches", where it appeared that petitioner waited for more than a year and a half after he knew that another had been appointed to the vacancy to which he was entitled before he made any demand that the position be given to him.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

4. Mandamus ⚷176

Where petitioner was not entitled to a writ of mandate directing Civil Service Commission to appoint petitioner senior accountant in office of City Controller because of laches in bringing proceedings, petitioner could not recover a money judgment for damages because he had been wrongfully deprived of the office. Code Civ.Proc. § 1095.

◆

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Proceeding by Charles B. Newbury against the Civil Service Commission of the City of Los Angeles and others, for a writ of mandate to have respondents appoint petitioner senior accountant in the office of the City Controller of the City of Los Angeles, and to enter a judgment for the amount of salary which petitioner would have received had he been appointed such accountant at time he was entitled to the position. From an order denying petitioner's motion to vacate judgment denying his application under § 663, subd. 1, of Code of Civil Procedure, the petitioner appeals.

Affirmed.

Hearing denied; CARTER, J., dissenting.

Walter S. Barrette, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and Bourke Jones, Deputy City Atty., all of Los Angeles, for respondents.

McCOMB, Justice.

Petitioner appeals from an order of the trial court denying his motion pursuant to the provisions of subsection 1, section 663 of the Code of Civil Procedure, to vacate and set aside the judgment of the trial court, denying his application for a writ of mandate to have respondents appoint him senior accountant in the office of the City Controller of the City of Los Angeles, and to enter a judgment in accordance with the prayer of his petition, on the ground that the judgment and conclusions of law are not consistent with or supported by the trial court's findings of fact.

[1] Since this appeal is from an order made pursuant to the provisions of section 663 of the Code of Civil Procedure, we are confined in our review to a determination of whether the conclusions of law and judgment are consistent with and supported by the findings of fact. Budd v. Hough, 100 Cal.App. 103, 106, 279 P. 1074; Dahlberg v. Girsch, 157 Cal. 324, 326, 107 P. 616.

The essential facts are:

Petitioner filed an application for a writ of mandate requiring respondents to appoint him senior accountant in the office of the City Controller of the City of Los Angeles and also for the amount of salary which he would have received had he been appointed such accountant at the time he was entitled to the position.

The trial court found that on October 11, 1935, petitioner was senior accountant in the classified civil service of the City of Los Angeles and that his name was the only one upon the reserve list of the Harbor Department for senior accountant; that on or about October 25, 1935, a vacancy occurred in the position of senior accountant in the office of the City Controller, to which vacancy, under the rules of the Civil Service Commission, petitioner was entitled to be appointed, but that in lieu thereof another person who was not qualified or eligible therefor was appointed; that petitioner knew of the vacancy in the Controller's office in the first part of November, 1935, but did not make any investigation or inquiry at the office of the Civil Service Commissioners relative to the vacancy to which he thought he was entitled until after August 1, 1937, nor did he protest to the Civil Service Commission or any other person the fact that another had been appointed to the position and was receiving the salary therefor until after August 6, 1937; and that after the last mentioned date he proceeded with due diligence to demand from the Board of Civil Service Commissioners that he be appointed senior accountant in the office of the Controller. Finding VIII reads thus: "It is not true that upon discovery of the alleged unlawful appointment of another to the position of senior accountant in the office of the City Controller petitioner made due demand upon the Board of Civil Service Commissioners that he be certified to such position and permitted to assume his duties as a permanent civil service employee in said position. He made such a demand but made it more than a year and a half after he had learned of the vacancy and the appointment of another to fill it."

Upon the foregoing findings the trial court predicated its conclusions of law as follows:

"I That petitioner was entitled to be certified and appointed Senior Accountant in the office of the City Controller on or about December 16, 1935. That, but for the conclusions hereinafter stated, petitioner would be entitled to judgment for damages against the respondents, and to a peremptory writ of mandate as prayed.

"II That petitioner's petition for damages or for salary and for appointment to a position in the classified service of the City of Los Angeles as Senior Accountant is barred by laches."

These are the questions presented for our determination:

First: Was the conclusion of law of the trial court that petitioner's claim was barred by laches *supported by the findings of fact?*

Second: Was petitioner entitled to a judgment for damages because he had been wrongfully deprived of the office of senior accountant in the office of the City Controller if he was not entitled to a writ of mandate directing that he be placed in such position?

[2, 3] The first question must be answered in the affirmative. The question of laches is in the first instance one for the determination of the trial court and its conclusion will not be set aside by an appellate court if such determination finds substantial support in the evidence. Greenberg v. Du Bain Realty Corp., 27 Cal.App. 2d 111, 118, 80 P.2d 537. In the present case it is clear that the trial court's conclusion that petitioner's claim was barred by laches is substantially supported by the findings. For example, paragraph VIII of the findings discloses that petitioner waited for more than a year and a half after he knew that another had been appointed to the vacancy to which he was entitled before he made any demand that the position be given to him.

In Hayman v. City of Los Angeles, 17 Cal.App.2d 674, 679, 62 P.2d 1047, a case where petitioner was denied relief after he waited for more than nine months before taking action to obtain the position to which he was entitled, this court held petitioner's claim to be barred by laches. Mr. Justice Shinn, speaking for the court, says at page 680 of 17 Cal.App.2d, at page 1050 of 62 P.2d: "It is to be presumed that, where one has been dismissed from an active position in the public service, some one else has been chosen to take his place. The work has to be done and it has to be paid for. It appears from the answer of defendants that ever since petitioner's discharge his position has been filled by one or more of the other city employees, and that there was at the time of the filing of the petition no vacant position in the department to which petitioner could be assigned. If petitioner should be reinstated, he no doubt would lay claim to the salary which he would have earned except for his discharge, or for so much thereof as he might be able to claim under charter provisions which require the filing of claims with the city within six months after the accrual of the demand. Whatever he might receive would be for services which he had not rendered but which had been performed by others, who had been compensated therefor. The city would thereby be prejudiced."

[4] The second question must be answered in the negative. The law is established in California that a money judgment will not be rendered in a mandate proceeding when petitioner is denied an order directing that he be placed in the position he seeks. Northrup v. Haynes, 15 Cal. App.2d 665, 666, 59 P.2d 1056; Coombs v. Smith, 17 Cal.App.2d 454, 62 P.2d 380; section 1095, 63 Kan. 883, Code Civ.Proc.; Brown v. Worthen, 65 P. 255.

For the foregoing reasons the order is affirmed.

We concur: MOORE, P. J.; WOOD, J.

42 Cal.App.2d 209

PEOPLE v. MURRAY.

Cr. 2135.

District Court of Appeal, First District, Division 1, California.

Dec. 31, 1940.

Hearing Denied Jan. 30, 1941.

1. Criminal law 🔑**317**

Where defendant, charged with receiving stolen goods, did not take witness stand to explain or deny any of the incriminating evidence introduced against him, such failure was proper subject matter for jury's consideration. Const. art. 1, § 13.

2. Receiving stolen goods 🔑**8(3)**

Evidence was sufficient to sustain conviction for receiving stolen goods. Pen.Code, § 496.

3. Receiving stolen goods 🔑**8(3)**

Where information alleged that typewriters were stolen by two individuals and that defendant feloniously and for his own gain and to prevent the owner from again possessing his personal property received the typewriters knowing the same to have been stolen, evidence was sufficient to prove allegation that defendant received the goods for his own gain and to prevent the owner from again possessing the same. Pen.Code, § 496.

4. Receiving stolen goods 🔑**7(6)**

In prosecution for receiving stolen goods, it was immaterial that goods were stolen by and that defendant received them from one individual rather than from such individual and another as alleged in the information, since all that the statute requires in such regard is proof that the goods were stolen and that the accused received them knowing the same to have been stolen. Pen.Code, § 496.

5. Receiving stolen goods 🔑**9(3)**

In prosecution for receiving stolen goods, verdict, "we the jury, find" defendant "guilty of crime of felony, to-wit, receiving stolen property as charged in the information", necessarily included an implied affirmative finding on each of the elements of crime as defined by statute and as alleged in the information. Pen.Code, § 496.

6. Criminal law 🔑**369(1)**

The statutory inhibition to the effect that when previous convictions are admitted they shall not be alluded to during trial is not fundamental but only a statutory regulation. Pen.Code, § 1025.

7. Criminal law 🔑**365(2), 369(2)**

An exception to the statutory inhibition to effect that when previous convictions are admitted, they shall not be alluded to during trial, is recognized where the accused offers himself as a witness or where prior conviction is of essence of the crime with which defendant is charged and is part of the res gestae. Pen.Code, § 1025.

8. Criminal law 🔑**369(2)**

The mere fact that evidence which is material to crime charged may disclose a prior conviction serves as no valid objection to its admission. Pen.Code, § 1025.

9. Criminal law 🔑**369(2)**
Witnesses 🔑**268(6)**

In prosecution for receiving stolen goods after prior convictions where defendant's witness from whom defendant had obtained goods gave testimony on direct examination in such a manner as to convey impression that there was nothing in his dealings or associations with defendant which could have caused defendant to believe that goods had been stolen, it was within scope of legitimate cross-examination not only to test truth of witness' statement that he had not told defendant that goods had been stolen but to show that because of nature of past relationship defendant must have known that witness had not obtained goods by honest means and therefore permitting cross-examination as to whether witness had met defendant in penitentiary was not erroneous, notwithstanding defendant had admitted prior conviction. Pen.Code, § 1025.

10. Criminal law 🔑**1202(1)**

To invoke operation of habitual criminal statute, prosecution in addition to alleging and proving fact of prior conviction must allege and prove that accused has served a term of imprisonment in the state or federal penitentiary for the particular felony of which he is charged with having been previously convicted. Pen.Code, § 644.

11. Criminal law 🔑**1202(1)**

Failure to allege and prove that accused has served a term of imprisonment in state or federal penitentiary for particular felony of which he is charged with having been previously convicted is fatal to an adjudication that defendant was an habitual criminal, unless it appears from record in some manner that accused has admitted having served such term of imprisonment or that the court in its judgment has so found. Pen. Code, § 644.

12. Criminal law ⚷1202(1)

To invoke operation of habitual criminal statute, allegation or proof of imprisonment for full term for particular felony of which accused is charged with having been previously convicted is not required but service of part time sufficient to bring case within purview of the statute, and such doctrine applies in dealing with cases arising under statute which provides for increased punishment in case of prior conviction of certain offenses. Pen.Code, §§ 644, 666, 667.

13. Criminal law ⚷1202(6)

Where it appeared that information when filed did not contain charges of prior conviction, that at time of arraignment trial court ordered information amended by adding five prior convictions, that defendant pleaded not guilty to main charges and denied prior convictions, that at opening of trial, defendant admitted five prior convictions "as charged in information", that information had not been amended to charge prior convictions but the prior convictions were merely set forth in transcript and record did not show that any evidence was offered to prove that defendant served terms of imprisonment for prior convictions or that he admitted having done so, or that judgment contained any finding to that effect and information did not contain appropriate affirmative allegations that he served terms of imprisonment, adjudication that defendant was an habitual criminal was unauthorized. Pen.Code, §§ 644, 969a.

14. Indictment and Information ⚷114

In prosecution for receiving stolen goods, allegation charging that defendant was received at San Quentin prison, having been convicted of robbery, was not the equivalent of an allegation that for such conviction he had served a term of imprisonment and did not form proper basis for an adjudication that he was an habitual criminal, since to hold that the words, "was received" at the prison, imported that defendant served a term of imprisonment therein would be distorting the meaning of the word "received". Pen.Code, §§ 644, 969a.

See Words and Phrases, Permanent Edition, for all other definitions of "Received".

15. Criminal law ⚷1202(7)

Where clerk's transcript showed that defendant admitted five prior convictions of felony "as charged in information" but information did not charge that defendant had served terms of imprisonment for prior conviction, defendant was entitled to the benefit of the record as thus made, which record was not sufficient to sustain an adjudication that defendant was an habitual criminal. Pen.Code, §§ 644, 969a.

16. Criminal law ⚷1165(2)

No portion of a judgment of conviction should be nullified for purely technical reasons.

17. Criminal law ⚷1202(1)

Since the service of time after previous convictions is one of the essential elements of habitual criminal statute it would be violative of one of a defendant's substantial rights to punish him therefor without charging and proving such element of the offense. Pen.Code, §§ 644, 969a.

18. Criminal law ⚷1202(7)

Before a sentence of life imprisonment can be upheld, especially in a case where accused is found guilty of selling stolen goods of small value, it should affirmatively appear that the sentence is supported by a record which conforms to all the essential requirements of the law. Pen.Code, §§ 644, 969a.

19. Criminal law ⚷1202(7)

Where evidence sustained conviction for receiving stolen goods, but record did not justify judgment adjudging defendant to be an habitual criminal, case was remanded to trial court for pronouncement of sentence upon defendant for the conviction of receiving stolen goods. Pen.Code, § 669.

◆

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Frank Murray was convicted under two informations charging him with crime of receiving stolen goods and with five prior convictions of felony, and he appeals.

Judgment of conviction affirmed, but portion of judgment adjudging defendant to be habitual criminal annulled and cause remanded with directions.

Hearing denied; GIBSON, C. J., dissenting.

Raine Ewell, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for respondent.

KNIGHT, Justice.

The appellant, Frank Murray, was found guilty by a jury on two informations charging him with the crime of receiving stolen goods, and with five prior convictions of felony. The stolen goods consisted of two portable typewriters which he sold for $10 each. The prior convictions were admitted. The first was for robbery (a federal offense); the second was for burglary under the state law; the third was apparently for some federal offense not specified in the accusations; and the fourth and fifth were for violations of the narcotic laws, one federal and the other state. The informations were consolidated for trial, and it appearing that the crimes involved in the first and second prior convictions were among those specified in section 644 of the Penal Code, appellant was adjudged an habitual criminal, and as such sentenced to life imprisonment in the state prison. The appeal in each case was taken from the judgment and order denying the motion for new trial. The first point presented for consideration relates to the sufficiency of the evidence, the contention appellant makes in this behalf being that the verdicts and judgments are contrary to the evidence and the law. There is no merit in the contention.

Among the facts and circumstances established by the prosecution were the following: During the month of December, 1939, John Jackson, presumably under twenty-one years of age, and Thomas Ryan, operating separately, burglarized a number of residences in San Francisco, wherein they stole much property. They took the fruits of the burglaries to an apartment at 1323½ Octavia street and turned it over to William Carson, who occupied the apartment jointly with Jackson and Ryan. Carson had served two terms in the state prison, and three in federal penitentiaries, and he stayed in the apartment most of the time. Knowing the criminal means whereby Jackson and Ryan obtained the property, Carson piled it in the closets and behind the curtains in the apartment, and from time to time they proceeded to sell it and divide the money received therefrom. Part of the articles stolen by Jackson and by him turned over to Carson consisted of seven typewriters, about twelve fur coats, and a number of suits of clothes, radios, and suitcases. Two of the typewriters were stolen by Jackson from the homes of Murray F. Eskew and James Mullins. Appellant and Carson had known each other, according to the latter, "five or ten" years, their acquaintanceship having been formed while they were inmates of the penitentiary. Throughout the month of December appellant visited the Octavia street apartment on at least six or seven occasions, mostly during the evening. On one of the visits Carson told appellant he had some second-hand typewriters, and asked appellant if he knew where he, appellant, could sell them. Without inquiring how or where Carson obtained the typewriters, appellant replied that he believed he could sell them to some of the employees of a coal company where he had formerly worked. Shortly afterwards and on December 22, 1939, appellant called at the coal company's office and told William J. Powers, an employee therein, that he had a friend who operated a store and was selling out typewriters and radios, and that he could get them cheap. Powers told him to bring in one of the typewriters so that he could examine it, and an hour or two later appellant returned with the typewriter, which Powers purchased for $10. On December 30, 1939, appellant again called at the office and Powers told him that another employee had seen the typewriters and desired to purchase one; and within two hours appellant brought in another typewriter, which he sold to Levitt Brandt for $10. The sales transactions were witnessed by James Maloney and Miss Horton, two other employees, and after selling the typewriters appellant inquired whether any of them would be interested in buying any suits of clothes or fur coats; but when he began talking about these other articles the parties became suspicious and declined to transact any further business with him. In delivering the typewriters appellant was driven to the coal company's office by Jackson in an automobile, which, according to the latter's testimony, had been stolen. In regard to the deliveries Jackson testified that in response to a note he found under the apartment door with appellant's name signed to it, stating he had sale for the typewriters, he took one of the typewriters from the apartment, picked up appellant at the corner of Third and Market streets, and then drove to the coal company's office; that he waited outside in the car while appellant took the typewriter into the office and sold it; that upon returning to the automobile appellant handed him the money. Jackson further testified that a few days later appellant told him that he could sell a couple more typewriters at the same place, and thereafter the second sale and delivery was made in the same manner.

[1, 2] The testimony concerning the burglaries, the theft of the property, the concealment thereof and appellant's association with Jackson and Carson, was given by the two just mentioned, the former having been called as a witness for the prosecution, and the latter as a witness for appellant. At the time they testified Jackson was an inmate of Preston state reformatory; and Carson was serving a life sentence as an habitual criminal, based primarily on the criminal acts here involved. Furthermore, the record shows the following: On the night of January 4, 1940, the police called at the Octavia street apartment to arrest appellant, and at first he attempted to prevent them from entering by closing the door against them; but upon entering, the police found therein three fur coats, miscellaneous jewelry, ten or twelve suits of clothes, and a kit of burglar and safe-cracking tools. One of the police officers in testifying as to the circumstances of the arrest gave the house number as "13—1223½ Octavia", but the surrounding circumstances show that it was doubtless the same apartment occupied by Jackson, Ryan and Carson. Jackson testified that he divided the proceeds of the typewriter sales with Ryan and Carson; but following appellant's arrest a police officer asked appellant "how he got the typewriters", and he replied, "Well, the kids are bringing that stuff in by the load, furs, and everything else in there. Everybody else was selling it. I took some of it and took it out and sold it too. I always split fair with them, I always cut it in half and gave them half of what I got for it." Appellant did not take the witness stand to explain or deny any of the incriminating evidence introduced against him, and therefore, under the provisions of section 13 of article I of the state Constitution such failure was proper subject-matter for the jury's consideration. In view of the foregoing evidence there is no legal ground upon which it may be held that the jury was not warranted in finding the defendant guilty in each case.

[3] Section 496 of the Penal Code, upon which the informations were founded, declares in part that "Every person who for his own gain, or to prevent the owner from again possessing his property, buys or receives any personal property, knowing the same to have been stolen * * *," shall be punished as prescribed therein. In each information it was alleged that the typewriter was stolen by Thomas Ryan and John Jackson, and that appellant feloniously, etc., "and for his own gain, and to prevent the owner * * * from again possessing his said personal property", did buy and receive the same from Ryan and Jackson, knowing the same to have been stolen; and the verdicts read: "We the Jury, find the Defendant, Frank Murray, guilty of the crime of Felony, to-wit: Receiving Stolen Property, as charged in the Information." One of the objections appellant makes to the sufficiency of the evidence is that the prosecution failed to prove in the conjunctive as alleged in the information that appellant received the goods for his own gain and to prevent the owner from again possessing the same. Such objection is answered by the facts already narrated.

[4, 5] Nor does it matter that the goods were stolen by and that appellant received them from Jackson, rather than from Jackson and Ryan, as alleged in the information. All that the code section requires in this regard is proof that the goods were stolen and that the accused received them, knowing the same to have been stolen; and the broad form of the verdicts rendered necessarily includes an implied affirmative finding on each of the elements of the crime as defined by said code section and as alleged in the information. People v. De Vaughn, 136 Cal.App. 746, 29 P.2d 914. In the case of People v. Tilley, 135 Cal. 61, 67 P. 42, cited by appellant, a different form of verdict was rendered. By its terms the jury found merely that the defendant was "guilty of receiving stolen property", which the court held was insufficient in that it did not import affirmative findings on all the essential statutory elements of the crime as they were alleged in the information. But in so holding the court went on to say that the verdict would have been sufficient if there had been added thereto the words "as charged"; and such was the form of the verdicts in the present case.

[6-9] Two assignments of error are made concerning the trial court's rulings on the admissibility of evidence. Both assignments are general in terms, and neither is

supported by argument or citation of authority. The first is entirely without merit. The second is directed against a ruling permitting appellant's witness Carson to answer two questions on cross-examination as to whether he "had met" appellant "in the penitentiary". We are satisfied that the ruling does not call for a reversal. The inhibition embodied in section 1025 of the Penal Code to the effect that when previous convictions are admitted they shall not be alluded to during trial "is not basal or fundamental, but only a statutory regulation" (People v. Stennett, 51 Cal.App. 370, 197 P. 372, 378); that is to say, it is not absolute, and the courts have long since recognized certain exceptions thereto; for example, where the accused offers himself as a witness in the case he is deemed to have waived the protection of the statutory rule, and on cross-examination may be asked as any other witness, whether he has been convicted of a felony; also where the prior conviction is of the essence of the crime with which the defendant is charged, and is part of the res gestae. People v. McFarlan, 126 Cal.App. 777, 14 P.2d 1066. It is also held generally that the mere fact that the evidence which is material to the crime charged may disclose a prior conviction, serves as no valid objection to its admission. People v. Mullaly, 77 Cal.App. 60, 245 P. 811. The situation which brought about the asking of the questions here complained of was this: The principal defense relied upon by appellant before the jury, and now stressed on appeal, was and is that appellant did not know that the typewriters he was asked to sell and the other articles which he attempted to dispose of, were stolen property; and obviously appellant's real purpose in calling Carson as a witness was to prove that fact. Accordingly, on direct examination, Carson testified that none of the stolen property was exposed to appellant's view in the apartment; that he, Carson, made no mention whatever of the suits of clothes or furs; that when he asked appellant if he would sell some typewriters appellant did not ask how or where they had been obtained, nor did he tell appellant. In short, Carson gave his testimony on direct examination in such a manner as to convey the impression that there was nothing in his dealings or association with appellant which could have caused appellant to believe that the property had been stolen. In that situation it was doubtless within the scope of legitimate cross-examination, not only to test the truth of Carson's statement that he had not told appellant that the goods had been solen, but to show that because of the nature of the past relationship between appellant and Carson appellant must have known that Carson had not obtained the goods by honest means, and that in attempting to sell the same, through appellant, he was not engaged in any lawful enterprise. It may be conceded that if the prosecution had attempted to establish the fact of such relationship by its own witnesses and as part of its case, the rule declared by section 1025 would have been violated; but since the direct examination of appellant's witness opened the way for the prosecution, on cross-examination, to go into the matter, no error is shown, even though the cross-examination did reveal that appellant had been an inmate of the penitentiary.

The final point made by appellant that the court erred in denying the motions for new trial includes only matters already discussed and decided.

We are of the opinion, however, that the prosecution failed to comply with certain essential statutory and judicial requirements in laying the proper foundation for a valid adjudication that appellant was an habitual criminal, and therefore that the portion of the judgment adjudging him to be such and sentencing him to imprisonment for life cannot be sustained.

[10, 11] Section 644 of the Penal Code, from which a trial court derives its power to adjudge an accused an habitual criminal, was amended in 1931, and by said amendment a clause was inserted in said code section, making actual servitude in a state prison or federal penitentiary for the prior conviction charged a prerequisite to an adjudication that the accused is an habitual criminal; and since the amendment it has become the settled law of this state that in order to invoke the operation of the habitual criminal statute the prosecution in addition to alleging and proving the fact of the prior conviction must allege and prove that the accused has served a term of imprisonment in a state prison or federal penitentiary for the particular felony of which he is charged with having been previously convicted, and that the failure to allege or prove such servitude is fatal to the adjudication, unless it appears from the record in some manner that the accused has

admitted having served such term of imprisonment or that the court in its judgment has so found. In re Fontino, 135 Cal.App. 466, 27 P.2d 413; In re McConnell, 5 Cal.2d 436, 55 P.2d 205; People v. Birdsell, 21 Cal.App.2d 682, 70 P.2d 231; People v. Nicholson, 34 Cal.App.2d 327, 93 P.2d 223.

[12] The law does not require allegation or proof of imprisonment for the full term; service of part time is sufficient to bring the case within the purview of the statute. People v. Carkeek, 35 Cal.App.2d 499, 96 P.2d 132. The same doctrine has long since been applied in dealing with cases arising under sections 666 and 667 of the Penal Code, which provide also for increased punishment in case of prior convictions of certain offenses, and likewise contain clauses making servitude in a penal institution for the previous offense a prerequisite to the imposition of the increased punishment. People v. Dawson, 210 Cal. 366, 292 P. 267; In re Boatwright, 216 Cal. 677, 15 P.2d 755; People v. Arnest, 133 Cal.App. 114, 23 P.2d 812.

[13] In the present case the clerk's transcript shows that when the informations were filed they contained no charges of prior convictions; that at the time of the arraignment the trial court, at the request of the district attorney, "ordered the Informations Amended by adding five prior convictions of a Felony"; that on the following day, upon being rearraigned, appellant pleaded not guilty to the main charges and denied the prior convictions; that a month later, at the opening of the trial and after the jury had been selected and sworn but in the absence thereof, appellant admitted "the five prior convictions of a Felony, as charged in Informations * * *" and the trial then proceeded. Section 969a of the Penal Code provides that when an information is ordered amended to charge prior convictions, the defendant "shall promptly be rearraigned on such information * * * *as amended* and be required to plead thereto" (italics ours). It does not appear from the record that any amended informations were filed. The prior convictions are merely set forth in the transcript under the heading "Prior Convictions"; and they are unsigned and without any introductory or concluding language making them part of the informations. Furthermore, the record does not show that any evidence was offered to prove that appellant served terms of imprisonment for any of said prior convictions nor that he admitted having done so; nor does the judgment contain any finding to that effect; therefore, under the doctrine of the cases above cited, unless it appears that the informations contain appropriate affirmative allegations that as a result of the prior convictions of robbery and burglary appellant served terms of imprisonment, the adjudication that he is an habitual criminal cannot be sustained. The allegations are as follows: "Prior Convictions: I. And he, the said Frank Murray, prior to the commission of the foregoing offense *was received* at San Quentin prison on or about the 7th day of November, 1913, having been convicted in the United States District Court for the Southern District of California, under the name of Ingwal Olson, of the crime of felony, to wit: robbery of personal property of the United States. II. That he, the said Frank Murray prior to the commission of the foregoing offense *was received* at San Quentin Prison on or about the 30th day of November, 1921, having been convicted in the Superior Court of the State of California in and for the County of Santa Cruz under the name of Ingwald Olsen of the crime of felony, to-wit, burglary, second degree, and was thereafter transferred to Folsom prison." (Italics ours.)

[14, 15] The wording of the habitual criminal statute is that "Every person convicted in this state of any felony who shall have been previously twice convicted upon charges separately brought and tried, and who shall have served separate terms therefor in any state prison and/or federal penitentiary, either in this state or elsewhere", etc. As will be noted, the concluding words of the allegations charging the prior conviction for burglary are that appellant "was thereafter transferred to Folsom prison", from which the inference probably can be drawn that for such conviction appellant served a term of imprisonment. But the allegations charging the prior conviction of robbery are merely that appellant "was received at San Quentin prison * * * having been convicted" of a certain crime; and it is our conclusion that to allege merely that appellant "was received" at the state prison falls far short of being the equivalent of an al-

legation such as the law requires, that for said conviction he has served a term of imprisonment in the state prison. Assuming that the use of such words as "imprisoned", "incarcerated", or "confined", would be sufficient to satisfy the requirement of the rule, we are of the opinion that to hold that the words "was received" at the prison import that appellant served a term of imprisonment therein would be clearly distorting the meaning of the word "received". True, the clerk's transcript shows that appellant admitted "the five prior convictions of a Felony, as charged in Informations * * *"; but as held in People v. Dawson, supra, [210 Cal. 366, 292 P. 270], he must be deemed to have "pleaded guilty only to as great a charge as was contained in the information". In other words, he is entitled to the benefit of the record as thus made. People v. Willison, 116 Cal. App. 157, 2 P.2d 543.

[16-18] It should be here stated that the point concerning the invalidity of the adjudication that appellant is an habitual criminal was not urged by counsel for appellant; and it should be stated also that in reaching the foregoing conclusion, we have not been unmindful of the fundamental rule that no portion of a judgment of conviction should be nullified for purely technical reasons. But since service of time after previous conviction is made one of the essential elements of the habitual criminal statute, it would be violative of one of appellant's substantial rights to punish him therefor without charging and proving this element of the offense. See concurring opinion in Re Boatwright, supra. Stated another way, before a sentence of life imprisonment be upheld, especially in a case such as this where the accused is found guilty of selling stolen goods of small value, it should affirmatively appear that the sentence is supported by a record which conforms to all of the essential requirements of the law.

[19] It is ordered, therefore, that in each case the judgment of conviction for receiving stolen goods and the order denying the motion for new trial be and the same are and each of them is hereby affirmed; that the additional portions of the judgments adjudging appellant to be an habitual criminal be and the same are hereby annulled, and the trial court is directed to pronounce sentence upon appellant in conformity with section 669 of the Penal Code for the two convictions of receiving stolen goods; and for such purpose the cause is remanded to the trial court.

We concur: PETERS, P. J.; WARD, J.

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42 Cal.App.2d 182

WALLACE v. KERR et al.

Civ. 11273.

District Court of Appeal, First District,
Division 1, California.
Dec. 30, 1940.

1. Conspiracy 🔑21

Where plaintiff suing for damages for conspiracy failed to establish a case which would sustain a judgment in her favor, the trial court was justified in granting nonsuit.

2. Conspiracy 🔑6

A conspiracy cannot be made the subject of a civil action unless something is done which, without the conspiracy would give a right of action, since damage is the gist of the action, not the conspiracy.

3. Conspiracy 🔑6

It is wrong done and the damage suffered pursuant to conspiracy which is cause of action for conspiracy, rather than conspiracy itself.

4. Conspiracy 🔑1

The elements of an action for civil conspiracy are the formation and operation of conspiracy and damage resulting to plaintiff from an act or acts done in furtherance of the common design.

5. Conspiracy 🔑21

Where amended complaint for conspiracy alleged that defendants, including plaintiff's divorced husband, maliciously conspired together for purpose of defaming and destroying good name and reputation of plaintiff, and injuring her reputation as a mother for purpose of destroying affection and regard of plaintiff's daughter, but plaintiff took the position that the action was not one for slander nor one for alienation of affections, so that the only injury about which plaintiff could complain resulted from guardianship proceeding which was instituted and maintained by her daughter in her own name after she reached age of 18, plaintiff failed to establish a case entitling her to judgment and nonsuit was justified.

6. Conspiracy 🔑6

Action for conspiracy could not be based upon fact that plaintiff's daughter whose custody had been awarded to plaintiff in divorce proceeding instituted guardianship proceeding after reaching age of 18, regardless of whether daughter was aided or encouraged by defendants.

7. Guardian and ward 🔑10, 13(3)

Where custody of minor daughter was awarded to mother in divorce proceeding, daughter on reaching age of 18 was entitled to petition for and nominate her own guardian.

8. Appeal and error 🔑1056(6)

In conspiracy action, court's ruling that certain statements made by some of the defendants to plaintiff out of presence of other defendants were binding only on defendant making statements, and excluding other declarations entirely as hearsay, was not prejudicial error where effect of such statements if admitted for all purposes would not have been legally sufficient to establish a case in favor of plaintiff.

9. Damages 🔑72

Where plaintiff instituting action for conspiracy took the position that action did not involve slander, portion of judgment awarding each of the defendants $100 attorney's fees was improper.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Leonora Wallace, etc., against Andrew Kerr and others for damages for conspiracy. From an adverse judgment, plaintiff appeals.

Judgment modified and as modified affirmed.

Carlton D. Dethlefsen, of San Francisco, for appellant.

Athearn, Chandler & Farmer, of San Francisco, for respondents.

Wm. Penn Humphreys, of San Francisco, for respondent Tillie Kerr.

KNIGHT, Justice.

[1] This is an appeal from a judgment for defendants entered pursuant to an order granting a motion for nonsuit in an action for the recovery of damages. We are of the opinion that plaintiff failed to establish a case which would have sustained a judgment in her favor, and therefore that the trial court was justified in granting the nonsuit.

The amended complaint upon which the cause went to trial was entitled "Amended Complaint for Conspiracy". In the first paragraph it was alleged that the defendants "maliciously conspired together for the purpose of defaming and destroying the good name and reputation of the plaintiff and to injure her reputation as a mother for the purpose of destroying the affection and regard of plaintiff's daughter, Louise Elizabeth Kerr, for her mother, the plaintiff herein". Then followed a narration of certain statements and acts plaintiff alleged were made and committed by defendants in furtherance of the alleged conspiracy; and in the final paragraph of said complaint is was alleged: "That said acts * * * and said statements * * * have injured said plaintiff in her health and reputation and have further deprived her of the love, affection and companionship" of her daughter, to plaintiff's damage in the sum of $100,000. The parties sued were Andrew Kerr, plaintiff's former husband and the father of Louise; Kerr's present wife, Mathilda, sued herein as Tillie Kerr; Adelaide Brown, plaintiff's sister; and Dennis Pickens, a friend of Louise. The statements and acts plaintiff alleged were made and committed by the defendants in furtherance of the alleged conspiracy were in substance that they told Louise that her mother was not a fit and proper person to have her custody; that plaintiff was insane and crazy, and that they advised Louise to leave plaintiff; that Adelaide Brown in the presence of Louise threatened to "railroad" plaintiff into an insane asylum if she sought to restrain her daughter; that Andrew Kerr made a similar statement to plaintiff; that he sent Louise transportation fare to come from New York to San Francisco by airplane to institute certain proceedings for the appointment of a guardian, and that he furnished the money to maintain said proceedings.

At the time the original complaint was filed Louise was past eighteen years of age;

and the background of the litigation, as it appears from the record, may be stated as follows: In September, 1923, plaintiff obtained an interlocutory decree of divorce from Kerr. She was awarded the care, custody and control of Louise, who was then about five years old, and Kerr was ordered to pay to plaintiff the sum of $75 a month for the support, maintenance and education of Louise. The provisions of the final decree were in conformity with those of the interlocutory decree, and Louise remained under plaintiff's care and custody until the early part of January, 1937, when she petitioned the superior court for the appointment of a guardian of her person, whom she nominated. Plaintiff filed objections to the granting of the petition, and appeared at the hearing in person and by attorney; and on April 21, 1937, Mrs. Mary C. Kohler, the ward's nominee, was appointed guardian. Plaintiff appealed, but on November 30, 1938, the trial court's order was affirmed. In re Kerr's Guardianship, 29 Cal.App.2d 439, 85 P.2d 145. Meanwhile, between the date of the filing of the petition for the appointment of a guardian and the making of the order granting the same, to-wit, on April 5, 1937, appellant brought the present action. On November 29, 1937, the amended complaint was filed; the trial of the action began on October 10, 1938, and the nonsuit was granted on October 17, 1938, which it will be noted was approximately six weeks prior to the affirmance of the order appointing Mrs. Kohler as guardian.

[2-4] It is well settled that a conspiracy cannot be made the subject of a civil action unless something is done which without the conspiracy would give a right of action. The damage is the gist of the action, not the conspiracy. Bowman v. Wohlke, 166 Cal. 121, 135 P. 37, Ann.Cas.1915B, 1011; Moore v. Finger, 128 Cal. 313, 60 P. 933. It is the wrong done and the damage suffered pursuant to the conspiracy which is the cause of action, rather than the conspiracy itself. Rapaport v. Forer, 20 Cal. App.2d 271, 66 P.2d 1242. In other words, as stated in Mox, Inc. v. Woods, 202 Cal. 675, 262 P. 302, 303: "The elements of an action for civil conspiracy are the formation and operation of the conspiracy and damage resulting to plaintiff from an act or acts done in furtherance of the common design. The cause of action is the damage suffered. 'It is a general and well-settled principle of law that, where two or more persons are sued for a civil wrong, it is the civil wrong resulting in damage, and not the conspiracy, which constitutes the cause of action.'" Citing Herron v. Hughes, 25 Cal. 555; Davitt v. American Bakers' Union, 124 Cal. 99, 56 P. 775; Dowdell v. Carpy, 129 Cal. 168, 61 P. 948; Menner v. Slater, 148 Cal. 284, 83 P. 35; see, also, Revert v. Hesse, 184 Cal. 295, 193 P. 943; Burckhardt v. Woods, 124 Cal.App. 345, 12 P.2d 482.

[5-7] In the present case plaintiff at the time of the hearing of the demurrers, and throughout the trial of the cause and on this appeal, has taken the positive position that the action is not one for slander, nor one for alienation of affections, and therefore that no recovery could be had on either of those theories; but it is contended that it is an action "for damages against members of a conspiracy for a malicious wrong". The single authority cited therefor is Mangum Electric Co. v. Border, 101 Okl. 64, 222 P. 1002. An examination of that case would seem to show that it is essentially different from the present one; but even though it be held that the law of this state recognizes the form of action there prosecuted, plaintiff has failed to point out, as required by the authorities above cited, what actionable wrong was committed by the defendants or any of them whereby she was injured. Obviously the injury could not be the loss of the love, affection and companionship of her daughter, because they are the elements of an action for alienation of affection; nor could it be for injury to plaintiff's good name and reputation, because those are the elements of a cause of action for slander; and as stated, plaintiff has strenuously insisted at all times that neither of those causes of action is here involved. It would appear, therefore, that the only injury about which plaintiff could complain resulted from the guardianship proceeding, which was not actionable, for admittedly it was instituted and maintained by her daughter in her own name, and whether she was aided or encouraged by any of the defendants so to do would seem to be immaterial, because being of the age of eighteen she was entitled to petition for and nominate her own guardian; and after a full hearing at which both parents were present and testified, the trial court found as alleged in her petition that it was

for the best interests of the child that a guardian other than plaintiff be appointed for her; and the trial court's decision was upheld on appeal. Therefore, in view of the foregoing, it is apparent that even though testimony was given by plaintiff in support of the allegations made in her amended complaint as to the statements and acts made and committed by the defendants, a judgment for damages based thereon could not have been legally sustained.

[8] During the course of the trial the court ruled that certain statements made by some of the defendants to plaintiff out of the presence of the other defendants were binding only on the defendants making the statements; and other declarations which plaintiff claims some of the defendants made to her were excluded entirely as hearsay. We find no error in any of the foregoing rulings; and in any event, the effect of such declarations and statements if admitted for all purposes would not have been legally sufficient to establish a case in favor of plaintiff under the theory under which it was brought and tried.

[9] We are unable, however, to sustain that portion of the judgment awarding each of the defendants $100 attorneys' fees. In this connection the record shows that at the commencement of the trial, on motion of defendants, the court required plaintiff to post a bond upon the theory that the action was one for slander; but as stated, plaintiff has at all times insisted that it was not such an action, and the judge of another department of the same court so held at the time the demurrers were overruled, in denying defendants' motion to dismiss the action upon the ground that a bond had not been posted. Moreover, the order granting the motion for nonsuit was not based upon the ground that the action was one for slander. Therefore, in that state of the record, we are of the opinion that the action cannot be treated as such for the purpose of exacting the payment of attorneys' fees.

In accordance with the views above expressed, it is ordered that the judgment be modified by striking therefrom the allowance for attorneys' fees, and as thus modified it will stand affirmed, respondents to recover costs.

We concur: PETERS, P. J.; WARD, J.

In re CHILDS' ESTATE.*

DWIGHT et al. v. RILEY, State Controller.

Civ. 12830.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1940.

Rehearing Denied Jan. 28, 1941.

Hearing Granted Feb. 27, 1941.

1. Statutes ⚷245
Taxation ⚷2

All laws imposing taxes on the person or property of an individual for a public purpose must find an express statutory authority, and all such laws should be construed strictly in favor of the citizens and against the state.

2. Constitutional law ⚷70(1)

A court may not properly rewrite a statute or insert provisions which are not included therein when exercising its power to interpret a statute.

3. Taxation ⚷859(7)

The taxability of a transfer inter vivos is determined by the law in effect at the time the transfer is made, and no subsequent act of the legislature can thereafter add to or diminish the tax or otherwise disturb it.

4. Taxation ⚷859(7)

An inheritance tax act cannot constitutionally be given a retroactive effect on transfers which have vested before its passage so as to increase the tax on those transfers, and an attempt to do so is void.

5. Taxation ⚷861, 873, 886½

Where a transferee has received a gift inter vivos and title has vested as of date of gift but with intention on transferor's part that gift shall not take effect in possession or enjoyment until after transferor's death, before death law in force at time of gift is amended by changing tax rate or amount of exemption, and upon death transferee receives property of deceased transferor as a testamentary beneficiary, value of property transferred by gift and value of property passing by will cannot be combined for purpose of ascertaining tax rate, but the two transfers should be treated as separate taxable units. Gen.Laws 1937, Act 8495, § 2.

6. Taxation ⚷861, 873, 886½

Where a transferee has received a gift inter vivos and title has vested as of date of gift but with intention on transferor's part that gift shall not take effect in possession or enjoyment until after transferor's death, before death law in force at time of gift is amended by changing tax rate or amount of exemption, and upon death transferee receives property of deceased transferor as a testamentary beneficiary, tax rate on property passing by will should be calculated and exemptions therefrom allowed solely upon value of property vesting in beneficiary by virtue of will without adding value of previous gifts. Gen.Laws 1937, Act 8495, § 2.

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* Subsequent opinion 115 P.2d 432.

7. Taxation 🔑861, 873, 886½

Computation of transfer and inheritance tax increasing amount of tax on inter vivos transfers over that which was fixed at date of transfers by not allowing proper exemptions and by bringing a larger sum into higher taxation bracket and by failing to treat inter vivos transfers and transfer by virtue of decedent's will as separate taxable units for purpose of exemption and tax rate was erroneous. Gen.Laws 1937, Act 8495, § 2.

8. Taxation 🔑861, 873, 886½

Where decedent who died on September 24, 1935, had before her death made irrevocable transfers to persons who were also beneficiaries under her will, each share passing to a beneficiary at decedent's death, should be taxed at rate and with exemptions provided by Inheritance Tax Act of 1935 for a share of such value and should not be taxed at a higher rate reached by superimposing value of such share on value of property transferred to beneficiary by decedent before effective date of 1935 act and without any exemption under that act. Gen.Laws 1937, Act 8495, § 2.

9. Taxation 🔑873, 886½

Where decedent who died on September 24, 1935, had made irrevocable transfers of $15,000, $7,000, and $92,163.51 in 1920, 1926, and 1927 to persons who were also beneficiaries under her will, and probate residue transferable to each beneficiary was $36,909.58, correct method of computation of transfer and inheritance tax under statute was to exempt $10,000 of inter vivos transfers, tax $15,000 at one per cent., $25,000 at two per cent., $50,000 at four per cent., and balance at seven per cent., and to exempt $5,000 of probate residue and tax $20,000 at two per cent., and balance at three per cent. Gen.Laws 1937, Act 8495, § 2.

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Proceedings in the matter of the estate of Emeline Childs, deceased, wherein Emma Childs Dwight and others instituted a proceeding against Harry B. Riley, State Controller. From an order fixing an inheritance and transfer tax upon gifts by the decedent before her death and upon the estate of decedent, Emma Childs Dwight and others appealed to the Supreme Court, and that court transferred the appeal to the District Court of Appeal for decision pursuant to the provisions of article 6, § 4c, of the Constitution.

Order reversed, with instructions.

Burr & Smith, of Los Angeles (A. J. Cathcart, of Los Angeles, of counsel), for appellants.

James W. Hickey, Inheritance Tax Atty., of Sacramento, Raymond G. LaNoue, Asst. Inheritance Tax Atty., of Los Angeles, and Alvin P. Jacobs, Asst. Inheritance Tax Atty., of Sacramento, for respondent.

McCOMB, Justice.

This appeal transferred from the Supreme Court to this court for decision pursuant to the provisions of Article VI, section 4c of the Constitution of the State of California, is from an order of the superior court sitting in probate fixing an inheritance and transfer tax upon (a) gifts by the decedent prior to her death and (b) the estate of decedent.

These are the conceded facts:

The inheritance tax appraiser reported that on September 24, 1935, decedent died and that there had passed to each of appellants, either by transfer prior to decedent's death or by decedent's will, property of the fair market value as indicated in the following table:

"Name of Appellant:	Hortense Childs Reynolds	Emma Childs Dwight	Carrie M. Hicks
1920 Transfer:	$ 15,000.00	$ 15,000.00	$ 15,000.00
1926 Transfer:	7,000.00	7,000.00	7,000.00
1927 Transfer:	92,163.51	92,163.51	92,163.51
Probate Residue:	36,909.58	36,909.58	36.909.58
Total:	$151,073.09	$151,073.09	$151,073.09"

It was stipulated at the time of the hearing in the lower court that each of the transfers listed in the foregoing table were irrevocable, absolute, and unconditional, and that the interests of the transferees vested immediately on the making of each transfer and were intended to take effect in possession or enjoyment at or after the death of decedent.

Appellants rely for reversal of the order of the trial judge on this proposition·

Each appellant's share of decedent's estate passing to her at decedent's death September 24, 1935 (as distinguished from a share passing to such appellant under transfers made prior thereto) should be taxed at the rate and with the exemptions provided by the Inheritance Tax Act of 1935 for a share of such value and should not be taxed at a higher rate reached by superimposing the value of such share on the value of property transferred to such appellant by decedent prior to June 25, 1935 (the effective date of the Inheritance Tax Act of 1935) and without any exemption under the 1935 act.

This proposition we believe to be tenable. The applicable portions of the Inheritance Tax Act of 1935 (Stats. [1935] 1266, Deering's General Laws of California, Act 8495, vol. Two, p. 3953) are as follows:

"Section 2. A tax shall be and is hereby imposed upon the transfer of any property * * * to persons, institutions or corporations, not hereinafter exempted * * * said taxes to be upon the market value of such property at the date of death of the decedent and at the rates hereinafter prescribed and only upon the excess over the exemptions hereinafter granted in the following cases:

"(1) When the transfer is by will or by the intestate or homestead laws of this State, from any person dying seized or possessed of the property while a resident of the State, or by any order of court setting apart property and/or making and granting extra or family allowances pursuant to the provisions of the Probate Code.

* * * * *

"(3) When the transfer is of property made by a resident * * * by deed, grant, bargain, sale, assignment or gift, made without valuable and adequate consideration (i. e., a consideration equal in money or in money's worth to the full value of the property transferred):

* * * * *

"(b) Intended to take effect in possession or enjoyment at or after such death, or in which a life income or interest is reserved by the grantor, either expressly or impliedly, or by the grantee promising to make payments to or care for the grantor.

* * * * *

"(10) When more than one transfer within the meaning of any of the preceding subdivisions of this section has been made, either before or after the passage of this act, by a decedent to one person, the tax shall be imposed upon the aggregate market value of all of the property so transferred to such person in the same manner and to the same extent as if all of the property so transferred were actually transferred by one transfer made at the date of the transferor's death and with the value, rates and exemptions as of that date."

The settled rules of law which are pertinent to the present case are:

[1] (1) All laws for the purpose of imposing or collecting taxes upon the person or property of an individual for a public purpose must find an express statutory authority and all such laws are to be construed strictly in favor of the citizens and against the state (Estate of Potter, 188 Cal. 55, 64, 204 P. 826).

[2] (2) A court may not properly in the exercise of its power to interpret a statute rewrite the same or insert provisions which are not included therein (Seaboard Acceptance Corp. v. Shay, 214 Cal. 361, 369, 5 P.2d 882).

[3] (3) The taxability of a transfer inter vivos is determined by the law in effect at the time the transfer is made and no subsequent act of the legislature can thereafter add to or diminish the tax or otherwise disturb it (Riley v. Havens, 193 Cal. 432, 434, 225 P. 275; Estate of Potter, supra, 188 Cal. at page 59, 204 P. 826).

[4] (4) An inheritance tax act cannot constitutionally be given a retroactive effect upon transfers which have vested prior to its passage so as to increase the tax upon such transfers and an attempt so to do is void (Estate of Potter, supra, 188 Cal. at page 71, 204 P. 826).

[5, 6] (5) Where a transferee has received gifts of property inter vivos and the title to such property has vested as of the date of the gift but with the intention upon the part of the transferor that the gift shall not take effect in possession or enjoyment until after the death of the transferor, and prior to the death of the transferor the law in force at the time of said gift is amended by changing the tax rate or the amount of exemption, and upon the death of the transferor the transferee receives property of the decedent as a beneficiary, the value of the property trans-

ferred by the gift and the value of the property passing by the will cannot be combined for the purpose of ascertaining the tax rate. In such a case the tax rate on the property passing by will is to be calculated and the exemptions therefrom allowed solely upon the value of the property vesting in the beneficiary by virtue of decedent's will without adding the value of previous gifts. The two transfers are to be treated as separate taxable units, having no relation to each other (Estate of Potter, supra, 188 Cal. at page 74, 204 P. 826; Estate of Brown, 196 Cal. 114, 128, 236 P. 144).

[7-9] The lower court computed the tax on each appellant's share by aggregating the value of the transfers prior to decedent's death and the net value of the estate passing to each appellant by decedent's will, and allowing one exemption to each appellant of $10,000. The computation was as follows:

"$10,000.00	Exempt	
15,000.00 at 1%	$ 150.00	
25,000.00 at 2%	500.00	
50,000.00 at 4%	2,000.00	
14,163.51 at 7%	991.45	
36,909.58 at 7%	2,583.67	
Total tax		$6,225.12"

The foregoing basis of computation by the lower court was clearly erroneous, as it contravenes the second and fourth rules of law above stated in that (a) it increases the amount of the tax on the various transfers made during the lifetime of the decedent over that which was fixed at the date of the transfers by not allowing proper exemptions and by bringing a larger sum into the higher taxation bracket; and (b) it fails to treat the transfers inter vivos and the transfer by virtue of decedent's will as separate taxable units for the purpose of exemption and tax rate as provided under the fourth rule above stated. The correct method of computation in accordance with the fourth rule, supra, is as follows:

"$10,000.00	Exempt	
15,000.00 at 1%	$ 150.00	
25,000.00 at 2%	500.00	
50,000.00 at 4%	2,000.00	
14,163.51 at 7%	991.45	
5,000.00	Exempt	
20,000.00 at 2%	400.00	
11,909.58 at 3%	357.28	
Total tax		$4,398.73"

The various attempts by respondent to support the method of computation by the trial court contravened the first, second, third, and fourth rules of law above stated. The contention that the method used by the trial court does not increase the tax on the gifts inter vivos but merely increases the amount of the tax on the property passing under decedent's will overlooks the rule of law first stated above that tax statutes must be construed strictly in favor of the taxpayer and it also asks this court to put a construction upon a set of facts which is strained and contrary to that which would be accepted by the ordinary business man or in fact the citizen of average intelligence.

For the foregoing reasons the order from which an appeal has been taken is reversed with instructions to the trial court to compute the taxes in accordance with the views hereinbefore expressed.

We concur: MOORE, P. J.; WOOD, J.

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42 Cal.App.2d 282

WALSH v. WALSH.

Civ. 12798.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1940.

Rehearing Denied Jan. 28, 1941.

Hearing Denied Feb. 27, 1941.

1. Contracts ⚷187(1)

A child can enforce provisions of his parents' property settlement agreement made for his benefit in the same manner as could a party to the agreement.

2. Judgment ⚷181

Where property settlement agreement between mother and father provided that father was to make certain payments to mother in consideration of her undertaking the maintenance, support, and education of children, a minor child could maintain action against his mother to enforce provisions for his support, maintenance, and education, and where there was an issue regarding whether the mother had provided for maintenance, support, and education of the minor, mother's motion for summary judgment should have been denied. Code Civ.Proc. § 437c.

3. Attachment ⚿244

A notice for an order dissolving an attachment theretofore issued must specify the grounds wherein the writ was improperly issued. Code Civ.Proc. § 556.

4. Attachment ⚿5, 6

An attachment may be issued when an action is founded upon a contract express or implied. Code Civ.Proc. § 537, subd. 1.

5. Attachment ⚿244

In minor's action against mother to enforce provisions for his support, maintenance, and education contained in property settlement agreement between mother and father, mother's notice of motion for order dissolving attachment stating that motion would be based on all of papers and files in action, on the points and authorities filed, and upon further ground that cause of action of minor had no foundation in law or in fact and was frivolous and sham, did not state grounds whereon it was urged that the writ of attachment had been improperly issued, and therefore motion to dissolve writ of attachment was improperly granted. Code Civ. Proc. § 537, subd. 1; § 556.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge

Action for money had and received by Robert R. Walsh against Miriam C. Walsh. From a judgment of dismissal and an order dissolving an attachment, plaintiff appeals.

Judgment and order reversed.

See, also, 108 P.2d 763.

Roland Rich Woolley, of Los Angeles, for appellant.

Robert W. Kenny, Morris E. Cohn, and Max Sisenwein, all of Los Angeles, for respondent.

McCOMB, Justice.

Plaintiff appeals from (1) a judgment of dismissal predicated upon the granting of defendant's motion for a summary judgment pursuant to the provisions of section 437c of the Code of Civil Procedure, and (2) an order dissolving an attachment.

So far as material here the complaint is in the form of a common count for money had and received. Plaintiff's affidavit in opposition to defendant's motion for a summary judgment alleges that Raoul A. Walsh and defendant were husband and wife and that plaintiff is the adopted minor son of said parties; that February 21, 1927, defendant and her husband entered into a property settlement agreement (hereinafter designated as the "first agreement"), which contract was modified by a subsequent agreement between the parties dated October 17, 1934 (hereinafter designated as the "second agreement"); and that defendant has failed, neglected, and refused to provide for the support, maintenance, and education of plaintiff, pursuant to the terms of the contracts aforesaid.

The first agreement read in part as follows:

"AGREEMENT.

"This agreement, made this 21st day of February, 1927, by and between Raoul A. Walsh, hereinafter referred to as the husband, and Miriam C. Walsh, hereinafter referred to as the wife,

"Witnesseth:

* * * * * *

"Whereas, the parties hereto have two children, to-wit, John R. Walsh, born on the 10th day of July, 1914, and Robert R. Walsh, born on the 4th day of February, 1922, and,

* * * * * *

"II. The husband shall, on or before the 31st day of December, 1927, pay to the wife, for her separate use and benefit the sum of Ten Thousand ($10,000.00) Dollars, and on or before the 31st day of December, 1928, the further sum of Ten Thousand ($10,000.00) dollars. * * * The said sums shall be paid to her in addition to the payments to be made to her for her maintenance and support and in consideration of her undertaking the maintenance and support of said children or either of them, as hereinafter provided, and in addition to any and all payments which the husband shall be obliged to make in any other paragraph of this agreement.

"III. The husband shall, so long as the wife remains unmarried to any person other than the husband, pay to the wife, for her separate maintenance and support, and for her separate use and benefit, and in consideration of her undertaking the support and maintenance of said children, or either of them, the sum of Five Hundred ($500.00) Dollars per week; provided, however, that if at any time the gross income of the husband from all sources shall be less than One Thousand ($1,000.00) Dollars per week, then during the time when such gross income is less than One Thousand ($1,000.00) Dollars per week the husband shall pay the wife a sum equal to one-half (½) of such gross income. The term 'gross income' as here used shall include all moneys to which the husband is or may be entitled from any source whatsoever, during any calendar year in which such period is included, whether such income is received during said period or not.

"IV. Should the wife marry any person during the lifetime of the husband, the husband shall, nevertheless, so long as she shall have the custody and control of the children or of either of them, as in paragraph VIII hereof provided, pay to her, in consideration of her undertaking the support and maintenance of said children or either of them, the sum of Fifty ($50.00) Dollars each per week."

Paragraphs 1 and 2 of the second agreement read thus:

"1. The parties hereto have heretofore made an agreement in writing dated the 21st day of February, 1927, and hereinafter sometimes referred to as 'Original Contract'. Except as modified in paragraph 2 of this agreement, the Original Contract is to remain in full force and effect; it being the intention of the parties to hereby ratify the Original Contract, in accordance with the terms thereof as modified only by paragraph 2 of this agreement and notwithstanding any act or acts heretofore done, or any agreement or agreements heretofore made, by either or both of the parties, or any waiver or waivers or modification or modifications heretofore made in the terms of the Original Contract.

"2. The Original Contract is hereby modified by deleting from paragraph III thereof the words and figures 'Five Hundred ($500.00) Dollars' wherever said words and figures now appear in said paragraph III, and by inserting the words and figures 'Three Hundred Twenty-five Dollars ($325.00)' wherever the words and figures 'Five Hundred ($500.00) Dollars' now appear in said paragraph III."

In defendant's affidavit accompanying her motion for a summary judgment she denies that she owes plaintiff any sum whatsoever.

These are the questions necessary for us to determine:

First: May a minor child sue to enforce the provisions for his support, maintenance, and education contained in a property settlement agreement between his mother and father?

Second: Did the trial court err in granting defendant's motion to dissolve the attachment which plaintiff had caused to be issued?

[1] The first question must be answered in the affirmative. The law is established in California that a child can enforce the provisions of a property settlement agreement made for his benefit in the same manner as could a party to the agreement. (Mutual Life Ins. Co. v. Henes, 8 Cal.App.2d 306, 311, 47 P.2d 513; see, also, Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, 244, 73 P.2d 1163.)

[2] Applying the foregoing rule to the facts of the instant case, it is apparent that the first property settlement agreement was made for the benefit, among other things, of the plaintiff herein, and that the second agreement did not in any way change the character of the first agreement on this point. Therefore, plaintiff was entitled to maintain the present action and, since there was an issue between the parties as to whether or not defendant had provided for the maintenance, support, and education of plaintiff, the motion for a summary judgment should have been denied and the case tried upon its merits.

The second question must be answered in the affirmative and is governed by these pertinent principles of law:

[3] (1) A notice pursuant to section 556 of the Code of Civil Procedure for an order dissolving an attachment theretofore issued must specify the grounds wherein the writ was improperly issued. (Donnelly v. Strueven, 63 Cal. 182, 183.)

[4, 5] (2) An attachment may be issued when the action is founded upon a contract express or implied. (Sec. 537, subd. 1, Code Civ.Proc.) In the instant case defendant's notice of motion read in part as follows:

"Said motion will be based upon all of the papers and files in this action; upon the points and authorities on file herein; upon the further ground that the cause of action of the plaintiff herein has no foundation in law or in fact and is frivolous and sham."

Applying the rules of law above stated, it is obvious that defendant's notice of motion did not state the grounds whereon it was urged that the writ of attachment had been improperly issued. From the affidavits before the trial court it is undisputed that plaintiff's claim was predicated upon rights arising upon a contract. Therefore, the motion to dissolve the writ of attachment should have been denied.

For the foregoing reasons the judgment and order are and each is reversed.

I concur: MOORE, P. J.

I concur in the judgment: WOOD, J.

WALSH v. WALSH.*

Civ. 12729.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1940.

Rehearing Denied Jan. 28, 1941.

Hearing Granted Feb. 27, 1941.

1. Contracts 🔑176(1)

It is for the trial court in the first instance to construe ambiguous terms in a contract.

2. Appeal and error 🔑1008(3)

Where a writing is uncertain and either of two constructions may be sustained, it is not within the functions of a court of review to declare that the interpretation given by the trial court should be supplanted by another construction of which the instrument is equally susceptible.

3. Parent and child 🔑3(1)

Where property settlement agreement between mother and father provided that mother was to have custody of children until they should respectively attain age of 21 years and mother agreed that she would, so long as she received payments provided for in agreement, properly care for, maintain, and educate the said "child or children", trial court's determination that mother's obligation under agreement to support and maintain child terminated when child attained his majority was proper for although the words child or children are of varying meaning, sometimes having a meaning synonymous with minor and at other times applying to adults as well as minors, the agreement was susceptible of the reasonable construction that the parties intended to use the words "child" and "children" as synonymous with a minor or minors.

See Words and Phrases, Permanent Edition, for all other definitions of "Child" and "Children".

4. Appeal and error 🔑1008(3)

The appellate court will not disturb a construction placed upon an ambiguous instrument by trial court where such interpretation appears to be consistent with the intent of the parties.

5. Appeal and error 🔑1008(3)

Where property settlement agreement between mother and father was ambiguous regarding whether mother's obligation to support and maintain child would terminate when child attained his majority, in action to enforce obligation, appellate court was bound by trial court's implied finding that the mother's obligation to child ceased when child attained his majority, and therefore judgment of dismissal predicated upon granting of mother's motion for summary judgment could not be disturbed. Code Civ.Proc. § 437c.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by John R. Walsh against Miriam C. Walsh to enforce alleged contract rights. From a judgment of dismissal, plaintiff appeals.

Affirmed.

See, also, 108 P.2d 765.

Roland Rich Woolley, of Los Angeles, for appellant.

Robert W. Kenny, Morris E. Cohn, and Max Sisenwein, all of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment of dismissal predicated upon the granting of defendant's motion for a summary judgment, pursuant to the provisions of section 437c of the Code of Civil Procedure, plaintiff appeals.

The complaint discloses that plaintiff is the adult adopted son of Raoul Walsh and defendant, who were husband and wife.

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* Subsequent opinion 116 P.2d 62.

Defendant and her husband, February 21, 1927, entered into a property settlement agreement (hereinafter designated as the "first agreement"), which contract was modified by a subsequent agreement between the parties dated October 17, 1934 (hereinafter designated as the "second agreement"); and that defendant has failed, neglected, and refused to provide for the support and maintenance of plaintiff, pursuant to the terms of the contracts aforesaid.

This is the sole question necessary for us to determine:

Did defendant's obligation to plaintiff under the terms of the property settlement agreements above mentioned terminate when plaintiff attained his majority?

This question must be answered in the affirmative and is governed by the following pertinent rules of law:

[1] (1) It is for the trial court in the first instance to construe ambiguous terms in a contract (Barlow v. Frink, 171 Cal. 165, 172, 152 P. 290).

[2] (2) Where a writing is uncertain and either of two constructions may be sustained, it is not within the functions of a court of review to declare that the interpretation given by the trial court should be supplanted by another construction of which the instrument is equally susceptible (Kautz v. Zurich Gen. A. & L. Ins. Co., 212 Cal. 576, 582, 300 P. 34; McNeny v. Touchstone, 7 Cal.2d 429, 435, 60 P.2d 986).

[3] Paragraph VIII of the first agreement read thus:

"The wife shall have the custody and control of the said children, John R. Walsh and Robert R. Walsh, and of their education, until they shall respectively attain to the age of twenty-one years, without any interference whatsoever on the part of the husband. The wife shall at all times, consistent with school attendance by said children, afford reasonable opportunity to the husband to visit the children and take them, or either of them, on recreational or other trips, and like opportunity to the children to visit the husband. The wife agrees that she will, so long as she receives the payments provided for in this agreement, properly care for, maintain and educate the said child or children in respect of whom said payments shall have been so made; but, subject only to this agreement, she may expend the said payments in accordance with her uncontrolled discretion."

In the present case it is clear that the words "child or children" as used in paragraph VIII of the first agreement are ambiguous. The words are of varying meanings, sometimes having a meaning synonymous with minor, at other times applying to adults as well as minors. It was, therefore, the trial judge's duty in the first instance to determine the meaning which the parties attached to the words when they entered into their agreement. From a reading of the paragraph it is susceptible of the reasonable construction that the parties intended to use the words child and children as synonymous with a minor and minors.

This construction is supported by the fact that the paragraph provides in the first sentence that defendant shall have their custody and control until they reach the age of twenty-one years. This interpretation is further supported by paragraph IV of the first agreement, which provided that, should the wife remarry, her former husband (Raoul Walsh) shall "so long as she [defendant] shall have the custody and control of the children or of either of them, as in paragraph VIII hereof provided, pay to her [defendant], in consideration of her [defendant's] undertaking the support and maintenance of said children or either of them, the sum of Fifty ($50.00) Dollars each per week".

Since the defendant was to have the custody of the children only until they attained the age of twenty-one years, the portion of paragraph IV quoted indicates the intention of the parties to provide for the support of the children until they reach that age, whether defendant married or remained unmarried.

[4, 5] Applying the rules of law above stated, this court will not disturb the construction placed upon an ambiguous instrument by the trial court, where such interpretation appears to be consistent with the intent of the parties. We are bound by the trial court's implied finding that defendant's obligation to plaintiff ceased upon plaintiff's attaining his majority.

For the foregoing reasons, the judgment is affirmed.

We concur: MOORE, P. J.; WOOD, J.

42 Cal.App.2d 287

WALSH v. WALSH.

Civ. 12689.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1940.

Hearing Denied Feb. 27, 1941.

1. Appeal and error ⟹931(1)

On plaintiff's appeal from judgment, evidence was viewed most favorable to the defendant.

2. Husband and wife ⟹279(1)

Where modification of property settlement agreement provided for reduction of weekly payments from $500 to $325, and provided that if husband should make three defaults wife should have right to enforce terms of original contract at rate of $500 per week, but time was not expressly made of the essence, and it did not clearly appear from the agreement that it was the intention of the parties that time should be of the essence of the contract, time was not of the essence of the contract.

3. Contracts ⟹214

Where time is not of the essence of a contract, payment made within a reasonable time after due date stated in contract constitutes compliance therewith.

4. Husband and wife ⟹281

Where modification of property settlement agreement provided for reduction of weekly payments from $500 to $325, but provided that in event husband made three defaults in performance of agreement, wife should have right to enforce terms of original contract, and where husband was absent from state from shortly before October 11, 1939, until evening of October 25, and did not make payments due on October 11, 18 or 25 but on October 26 husband's attorney informed wife's attorney that he had check for $975 for wife and on following day tendered check conditioned upon wife's giving receipt in full, in wife's action for breach of agreement, evidence sustained finding that husband was excused from making payments on time.

5. Trial ⟹404(2)

In wife's action for breach of property settlement agreement, that trial court's finding that husband was excused from making payments on time appeared as a conclusion of law was immaterial, in view of fact that it was actually a finding of fact.

6. Appeal and error ⟹854(1)

In wife's action against husband for breach of property settlement agreement, the fact that trial judge stated reasons in support of his finding that husband was excused from making payments on time different from reasons given by appellate court for sustaining finding was immaterial.

7. Appeal and error ⟹854(1)

In reviewing judgment, appellate court is interested not in trial judge's reasons for his findings and conclusions but whether there was in fact substantial evidence to sustain the findings upon which his conclusions were predicated.

8. Tender ⟹14(2)

Where husband was excused from making payments on time under property settlement agreement, and husband tendered full amount due, the tender was not rendered ineffective because it was conditioned upon wife's giving a receipt in full.

9. Tender ⟹14(2)

If a debtor tenders a sufficient amount of money, he is entitled to a receipt in full and may as a condition of his tender demand such a receipt.

10. Tender ⟹14(2)

Where wife brought action for breach of property settlement agreement, but husband who was excused from making payments on time made tender of full amount due and thereafter on due date of each weekly payment deposited amount of payment in bank to credit of plaintiff and her attorney subject only to demand for receipt in full and dismissal of the action, the tender was good and sufficient.

◆

Appeal from Superior Court, Los Angeles County, William S. Baird, Judge.

Action by Miriam C. Walsh against Raoul A. Walsh, to recover for an alleged breach of a property settlement agreement. From a judgment, plaintiff appeals.

Affirmed.

See also 108 P.2d 768; 108 P.2d 760.

Robert W. Kenny, Max Sisenwein, and Morris E. Cohn, all of Los Angeles, for appellant.

Roland Rich Woolley and Joseph F. Rank, both of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment entered after trial before the court without a jury in an action to recover damages for an alleged breach of a property settlement agreement, plaintiff appeals.

[1] Viewing the evidence most favorable to the defendant (respondent), the essential facts are:

Plaintiff and defendant were husband and wife. February 21, 1927, they entered into a property setttlement agreement hereinafter referred to as the "first agreement", reading in part thus:

"III. The husband shall, so long as the wife remains unmarried to any person other than the husband, pay to the wife, for her separate maintenance and support, and for her separate use and benefit, and in consideration of her undertaking the support and maintenance of said children, or either of them, the sum of Five Hundred ($500.00) Dollars per week; provided, however, that if at any time the gross income of the husband from all sources shall be less than One Thousand ($1,000.00) Dollars per week, then during the time when such gross income is less than One Thousand ($1,000.00) Dollars per week the husband shall pay the wife a sum equal to one-half (½) of such gross income. The term 'gross income' as here used shall include all moneys to which the husband is or may be entitled from any source whatsoever, during any calendar year in which such period is included, whether such income is received during said period or not.

. . . . . .

"XIII. In the event that the wife shall bring any action against the husband to enforce the provisions of this agreement or the payment of any claim hereunder, or to protect the rights of the wife herein secured, the wife shall be entitled to recover, and the husband shall pay, all cost and expense incurred by the wife in bringing such action, including reasonable attorney's fees."

Thereafter, October 17, 1934, they entered into a second agreement hereinafter referred to as the "second agreement", reading in part thus:

"Witnesseth:

"1. The parties hereto have heretofore made an agreement in writing dated the 21st day of February, 1927, and hereinafter sometimes referred to as 'Original Contract'. Except as modified in paragraph 2 of this agreement, the Original contract is to remain in full force and effect; it being the intention of the parties to hereby ratify the Original Contract, in accordance with the terms thereof as modified only by paragraph 2 of this agreement and notwithstanding any act or acts heretofore done, or any agreement or agreements heretofore made, by either or both of the parties, or any waiver or waivers or modification or modifications heretofore made in the terms of the Original Contract.

"2. The Original Contract is hereby modified by deleting from paragraph III thereof the words and figures 'Five Hundred ($500.00) Dollars' wherever said words and figures now appear in said paragraph III, and by inserting the words and figures 'Three Hundred Twenty-five Dollars ($325.00)' wherever the words and figures 'Five Hundred ($500.00) Dollars' now appear in said paragraph III.

"3. Second party shall, concurrently with the execution of this agreement, pay to first party the sum of Twenty-five Hundred Dollars ($2500.00). Said sum of Twenty-five Hundred Dollars ($2500.00) shall be paid in consideration of the consent of first party to the terms of this agreement, and receipt of said sum of Twenty-five Hundred Dollars ($2500.00) is hereby acknowledged by first party.

. . . . . .

"5. In the event that second party shall default in the performance of any of the terms of the Original contract as modified by paragraph 2 of this agreement, first party shall have the right, without notice or demand to second party, to enforce the terms of the Original Contract as modified by paragraph 2 of this agreement. In the event that second party shall make three (3) defaults in the performance of the terms of the Original Contract as modified by paragraph 2 of this agreement, first party shall have the right, without notice or demand to second party and whether or not first party shall have taken any action as a result of prior defaults, to enforce the terms of the Original Contract, from the date hereof, and at the rate of Five Hundred Dollars

($500.00) per week as provided in the Original Contract."

Payments were made according to the terms of the second agreement for approximately a year prior to the institution of the present suit. The payments were made by defendant and accepted by plaintiff frequently during the year on Thursday, Friday, and sometimes as late as Monday of the week following the Wednesday upon which they were due. Defendant was out of the city and did not make the payments due on October 11, 1939, October 18, 1939, or October 25, 1939. October 26, defendant's attorney telephoned to the attorney for plaintiff, saying that he had a check for $975, which he would deliver to him. This plaintiff's attorney said he would refuse to accept, and that his client (plaintiff) intended to sue to enforce the terms of the first agreement. The following day, October 27, defendant's attorney went to the office of plaintiff's attorney and offered him a check for $975 on condition that plaintiff would give defendant a receipt in full. Plaintiff's attorney refused the offer and signed the following letter:

"October 27, 1939

"Mr. Louis L. Swarthe
812 Union Bank Bldg.
Los Angeles, California.

"Dear Mr. Swarthe:

"I acknowledge that you have made tender this day to me on behalf of Mrs. Miriam Cooper Walsh in the sum of $975.00, in full payment of all sums due to date.

"I am authorized by Mrs. Walsh to act as her attorney at law and also as her agent in advising you that this tender is refused under the terms of the contract, because we consider it insufficient in amount. Mrs. Walsh has elected to exercise her rights under the existing contracts.

"Very truly yours,
"Max Sisenwein"

The same day the present action was instituted by plaintiff. On the following day defendant caused $975 to be deposited in the Bank of America, Melrose and Irving Branch, in the city of Los Angeles, to the credit of plaintiff Miriam C. Walsh and/or MacFarland & Sisenwein, her attorneys, conditioned upon plaintiff's giving defendant a receipt in full. Plaintiff was duly advised by the bank of this deposit. Thereafter, pending the trial of the present action, defendant deposited in the same bank the sum of $325 each week to the credit of plaintiff conditioned upon her giving a receipt in full and dismissing the present action. The trial court gave judgment in favor of plaintiff for (a) $975 on the original complaint, together with interest from October 11, 1939, on $325, from October 18, 1939, on $325, and from October 25, 1939, on $325, and costs; (b) $1,000 as attorney's fees; and (c) a judgment upon a supplemental complaint at the rate of $325 per week for the weeks subsequent to the week of October 25, 1939, including interest on each payment found to be due.

These are the questions necessary for us to determine:

First: Was there substantial evidence to sustain the finding by the trial court "that defendant was excused from making payments due under the terms of the second agreement on the days stated in such agreement"?

Second: Did defendant make a tender of the amounts due under the second agreement for the fifteen week period following October 25, 1939?

[2] The first question must be answered in the affirmative. Time was not expressly made of the essence of the contract, nor does it appear from the agreement "clearly, unequivocally, and unmistakably" (Miller v. Cox, 96 Cal. 339, 344, 31 P. 161, 163) that it was the intention of the parties that time should be of the essence of the contract. Therefore, time was not of the essence of the contract.

[3, 4] The rule is established that, where time is not of the essence of a contract, payment made within a reasonable time after the due date stated in the contract constitutes compliance therewith. Milton Realty Co. v. Butterfield, 87 Cal.App. 772, 776, 262 P. 419. It was stipulated by the parties in the present case that payments due on Wednesday under the terms of the second agreement had been accepted by plaintiff from defendant, at some times on Thursday of the same week, at other times on Friday of the same week, and at still other times as late as Monday of the following week. It is also undisputed that defendant was absent from the state of California from shortly before October 11, 1939, until the evening of October 25, 1939; and that on the 26th of October, 1939, defendant's attorney telephoned plaintiff's attorney, stat-

ing that he had a check for $975 for plaintiff, which plaintiff's attorney said he would refuse to accept; that on the following day defendant's attorney tendered to plaintiff's attorney a check for $975 conditioned upon plaintiff's giving defendant a receipt in full. This plaintiff's attorney refused to do and handed to defendant's attorney the letter dated October 27, 1939, addressed to Mr. Swarthe and signed by Mr. Sisenwein.

[5-7] From the foregoing evidence the trial court was clearly justified in finding that defendant was excused from making payments on time. The fact that such finding appears as a conclusion of law is immaterial, since it is actually a finding of fact. Estate of Woods, 23 Cal.App.2d 187, 190, 72 P.2d 258. Nor is it important that the trial judge stated a different reason in support of his finding. We are not interested in the trial judge's reasons for his findings and conclusions but whether there was in fact substantial evidence to sustain the findings upon which his conclusions were predicated.

[8, 9] We find no merit in plaintiff's contention that defendant's tender was ineffective, for the reason that it was conditioned upon plaintiff's giving a receipt in full. The law is established in California that, if a debtor tenders a sufficient amount of money, he is entitled to a receipt in full and may as a condition of his tender demand such a receipt. Hancock v. Hunt, 34 Cal.App. 530, 533, 168 P. 142; Ferrea v. Tubbs, 125 Cal. 687, 690, 58 P. 308.

[10] The second question must be answered in the affirmative. The rules and reasoning heretofore applied in answering the first question presented to us on this appeal are likewise applicable to the present problem, and, since on Wednesday of each of the weeks subsequent to October 25, 1939, defendant deposited $325 in the bank to the credit of plaintiff and/or her attorney subject only to a demand for a receipt in full and dismissal of the present action, the tender was good and sufficient and the trial court's judgment for this amount alone was proper.

For the foregoing reasons the portions of the judgment appealed from are affirmed.

We concur: MOORE, P. J.; WOOD, J.

42 Cal.App.2d 293

WALSH v. WALSH.

Civ. 12689.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1940.

Rehearing Denied Jan. 28, 1941.

1. Damages ⟹71

If a contract provides for the allowance of attorney's fees and action is instituted to enforce provisions of contract, allowance of attorney's fees may properly be made only where it was necessary to institute the action in order to enforce an obligation or obligations under the contract.

2. Husband and wife ⟹281

Where property settlement agreement provided that, if wife should bring action against husband to enforce agreement, husband should pay all costs and expenses including reasonable attorney's fees, but, before institution of action for breach of property settlement agreement, husband made valid tender to wife of amount found by court to be due, award of attorney's fees was improper.

3. Costs ⟹42(1)
Interest ⟹50

Where property settlement agreement provided that, if wife should bring action against husband to enforce agreement, husband should pay all costs and expenses, but husband prior to institution of wife's action for breach of property settlement agreement made valid tender of amount due her which amount and other amounts becoming due were deposited to her credit in bank, neither interest nor costs could properly be collected by wife upon several payments due her under the agreement. Code Civ.Proc. § 1025; Civ.Code, § 1504.

◆

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Miriam C. Walsh against Raoul A. Walsh for damages for breach of a property settlement agreement. From a judgment for plaintiff, defendant appeals. Judgment modified, and as modified, affirmed.

See, also, 108 P.2d 765.

Roland Rich Woolley, of Los Angeles, for appellant.

Robert W. Kenny, Morris E. Cohn, and Max Sisenwein, all of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover damages for breach of a property settlement agreement, defendant appeals.

The essential facts involved in the present appeal are set forth in extenso in an opinion filed by us this day in a companion appeal by the plaintiff in the above-entitled action. 108 P.2d 765. In addition to the facts stated in the opinion just referred to, it is to be noted that the first agreement contained the following provision: "XIII. In the event that the wife shall bring any action against the husband to enforce the provisions of this agreement or the payment of any claim hereunder, or to protect the rights of the wife herein secured, the wife shall be entitled to recover, and the husband shall pay, all costs and expense incurred by the wife in bringing such action, including reasonable attorney's fees."

The trial court gave judgment in favor of plaintiff for (a) $1,000 as attorney's fees, (b) interest from their due date on the payments found to be due October 11, 18, 25, 1939, and on Wednesday of the fifteen succeeding weeks, and (c) costs.

These are the questions here presented:

First: When a contract provides for the payment of attorney's fees, if suit is instituted to enforce the provisions thereof, may the judgment rightfully award attorney's fees in such action, if plaintiff recovers only the amount defendant tendered prior to the institution of the action?

Second: Is a party entitled to recover interest and costs in an action on a contract when such party has refused to accept tender, prior to the institution of the suit, of the amounts found by the court to be due?

[1] In view of our decision on the points raised by plaintiff in her appeal from the judgment rendered in the instant case (see companion opinion filed this day), it is established that defendant made a valid tender to plaintiff prior to the institution of the present action of the amounts for which the trial court gave her judgment. Therefore, there was no necessity for the institution of the present action. The law is established that, if a contract provides for the allowance of attorney's fees and suit is instituted to enforce the provisions of the contract, such an allowance may properly be made only where it is necessary to institute the action in order to enforce an obligation or obligations under the contract. Graham v. Light, 4 Cal. App. 400, 403, 88 P. 373; see, also, McArthur v. John McArthur Co., 39 Cal.App. 704, 705, 179 P. 700.

[2] Applying this rule to the facts of the instant case, since defendant made a valid tender to plaintiff of the amount for which she recovered judgment in the present action, it was unnecessary for her to file the present action and the judgment should not have included an allowance to her for attorney's fees.

[3] The second question must likewise be answered in the negative. In view of the fact that defendant prior to the institution of suit made a valid tender to plaintiff of the amounts due her, which amounts were immediately deposited to her credit in a bank in this state, neither interest nor costs could properly be collected upon the several payments due plaintiff under the terms of the contract. (Sec. 1504, Civ.Code, and sec. 1025, Code Civ. Proc.)

For the foregoing reasons the judgment from which an appeal is taken is modified by striking therefrom the provisions relating to (a) attorney's fees, (b) interest, and (c) costs.

As thus modified the judgment is affirmed.

We concur: MOORE, P. J.; WOOD, J.

O'DAY et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.*

L. A. 17598.

Supreme Court of California.

Jan. 7, 1941.

Rehearing Granted Feb. 3, 1941.

1. Descent and distribution 🔑71(1)

In enacting statutes relating to proceeding to determine heirship, the obvious intention of Legislature was to provide a simple and expeditious method of determining who are the rightful heirs of an estate and entitled to distribution thereof. Probate Code, §§ 1080–1082.

2. Descent and distribution 🔑71(1)

The statutory proceeding for determination of heirship is not in the nature of a "civil action" wherein respective claimants are necessarily adverse parties to each other in sense that they are seeking redress of any grievance arising out of violation of any right inuring to them, but is in the nature of a "proceeding in rem" to determine who is entitled to the assets of an estate. Probate Code, §§ 1080–1082.

See Words and Phrases, Permanent Edition, for all other definitions of "Civil Action" and "Proceeding in Rem".

3. Descent and distribution 🔑71(1)
Executors and administrators 🔑1

The ultimate aim and purpose of administrative proceedings, including proceedings to determine heirship, is to ascertain the persons entitled to share in estate of decedent and to decree distribution accordingly. Probate Code, §§ 1080–1082.

4. Descent and distribution 🔑71(1)

Every consideration of justice and public policy dictates that estates of decedents be distributed to persons rightfully entitled thereto and that every concern and endeavor of a probate court should be directed to accomplishment of this purpose.

5. Descent and distribution 🔑71(1)

Although statute requires that clerk shall set petition to determine heirship for hearing by the court, the only notice required to be given prior to such hearing is a ten days' notice by posting in the manner required by Probate Code. Probate Code, §§ 1080–1082, 1200.

6. Descent and distribution 🔑71(3)

Where original petition to determine heirship is filed, any person claiming to be an heir to the estate may appear and file a written statement setting forth his interest in the estate, and the petition and statement so filed consitute the "pleadings" in the proceeding. Probate Code, §§ 1080–1082.

See Words and Phrases, Permanent Edition, for all other definitions of "Pleadings".

7. Descent and distribution 🔑71(7)

Although statute relating to proceeding to determine heirship does not refer to a hearing on statement of heirship filed subsequent to the filing of the original petition, it will be assumed that it was intention of the Legislature that all claimants, whether by petition or statement, are entitled to have their claims heard before the court determines who are the heirs of the decedent and entitled to distribution of his estate. Probate Code, §§ 1080–1082.

8. Descent and distribution 🔑71(7)

In proceeding to determine heirship, the trial court is not warranted in granting judgment of nonsuit or dismissal against any person complying with provisions of the statute with respect to filing of petition or statement of heirship, and a person filing such a petition or statement is entitled to participate in the hearing of the proceeding in accordance with the statutory rules of procedure and the rules of court. Probate Code, §§ 1080–1082.

9. Descent and distribution 🔑71(7)

Where claimants filed statement of heirship in proceeding to determine heirship and complied with provisions of statutes relating to such a proceeding, and Superior Court granted motion to enter judgment of nonsuit against any claimant who should fail to appear in court on certain day, superior court's order, purporting to grant motion for nonsuit against the claimants because they did not appear in court on such day, was unauthorized by statute and was void. Probate Code, §§ 1080–1082.

10. Mandamus 🔑60

Action of the superior court, in granting order of nonsuit against claimants who had filed statement of heirship in proceeding to determine heirship and in refusing to permit claimants to participate in the proceeding, was in excess of the court's jurisdiction, and hence mandamus would lie to require the superior court to permit the claimants to participate in the proceeding. Probate Code, §§ 1080–1082.

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* Subsequent opinion 116 P.2d 621.

11. Mandamus ⟹4(1)

Judgment of nonsuit and dismissal, against claimants who had filed statement of heirship, in proceeding to determine heirship, not being authorized by any provision of law, was not appealable, and hence there was no adequate remedy by appeal afforded to the claimants so as to preclude them from maintaining mandamus proceeding to require the superior court to permit claimants to participate in the proceeding. Probate Code, §§ 1080–1082, 1240.

◆

Original mandamus proceeding by Henry J. O'Day and others against the Superior Court of the State of California in and for the County of Los Angeles and others, to require the Superior Court to permit petitioners to participate in proceeding to determine heirship in accordance with statement of heirship filed by petitioners, as alleged heirs of Michael F. O'Dea, deceased, and to require the clerk of the Superior Court to accept for filing a second statement of heirship presented by the petitioners and to compel the Superior Court to permit the filing of the second statement of heirship and to consider merits of the same in the proceeding.

Writ of mandate issued directing the respondent Superior Court to permit petitioners to participate in the proceeding to determine who are the rightful heirs of the estate of the deceased.

Claud B. Andrews and John Leo Harris, both of Los Angeles (Mosher & Shafer, of Los Angeles, of counsel), for petitioners.

J. H. O'Connor, Co. Counsel, J. F. Moroney, Deputy Co. Counsel, Faries & McDowell, Salisbury, Robinson & Himrod, Bailie, Turner & Lake, Freston & Files, Wayne R. Hackett, and Charles A. Loring, all of Los Angeles, for respondents.

CARTER, Justice.

This is an original proceeding in mandamus wherein petitioners ask this court to issue a writ of mandate directing the superior court of the county of Los Angeles to permit petitioners to participate in a proceeding to determine heirship in accordance with a certain statement of heirship filed by them on May 8, 1939, as alleged heirs of one Michael F. O'Dea, deceased. Petitioners also ask this court to issue a writ of mandate against said superior court and the clerk thereof directing the latter to accept for filing a "second statement of heirship" presented by them for filing on May 1, 1940, and compelling said superior court to allow and permit the filing of said "second statement of heirship" and to consider the merits of same in said proceeding.

On August 11, 1938, James Lynch and others constituting one group of alleged heirs of said deceased, filed a petition in said superior court to establish heirship in the matter of the estate of Michael F. O'Dea, as provided by section 1080 of the Probate Code. On May 8, 1939, petitioners herein filed their first statement of heirship in said estate proceeding. During the pendency of said estate proceeding, many other claimants filed similar statements, and after considerable delay, a hearing on the proceeding to determine heirship was commenced on July 17, 1939. The clerk of said court gave notice of said hearing by posting as required by section 1200 of the Probate Code. There were hundreds of alleged claimants, and on July 25, 1939, the probate court, apparently in an effort to facilitate proceedings by eliminating all those claimants who were not seriously pressing their alleged claims, or who had failed to diligently prosecute same, granted a motion made by counsel for some of the claimants for an order to enter default judgments against all claimants who had not, at that date, appeared or filed statements of heirship, and a further motion to enter a judgment of nonsuit against all persons who had filed such statements, but who were not then present either in person or by counsel. The latter order included the names of the petitioners herein. The method used by the court was to have the clerk read aloud the names of all persons who had filed such statements, and those who did not answer were nonsuited. It may be here noted that petitioners were represented by attorneys in the proceeding up to the day prior to the entry of the judgment of nonsuit. At that time, July 24, 1939, said attorneys stated to the court that they were withdrawing, and that in any further proceedings, the petitioners would represent themselves in propria personae.

The next date of importance is that of January 5, 1940. On that date petitioners, through new attorneys, moved to set aside the judgment of nonsuit and dismissal under section 473 of the Code of Civil Procedure. This motion was denied, and on April 15, 1940, petitioners again moved to vacate the judgment of nonsuit and dismissal. Again the motion was denied and on April 25, 1940, petitioners appealed to this court from the order of denial. On July 3, 1940, this court granted a motion to dismiss the appeal from the order denying the motion to vacate the judgment of nonsuit on the ground that such order was not appealable under section 1240 of the Probate Code. Estate of O'Dea, Cal.Sup., 104 P.2d 368.

On May 1, 1940, petitioners, in open court offered a "second statement of heirship" for filing. This statement was identical with the first, and before permitting its filing, the superior court asked if there were any objections to filing the same. Objections were thereupon made by attorneys for other claimants whose claims were then being heard; the objections were sustained, and the court ordered the clerk to not accept the statement of petitioners for filing but to keep it in the records of the estate proceeding endorsed for identification only.

The petition for writ of mandate presented to this court by petitioners is in two counts. The first count pleads the facts with reference to the filing by petitioners in the trial court of their first statement of heirship and the making of the order directing the entry of a default against all claimants who had not appeared in said proceeding on or prior to July 25, 1939, and the entry of a judgment of nonsuit and dismissal against all petitioners who had filed claims or statements of heirship but who were not present either in person or by attorney on that date. The second count pleaded the facts with reference to the offer of petitioners to file their so-called second statement of heirship and the refusal of the trial court to permit the filing of the same.

In their prayer to the petition, petitioners ask this court for a writ of mandate "compelling the respondent court to assume jurisdiction of the cause manifested and commenced by the statement of heirship of petitioners filed on May 8, 1939, and to provide a trial and hearing on the merits of the issues raised by said statement of heirship as prescribed by law and to permit petitioners to fully participate in all proceedings and hearings at the trial of all proceedings to determine heirship in said estate".

Petitioners contend that the trial court acted in excess of its jurisdiction in directing the entry of a judgment of nonsuit and dismissal against them and that said judgment is therefore void and of no effect and does not constitute a bar to their participation in the proceedings to determine heirship in said estate.

We are disposed to agree with the contention of petitioners in this regard as we are of the opinion that the trial court misconceived the nature of the proceeding to determine heirship now authorized by sections 1080, 1081 and 1082 of the Probate Code.

[1, 2] In enacting these sections of the Probate Code it was the obvious intention of the legislature to provide a simple and expeditious method of determining who are the rightful heirs of an estate and entitled to distribution thereof. The proceeding contemplated by said sections is not in the nature of a civil action wherein the respective claimants are necessarily adverse parties to each other in the sense that they are seeking redress of any grievance arising out of the violation of any right inuring to the respective claimants. Such proceeding is essentially one in rem to determine who is entitled to the assets of the estate. It is conceivable that the trial court might determine that none of the claimants who had filed petitions or statements of heirship were the rightful heirs to the estate and were therefore not entitled to the distribution of any portion thereof; in other words, the court is not required to decide in favor of any claimant who does not prove to the satisfaction of the court that he is a relative of the deceased and entitled to distribution of a portion of his estate under the laws of descent of this state. It is possible therefore that the result of such a proceeding might be a determination that deceased left no living heirs and his estate would escheat to the state of California.

[3, 4] It cannot be denied that the ultimate aim and purpose of administrative proceedings, including proceedings to determine heirship, is to ascertain the persons entitled to share in the estate of the decedent and to decree distribution accordingly. Every consideration of justice and public policy dictates that the estates

of decedents be distributed to persons rightfully entitled thereto and that every concern and endeavor of a probate court should be directed to the accomplishment of this purpose. Edlund v. Superior Court, 209 Cal. 690, 289 P. 841.

[5, 6] With the foregoing considerations in mind let us proceed with an analysis of the provisions of sections 1080, 1081 and 1082 of the Probate Code in their application to the accomplishment of the above-mentioned object and purpose. Said sections contain no provision for the entry of defaults, dismissals or nonsuits which are characteristic of civil actions. In this respect proceedings under these sections are somewhat analogous to a proceeding under former section 1668 of the Code of Civil Procedure which authorized the filing of objections to a petition for distribution by one claiming the right to have a share of the estate distributed to him differently from that proposed in the petition for distribution. It was held by this court that since no provision was contained in section 1668 authorizing the entry of a default against such a claimant, he was not barred even if he failed to file his objections prior to the actual commencement of a hearing on a petition for distribution. Estate of Ross, 185 Cal. 8, 195 P. 674. While section 1080 provides that the clerk shall set the petition to determine heirship for hearing by the court, the only notice required to be given prior to such hearing is a ten day's notice by posting in the manner required by section 1200 of the Probate Code. After the original petition to determine heirship is filed, any person claiming to be an heir to the estate may appear and file a written statement setting forth his interest in the estate. The petition and statements so filed constitute the pleadings in such a proceeding.

[7] Section 1081 provides for a hearing on the petition and any objection thereto that may have been presented. While no reference is made in said last-mentioned section to a hearing on the statements of heirship filed subsequent to the petition, it must be assumed that it was the intention of the legislature that all claimants whether by petition or statement are entitled to have their claims heard by the court before the court determines who are the heirs of the decedent and entitled to distribution of his estate. Section 1082 provides that when the decree determining heirship becomes final, it shall be conclusive upon the matters determined during the remainder of the administration of the estate and upon any subsequent proceeding for distribution.

[8] In our opinion the plain language of the three sections above-mentioned admits of no interpretation which would warrant the trial court in granting a judgment of nonsuit or dismissal against any person complying with the provisions of section 1080 with respect to the filing of a petition or statement of heirship and that a person so filing such a petition or statement of heirship is entitled to participate in the hearing of the proceeding in accordance with the rules of procedure provided by statute and rules of court.

[9, 10] The order granting the judgment of nonsuit and dismissal against the petitioners was not a mere error committed by the trial court in the exercise of its jurisdiction in this proceeding, but was unauthorized by any provision of law and was therefore void and of no effect whatsoever (Estate of England, 214 Cal. 298, 5 P.2d 428; Texas Co. v. Bank of America, 5 Cal.2d 35, 53 P.2d 127), and the trial court therefore acted in excess of its jurisdiction in refusing to permit petitioners to participate in the proceeding to determine heirship after the granting of said judgment of nonsuit and dismissal of their statement of heirship, and petitioners are entitled to a writ of mandate directing the respondent court to permit petitioners to participate in the proceeding to determine heirship in said estate.

[11] The judgment of nonsuit and dismissal against petitioners not being authorized by any provision of law, it was clearly not an appealable order and therefore no adequate remedy by appeal was afforded petitioners under section 1240 of the Probate Code. Estate of O'Dea, Cal. Sup., 104 P.2d 368.

Since the conclusion reached by us with reference to the granting of the judgment of nonsuit and dismissal against petitioners has the effect of permitting them to proceed on their first statement of heirship, it is unnecessary for us to consider whether or not they should have been permitted to file the so-called second statement of heirship presented to the court on May 1, 1940.

Let a peremptory writ of mandate issue directing the respondent court to permit petitioners to participate in the proceeding to determine who are the rightful heirs to the estate of Michael F. O'Dea, deceased, pending in said court.

We concur: GIBSON, C. J.; SHENK, J.; TRAYNOR, J.; SPENCE, Justice pro tem.

I concur in the judgment: EDMONDS, J.

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17 Cal.2d 1

In re LAWRENCE'S ESTATE.

L. A. 17279.

Supreme Court of California.
Jan. 7, 1941.

1. Wills 🔑439, 440

A will is to be construed according to intention of testator as expressed therein, and such intention must be given effect as far as possible.

2. Courts 🔑89

In construction of will, each case depends upon its own peculiar facts.

3. Wills 🔑448

Interpretation should, if possible, be placed upon provisions of a will as will prevent intestacy, especially where will evinces an intention on part of testator to dispose of his whole estate.

4. Wills 🔑467

When words of recommendation, request and the like in a will, are used with direct reference to the estate, they are prima facie "testamentary" and "imperative", and not "precatory".

See Words and Phrases, Permanent Edition, for all other definitions of "Imperative," "Precatory" and "Testamentary".

5. Wills 🔑467

Although desire of a testator for disposal of his estate is a mere "request" when addressed to his devisee, it is to be construed as a "command" when addressed to his executor.

See Words and Phrases, Permanent Edition, for all other definitions of "Command" and "Request".

6. Wills 🔑467

Where will directing executors to use entire residue of testator's property for purchase of annuity payable to friend of testator for life recommended annuity contract providing for repayment of unused principal to executors if annuitant died before all money used in purchasing annuity was consumed, and bequeathed money so refunded to named charities, that testator when discussing type of annuity which should be purchased used precatory words "I further recommend" did not establish that charitable institutions had no enforceable right, but a mere "contingent expectancy". Probate Code, § 140.

See Words and Phrases, Permanent Edition, for all other definitions of "Contingent Expectancy".

7. Wills 🔑852

Under will directing executors to use entire residue of testator's property for purchase of annuity payable to friend of testator for life, recommending annuity contract providing for repayment of unused principal to executors if annuitant died before all money used in purchasing annuity was consumed, and bequeathing money so refunded to named charities, such friend did not become a "residuary legatee" of estate whose death before that of testator would destroy remainder to charities. Probate Code, § 140.

See Words and Phrases, Permanent Edition, for all other definitions of "Residuary Legatee".

8. Wills 🔑587(1)

No particular mode of expression is necessary to constitute a "residuary legatee", but it is sufficient if intention is plainly expressed in will that surplus of estate, after payment of debts and legacies, shall be taken by the person there designated.

9. Wills 🔑619

Under will directing executors to use entire residue of testator's property for purchase of annuity payable to friend of testator for life recommending annuity contract providing for repayment of unused principal to executors if annuitant died before all money used in purchasing annuity was consumed, and bequeathing money so refunded to named charities, duty of executors to purchase a refund type of annuity was "mandatory", and fact that executors might refuse to perform their duty would not create a "contingency" as to bequests to charities. Probate Code, § 140.

See Words and Phrases, Permanent Edition, for all other definitions of "Contingency" and "Mandatory".

10. Wills ⚷634(4)

Under will directing executors to use entire residue of testator's property for purchase of annuity payable to friend of testator for life, recommending annuity contract providing for repayment of unused principal to executors if annuitant died before all money used in purchasing annuity was consumed, and bequeathing money so refunded to named charities, that corpus might be consumed in providing for life tenant did not make bequests to charitable institutions "contingent remainders". Probate Code, § 140.

See Words and Phrases, Permanent Edition, for all other definitions of "Contingent Remainder".

11. Wills ⚷634(3)

It is not the uncertainty of actual enjoyment but the uncertainty of the right to enjoyment that renders a remainder contingent.

12. Wills ⚷629

The law favors the vesting of estates.

13. Wills ⚷858(1)

Under will directing executors to use entire residue of testator's property for purchase of annuity payable to friend of testator for life, recommending annuity contract providing for repayment of unused principal to executors if annuitant died before all money used in purchasing annuity was consumed and bequeathing money so refunded to named charities, where friend's right to annuity lapsed as result of his death prior to death of testator, residue of estate thereupon vested in charities as "residuary legatees" named in will to whom residue was to be distributed upon death of friend. Probate Code, §§ 92, 140.

14. Wills ⚷452

The rule that where a will is capable of two interpretations under one of which those of the blood of the testator will take, while under the other the property will go to strangers, the interpretation by which property will go to those of the blood is preferred, does not apply where in order to prefer those of the blood of the testator, it is necessary to ignore presumption against intestacy and in favor of upholding intent of testator as expressed in his will.

15. Wills ⚷862

Under will directing executors to use entire residue of testator's property for purchase of annuity payable to friend of testator for life, recommending annuity contract providing for repayment of unused principal to executors if annuitant died before all money used in purchasing annuity was consumed and bequeathing money so refunded to named charities, even if survival of friend and purchase of a refund type of annuity were a "condition precedent" under the Probate Code to bequests to charities, fulfillment of conditions was impossible upon death of friend prior to death of testator, and, where it appeared that the conditions were not the sole motive thereof, the bequests to charities vested. Probate Code, § 142.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition Precedent".

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Proceeding in the matter of the estate of Philipp E. Lawrence, deceased. From a decree directing distribution of the whole estate to Charles Lawrence and others, testator's heirs at law, the Church Home for Children of the Protestant Episcopal Church in the Diocese of Los Angeles and another appeal.

Reversed as to the claim of the named appellant, with directions to distribute to such claimant one-half of the estate of deceased. Appeal from order denying a new trial dismissed.

For prior opinion, see 102 P.2d 559.

Waldo & Waldo and G. E. Waldo, all of Pasadena, O'Melveny & Myers and Louis W. Myers, all of Los Angeles (George E. Waldo, of Pasadena, of counsel), for Church Home for Children, and others.

Ticknor & Maxwell, of Pasadena, for David and Margaret Home for Children, Inc.

E. D. Yeomans and Thomas W. Cochran, both of Los Angeles, for respondent heirs at law.

David D. Stuart, of Los Angeles, for respondent executors.

CARTER, Justice.

This appeal is taken from a decree of the superior court of Los Angeles county sitting in probate, directing distribution of the estate of Philipp E. Lawrence to his heirs at law.

The testator, a single man, died July 1, 1938, at the age of 80 years, leaving as his nearest relatives nephews, nieces, grandnephews and grandnieces. He left a will, executed more than six months prior to his death, which was admitted to probate without question as to its validity.

Said will provided for payment of his debts and funeral expenses out of the property left by him at the time of his death, then disposed of his entire estate in the following terms:

"Third: I direct that all the residue and remainder of money and property left by me at the time of my death (after payment of all my just debts and funeral expenses), shall be, by my executors used to purchase or contract for an annuity in favor of and payable to my friend Walter C. Black, now residing at 200 West Ave. 33rd, Los Angeles, California, during the remainder of his life. I recommend that such annuity be purchased from the Equitable Assurance Company of New York but if in the judgment of my executors it is unwise at the time such annuity is purchased to so deal with said company, my executors are to use their judgment in that event as to where they will purchase such annuity. I further recommend that such annuity contract shall be one that will provide for repayment to my executors of the principal unused in the payment of annuities in event of the death of the said Walter C. Black before all of the money thus used in purchasing annuity has been consumed under such contract.

"Fourth: In event that refund of principal, as provided in the Third paragraph hereof, is made I give, devise and bequeath of such moneys so refunded, to the Church Home for the children of the Protestant Episcopal Church of the Diocese of Los Angeles, now located at 940 North Avenue 64th, Los Angeles, California and to David and Margaret Home, now located at La Verne, California, in equal parts, share and share alike."

The annuitant Black, a man 39 years of age, lived in the home of the testator. On June 30, 1938, he struck the testator on the head with a hammer, then shot himself, dying almost instantly. The testator never regained consciousness and died the following day.

During the course of administration certain of the heirs at law petitioned the superior court sitting in probate for a distribution of the entire estate to them, whereupon the two charitable institutions named in the will appeared in opposition to said petition and sought distribution of the estate to themselves, each claiming one-half thereof. When said petition of the heirs, the objections thereto, and the final account and petition for distribution "to persons entitled thereto" filed by the executors came on for hearing in April, 1939, the superior court made its order and decree that neither of the charitable institutions was entitled to any part of the estate, and directed distribution of the whole estate, with the exception of certain sums set aside for payment of inheritance taxes and other legal obligations to the heirs at law of testator.

Both charitable institutions appealed from said order and decree which was entered on April 25, 1939. After said appeals had been perfected, the David and Margaret Home for Children, Inc., on August 8, 1939, entered into a compromise and settlement agreement with the heirs, by the terms of which it was agreed that the sum of $4,500 should be paid out of the assets of the estate to this one appellant, and in consideration thereof said appellant assigned to the heirs the balance of the estate and agreed to dismiss its appeal. Thereafter, said appellant David and Margaret Home for Children, Inc., made a motion in the District Court of Appeal for dismissal of its appeal and for an order directing the lower court to enter a judgment for partial distribution in accordance with a stipulation signed by appellant and the heirs pursuant to the compromise and settlement agreement of August 8th. Said motion was granted by the District Court of Appeal and remittitur therein issued on December 30, 1939. Estate of Lawrence, 36 Cal.App.2d 377, 97 P.2d 850. As a result of this proceeding the David and Margaret Home for Children, Inc., has been eliminated as a party to this appeal.

The judgment of the trial court herein appealed from upheld the contention of the heirs that the bequest to Black lapsed because he predeceased the testator; that the remainder over to the two charities was contingent; and that said remainder was destroyed by failure of the intervening life estate—with total intestacy resulting.

The appellant Church Home for Children of the Protestant Episcopal Church in the Diocese of Los Angeles claims that paragraph 4 of the will provides for a residuary legatee; that the legacy to Black under paragraph 3 of the will constitutes a limited interest, i. e., a life estate in an annuity; and that the death of the legatee of a limited interest before the testator's death does not defeat the interest of the remainderman who survives the testator, Probate Code, § 140; also, that the gift to the charities was not a contingent remainder but vested upon the death of the testator.

[1] In the construction of wills the paramount rule, to which all others must yield, is that a will is to be construed according to the intention of the testator, as expressed therein, and this intention must be given effect as far as possible. Estate of Wilson, 184 Cal. 63, 66, 67, 193 P. 581; Estate of Newman, 68 Cal.App. 420, 423, 229 P. 898; Estate of McCurdy, 197 Cal. 276, 282, 240 P. 498; Estate of Phelps, 182 Cal. 752, 756, 190 P. 17; Estate of Ritzman, 186 Cal. 567, 568, 569, 199 P. 783.

[2] Of course, as stated in the case of Estate of Wilson, supra, 184 Cal. at page 68, 193 P. at page 583: "Of this class of questions, it may be said, with more truth, perhaps, than of any other, that each case depends upon its own peculiar facts, and that precedents have comparatively small value. Except for the establishment of general principles, very little aid can be procured from adjudged cases in the construction of wills."

The heirs in this case contend that it is obvious that the primary thought of the testator herein was to provide for his friend Black; that the provision as to the charities was secondary and subordinate thereto; and that said provision naming the charities was only a contingent remainder, based on the following contingencies: (1) That Black survive the testator; (2) that a refund type of annuity be purchased; and (3) that there be a remainder of such principal from this specific annuity left upon the death of Black. They further contend that the testator did not intend the charities to have his entire estate, but only the unspent remnant remaining at the end of the life of Black, which under the normal life expectancy of Black would be nothing.

Examining the will before us, we are of the opinion that the general intent of the testator, as expressed therein, was to provide for Black during his life, and that thereafter any of the estate remaining was to go to the two named charities.

[3] In this interpretation we are aided by the rule that constructions which lead to intestacy, total or partial, are not favored; and that such interpretation should, if possible, be placed upon the provisions of the will as will prevent intestacy, especially where the will evinces an intention on the part of the testator to dispose of his whole estate. Estate of Gregory, 12 Cal.App. 309, 312, 107 P. 566; Le Breton v. Cook, 107 Cal. 410, 416, 40 P. 552; Estate of Granniss, 142 Cal. 1, 7, 75 P. 324; Estate of Phelps, supra; Estate of McCurdy, supra. It is clear also in the instant case that the testator intended to and did dispose of his entire estate entirely without provision for his heirs.

[4-6] The heirs maintain that the testator used mere precatory words—"I further recommend"—when discussing the type of annuity which should be purchased; and that therefore, the charities had no enforceable right, but a mere contingent expectancy which would be completely destroyed if the executors should, in the exercise of their discretion, purchase a straight life annuity which would give Black the maximum annual income, but provide for no refund in the event of Black's death prior to the consumption of the principal.

The rule seems to be well settled to the contrary. It has been stated frequently that when words of recommendation, request and the like are used in direct reference to the estate, they are prima facie testamentary and imperative and not precatory. While the desire of a testator for the disposal of his estate is a mere request when addressed to his devisee, it is to be construed as a command when addressed to his executor. All expressions indicative of his wish or will are commands. Estate of Tooley, 170 Cal. 164, 166, 167, 149 P. 574, Ann.Cas. 1917B, 516; Estate of Pforr, 144 Cal. 121, 128, 77 P. 825; Estate of Marti, 132 Cal. 666, 671, 61 P. 964, 64 P. 1071; Estate of Mayne, 28 Cal.App.2d 340, 343, 82 P.2d 504.

[7] We likewise, cannot agree with the heirs' contention that Black was the residuary legatee, whose death destroyed any

remainder which might have gone to the charities. From a careful analysis of paragraph 3 of the will, we are forced to conclude that the testator did not devise and bequeath to Black all the residue and remainder of his property. Instead, he directed that the whole of his estate which was the residue and remainder of his money and property after the payment of debts and funeral expenses, be used by his executors to purchase an annuity payable to Black during his life, which contract should specifically provide for a refund, if any, of the principal remaining unused at Black's death, and that such remaining principal, which actually was the residue of his entire estate, be paid to the two charities named by him.

[8] No particular mode of expression is necessary to constitute a residuary legatee. It is sufficient if the intention be plainly expressed in the will that the surplus of the estate, after payment of debts and legacies, shall be taken by a person there designated. Estate of Fritze, 85 Cal. App. 500, 505, 259 P. 992; Estate of Upham, 127 Cal. 90, 98, 59 P. 315.

In our opinion none of the three contingencies set forth by the heirs must occur in order to permit the vesting of the interest of the charities. It is provided in Probate Code, section 140, that: "The death of a devisee or legatee of a *limited interest* before the testator's death does not defeat the interest of persons in remainder who survive the testator." Therefore the fact that Black, the legatee of the limited interest, predeceased the testator does not defeat the interest of the charities.

[9] Since we have determined that it was the mandatory duty of the executors to purchase a refund type of annuity, the fact that they might refuse to perform their duty does not create a contingency. Otherwise every bequest would be contingent, for the reason that the executor might refuse to do what was required to effectuate it.

[10, 11] That there might be no principal remaining from this specific annuity upon Black's death likewise would not defeat the interest of the charities, because the law is clear to the effect that the circumstance that all of the *corpus may* be consumed in providing for the life tenant does *not* make the remainder a contingent one. Estate of Ritzman, supra; Estate of Phelps, supra; Estate of Rider, infra; Estate of Gregory, supra; Estate of Mayne, supra. It is not the uncertainty of *actual* enjoyment, but the uncertainty of the *right* to enjoyment that renders a remainder contingent. In re De Vries, 17 Cal.App. 184, 189, 119 P. 109; County of Los Angeles v. Winans, 13 Cal.App. 234, 243, 109 P. 640.

[12, 13] For the foregoing reasons and because the law favors the vesting of estates (Estate of Rider, 199 Cal. 724, 251 P. 799), it is our conclusion that upon the death of the testator, the right of Black to the annuity bequeathed to him by the will having lapsed as the result of his death prior to the death of the testator, the residue of the estate thereupon vested in the charities as residuary legatees named in the will to whom the residue was to be distributed upon the death of Black.

A case so nearly *on all fours* with the present case as to bear mention is that of Estate of Gregory, 12 Cal.App. 309, 107 P. 566, 567. The testator, in the 5th paragraph of his will, bequeathed the residue of his estate in trust to be converted into cash and invested and reinvested so as to provide an income to be paid to his wife for life at the rate of $30 per month, "together with such *additional sum or sums,* from time to time during her life as said trustee or his successor may from time to time determine that her circumstances require, said payments to be made *from the principal* of said fund, and upon the death of my wife, to immediately pay over and deliver all of *said trust fund and residue* of my estate then remaining" to his grandchildren, to whom—"I hereby give, devise and bequeath all of said *residue of said trust fund* in equal share". The wife predeceased the testator and the trust never came into existence because of the predecease of the beneficiary. It was contended there, as it is here, that the remainder to the grandchildren was destroyed by the lapsing of the intervening estate and the failure of the trust; that there was no provision in the will for the disposition of the residue of the estate except the one attempted to be set out in the aforesaid trust clause, which was for the residue not of the estate but of the trust fund; that by reason thereof the deceased died intestate as to the residue of his estate.

The court, 12 Cal.App. at page 311, 107 P. at page 567, therein said:

"The residue of the testator's estate consists entirely of personal property, and appellant contends that sections 769 and 1344 of the Civil Code deal with real or immovable property exclusively, and that therefore the grandchildren did not upon the death of the testator have a vested remainder in the residue of his estate. Yet, on the other hand, to support her position that the provisions of the trust are void, she calls our attention to a number of cases, in each of which the trust concerned real property, and was either to convey, or suspended the power of alienation for an unlawful period, and was therefore invalid. Neither the sections of the Civil Code cited nor the cases referred to are in point. The property involved here is personal property, which is subject to no statutory restriction (Estate of Walkerly, 108 Cal. [627] 656, 41 P. 772, 49 Am.St.Rep. 97), and the trust created by the will was not unlawful nor invalid. It merely, by reason of the death of the beneficiary before the will took effect, became inoperative and failed. The real question in the case is: Did the testator intend to dispose of the whole of his estate, and is his will susceptible to such construction? We think so, and that it is plain from the provisions of the fifth paragraph of his will, above quoted, that the testator constituted the residue of his estate into a trust fund, and provided that upon the death of his wife whatever was left of this trust fund should go to the two grandchildren named. The fact that the wife never lived to become the beneficiary of the trust created in her favor is no reason for holding that the subsequent provision of the will directing the disposition of the fund should be defeated. 'In the interpretation of wills, constructions which lead to intestacy, total or partial, are not favored; and such an interpretation should, if possible, be placed upon the provisions of the will as will prevent intestacy, especially where the will evinces an intention on the part of the testator to dispose of his whole estate.' Le Breton v. Cook, 107 Cal. 410, 40 P. 552; Estate of Granniss, 142 Cal. 1, 75 P. 324; Estate of Lux, 149 Cal. [200] 205, 85 P. 147.

"In paragraph fifth of the will, as we have seen, the testator gave, devised, and bequeathed all the rest, residue, and remainder of his estate to the trustee in trust for the benefit of his wife, and the residue of that fund which would be the residue of the estate, he directed to be delivered and paid over to his two grandchildren in equal shares, and in the same paragraph he directed that all the trust fund and the residue of his estate be paid over and delivered to his said grandchildren. The testator's wife having died before him, she never became entitled to the trust fund. The provision as to her lapsed; but, as there were residuary legatees designated in the will, the property out of which the trust fund was to be constituted must go to them, and not descend to the heirs."

In said case the testator directed that the entire residue of the estate be formed into a trust fund, and provided that the residue of said fund which was the residue of his estate should be paid to his grandchildren, after a life income therefrom and so much of the principal as she needed should have been paid to the wife. It seems to us that in substance there is very little difference between a direction that a trust fund for the purpose of providing income be formed and a direction that an annuity for the same purpose be purchased. In the Estate of Gregory, supra, it might have been necessary to exhaust the entire *corpus* of the trust in order to provide for the beneficiary's needs. In the present case Black might have lived long enough to have consumed the entire annuity. Similarly, also, the entire residue of the testator's estate was to be used to purchase said annuity, and, in like manner, the provision that the remaining portion, if any thereof—"I give, devise and bequeath" to the named charities—was in effect a devise of the residue of the entire estate. It follows that, as in the Estate of Gregory, supra, the fact that Black never lived to become the beneficiary of the annuity to be purchased in his favor, and that said annuity would therefore not be purchased, does not prevent the property out of which such annuity was to have been purchased from vesting in the charities in accordance with the intention of the testator as expressed in the will.

In our opinion it was the intention of the testator, as indicated by the provisions of his will hereinabove quoted, that the charities were to succeed to any unused portion of his estate not consumed in providing the life annuity in favor of Black. This brings the case clearly within the provisions of section 92 of the Probate Code, which reads: "If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, *unless an intention appears to substitute another in his place;* * * *." We cannot read the above-quoted provisions of the will without arriving at a very definite conclusion that it was the intention of the testator to substitute the charities in the place and stead of Black should the latter die before all or any part of the testator's estate was consumed in providing the annuity for Black.

[14] Although it has been held that where a will is capable of two interpretations, under one of which those of the blood of the testator will take, while under the other the property will go to strangers, the interpretation by which the property goes to those of the blood is preferred (Estate of Boyd, 24 Cal.App.2d 287, 289, 74 P.2d 1049; Estate of Hartson, 218 Cal. 536, 540, 24 P.2d 171; Estate of Wilson, 65 Cal.App. 680, 689, 225 P. 283), nevertheless, the said rule does not apply where in order to prefer those of the blood of the testator, it is necessary to ignore the presumption against intestacy and in favor of upholding the intent of the testator as expressed in his will.

[15] The heirs advance the argument that the survival of Black and the purchase of the annuity are conditions precedent to the bequest to the charities. This contention was completely refuted by the appellant's answer, that the purchase of a refund annuity was purely a matter of procedure, incidental to the substance of the testator's intent, which was to provide first for Black and second for the charities. It points out that section 142 of the Probate Code reads as follows:

"A condition precedent in a will is one which is required to be fulfilled before a particular disposition takes effect. *It is to be deemed performed when the testator's intention has been substantially, though not literally, complied with.* Nothing vests until such condition is fulfilled, except *where fulfillment is impossible,* in which case *the disposition vests,* unless the condition was the sole motive thereof *and* the impossibility was unknown to the testator or arose from an unavoidable event subsequent to the execution of the will." (Italics ours.)

Assuming, however, that the heirs were correct in their contention as to the presence of conditions precedent, appellant contends that the testator's intention to provide a life income for Black was *substantially though not literally* complied with, because Black did not live for any period of time after testator's death, without receiving such income. Further assuming that these conditions precedent were unfulfilled, the charities submit that *fulfillment was then impossible,* because the executors could not purchase an annuity for a man already dead. In such case as this then, according to the code, the disposition vests, because although the impossibility was unknown to the testator—as well as arose from an unavoidable event subsequent to the execution of the will, the condition was not the *sole motive* thereof. In our opinion the arguments of the heirs are thus completely answered.

Since on this appeal we are concerned only with the rights of the Church Home for Children of the Protestant Episcopal Church in the Diocese of Los Angeles, the decree appealed from is, as to the claim of said appellant, hereby reversed with directions to the trial court to distribute to said claimant one-half of the estate of said deceased.

The appeal from the order denying motion for new trial is dismissed.

We concur: GIBSON, C. J.; SHENK, J.; EDMONDS, J.; SPENCE, Justice pro tem.

ACKER v. BALDWIN et al. *

L. A. 16619.

Supreme Court of California.

Jan. 6, 1941.

Rehearing Granted Feb. 3, 1941.

1. Appeal and error 🔑781(4)

That, after rendition of judgment declaring zoning ordinance oppressive and void and appeal therefrom, board adopted new map reducing zone to 25 per cent. of original area did not require dismissal of appeal on ground issues involved had become "moot questions", where plaintiff's property remained in the restricted zone.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

2. Municipal corporations 🔑122(2)

Although strong presumption favors validity of zoning ordinance, nevertheless validity depends upon its reasonable relation to public welfare.

3. Municipal corporations 🔑601

If reasonable minds might differ as to presence of any substantial relation to the public health, safety, morals or general welfare, zoning ordinance will be held valid.

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* Subsequent opinion 115 P.2d 455.

4. Municipal corporations ⟹601, 626

Courts considering validity of zoning ordinances must determine, in addition to need thereof, whether they are arbitrary and discriminatory in their conception and application and whether they have any reasonable tendency to promote the public morals, health, safety, or general welfare and prosperity of a community.

5. Municipal corporations ⟹601

The adoption and enforcement of a zoning plan, when fairly conceived and equitably applied, is within scope of police power.

6. Municipal corporations ⟹589

A large discretion is vested in legislative branch of government with reference to the exercise of police power.

7. Municipal corporations ⟹63(1)

Every intendment is to be indulged by courts in favor of validity of exercise of police power and unless measure is clearly oppressive, it will be deemed to be within purview of that power.

8. Counties ⟹21½

Where entire district contained 2,496 acres and it was sparsely settled, and by zoning ordinance 86 per cent. of district was drawn for strictly residential purposes, but district, up to about 90 per cent. of its area, was devoted to light commercial and agricultural purposes conducted mostly from homes of various residents, and planning commissioners, when laying out district in 1922, contemplated that entire district would be available for residence and light commercial pursuits by residents and there were diverse businesses operated from homes of residents, ordinance was void, there being no consideration of public health, safety, morals, or general welfare promoted by ordinance.

9. Counties ⟹21½

Where ordinance zoning 86 per cent. of district for strictly residential purposes was modified by amended zoning map reducing zone to one-fourth of original area, and the original ordinance was oppressive and void, and plaintiff's property was within restricted area under modified zoning map, if modification stood as reasonable exercise of police power, it should speak as of date of adoption of modification and plaintiff's use would be nonconforming use in existence at date of adoption, so that right to pursue that use could not be taken from plaintiff.

GIBSON, C. J., and EDMONDS and TRAYNOR, JJ., dissenting.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Suit by Ivan R. Acker against R. O. Baldwin and others, for declaratory relief and for an injunction restraining defendant officials of county from the threatened enforcement of a county zoning ordinance. From a judgment for plaintiff, defendants appeal.

Affirmed.

For prior opinion see 101 P.2d 505.

J. H. O'Connor, Co. Counsel, Everett W. Mattoon, Co. Counsel, and Beach Vasey, Deputy Co. Counsel, all of Los Angeles, for appellants.

Aubrey N. Irwin, City Atty., A. L. Lawson, Asst. City Atty., and Ray T. Hall, Deputy City Atty., all of Glendale, Harold P. Huls, City Atty., and Neil B. Ross, Deputy City Atty., both of Pasadena, Richard C. Waltz, City Atty., of Beverly Hills, James B. Ogg, City Atty., of Alhambra, Ralph K. Pierson, City Atty., of Compton, M. Tellefson, City Atty., of Culver City, Clyde Woodworth, City Atty., of Inglewood, George W. Trammell, Jr., City Atty., Henry D. Lawrence, Asst. City Atty., Joseph B. Lamb, Deputy City Atty., all of Long Beach, Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Leon T. David, Asst. City Atty., all of Los Angeles, Hugh B. Bradford, City Atty., of Sacramento, H. S. Farrell, City Atty., of San Gabriel, Gilbert D. Ferrell, Dist. Atty., and Daniel E. Sullivan, Asst. Dist. Atty., both of Redwood City, County of San Mateo, Percy C. Heckendorf, Dist. Atty., of Santa Barbara, County of Santa Barbara, C. W. McInerny, Jr., City Atty., of Santa Monica, Walter F. Dunn, City Atty., of Sierra Madre, and Tom B. Quinn, City Atty., of Stockton, amici curiae.

Sparling & Teel and Courtney A. Teel, all of Los Angeles, for respondent.

PER CURIAM.

The plaintiff sued for declaratory relief and for an injunction against the defendants, officials of the county of Los Angeles, restraining the threatened enforcement of ordinance No. 1813, N.S., a county zoning ordinance. The trial court declared the ordinance oppressive, therefore unconstitutional and void, and entered judgment granting the relief sought. The defendants appealed.

Ordinance 1813, N.S., was adopted by the board of supervisors of the county of Los Angeles on March 29, 1930. It created a county zoning territory designated as South Santa Anita District, an unincorporated area which includes the town of Temple City. The ordinance provided: "No building, structure, improvement or premises shall be used, and no building, structure or improvement shall be erected, constructed, established, altered or enlarged in Zone R–1 which is designated, arranged or intended to be occupied or used for any purpose other than a single family residence, together with the outbuildings necessary to use such located on the same lot or parcel of land, including a private garage with a capacity not to exceed three cars."

The entire district contains 2,496 acres and is sparsely settled. By the ordinance eighty-six per cent of the district was zoned for strictly R–1 or residential purposes. The record shows, however, that the district, up to about ninety per cent of its area, is devoted to light commercial and agricultural purposes, which for the most part are conducted at or from the homes of the various residents. It also appears that when the district was laid out in 1922 by the planning commissioners it was in their contemplation that the entire district would be available for residence and light commercial pursuits by the residents to supplement their incomes. There are in the district divers businesses, in addition to the plaintiff's, operated from the homes of the residents. They include such businesses as real estate, insurance, doctors and dentists, engineering, sanatoriums and rest homes, serum manufacturing, electrician, dairies, hay dealers, aviary, ornamental rock works, poultry ranches, agricultural pursuits, cement contractor, riding stable, plowing, teaming and leveling contractors, contractors and builders, paint shops, hatchery, brick and coal yard, wrought iron manufactory, junk dealers, kennels, locksmith, lawnmower and bicycle repairing and shoe repair.

[1] The plaintiff acquired his residence in July, 1930, a few months after the ordinance went into effect. He conducted and now conducts a contracting and jobbing plumbing business, with his office and headquarters at his residence where he lives with his wife and children. He has fastened a small sign on the premises indicating his business, maintains a truck which he has equipped with a portable plumbing shop, and stores some fittings and pipe on the premises. Otherwise there is no indication that the premises are used for any purpose other than residential. Many of the businesses above enumerated became established in the R–1 zone and have been conducted similarly from the residences of the respective operators thereof since the adoption of ordinance No. 1813, N.S. Such businesses are not confined to any particular area in the R–1 zone, but are scattered over the district generally, in the immediate neighborhood of the plaintiff as well as elsewhere. Apparently ordinance No. 1913, N.S., remained without any attempt being made to enforce it until prior to the filing of the action herein in February, 1937. Subsequent to the rendition of the judgment and the taking of the appeal herein the board of supervisors adopted a new map of the district, reducing the R–1 zone to 25 per cent of the original area established by the ordinance. This circumstance is made the basis of a motion to dismiss the appeal herein on the ground that the questions involved have become moot. But inasmuch as the plaintiff's residence remains in the 25 per cent R–1 zone, it is deemed necessary also to consider the merits of the appeal.

The trial court made a personal inspection of the district before formulating its findings of fact and rendering its conclusions and judgment. In addition to the facts presented in the evidence hereinabove stated, it found that the zoning ordinance was not reasonably or at all necessary or related to the public health, safety, morals and general welfare, and that its enforcement would jeopardize and deprive the plaintiff of his rights to the free use and enjoyment of his property as guaranteed by the federal and state Constitutions. It concluded that the ordinance was discriminatory, unreasonable, oppressive, arbitrary and confiscatory in nature and in so far as it attempted to prohibit home industries in the R–1 zone it was unconstitutional and void.

The question on this appeal is whether the trial court correctly concluded, on the facts before it, that the zoning ordinance was of the character stated, namely, discriminatory, unreasonable, oppressive and arbitrary, confiscatory in its nature and therefore unconstitutional and void. If there is sufficient support in the record for the finding that the ordinance was not reasonably or at all related or necessary to the public health, safety, morals or general welfare, then the conclusion of the court follows and is in accordance with the law as expressed in the cases of Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479; In re White, 195 Cal. 516, 234 P. 396; Pacific Palisades Ass'n v. Huntington Beach, 196 Cal. 211, 237 P. 538, 40 A.L.R. 782; Hurst v. City of Burlingame, 207 Cal. 134, 143, 277 P. 308; People v. Hawley, 207 Cal. 395, 411, 279 P. 136; Biscay v. City of Burlingame, 127 Cal. App. 213, 218, 15 P.2d 784.

[2-7] A strong presumption favors the validity of the legislative act. Nevertheless the validity of the act depends upon its reasonable relation to the public welfare. If reasonable minds might differ as to the presence of any substantial relation to the public health, safety, morals or general welfare, the zoning ordinance will be held valid. Miller v. Board of Public Works, supra; Zahn v. Board of Public Works, 195 Cal. 497, 234 P. 388. We reiterate what was said in the Miller case [195 Cal. 477, 234 P. 383, 38 A.L.R. 1479]: "The police power of a state is an indispensable prerogative of sovereignty and one that is not to be lightly limited. Indeed, even though at times its operation may seem harsh, the imperative necessity for its existence precludes any limitation upon its exercise save that it be not unreasonably and arbitrarily invoked and applied. [Citing cases.] It is not, however, illimitable and the marking and measuring of the extent of its exercise and application is determined by a consideration of the question of whether or not any invocation of that power, in any given case, and as applied to existing conditions, is reasonably necessary to promote the public health, safety, morals * * * or general welfare of the people of a community. * * * It may be taken as now well settled that courts are required in considering the validity of zoning ordinances to determine in addition to the need thereof, whether or not they are arbitrary and discriminatory in their conception and application, and whether they have any reasonable tendency to promote the public morals health, safety, or general welfare and prosperity of a community. It may be safely said, we think, that it is the consensus of opinion that the regulation of the development of a city under a comprehensive and carefully considered zoning plan, does tend to promote the general welfare of a community, and there is no doubt, it seems to us that the adoption and enforcement of such a plan, when fairly conceived and equably applied, is well within the scope of the police power. * * * It cannot be gainsaid, however, that many municipalities, evidently upon the theory that zoning is a panacea for civic ills have, under the guise of zoning, sought to enact and enforce unreasonable and discriminatory ordinances. Some of these attempted regulations have been palpably for the exclusive and preferential benefit of particular localities. The duty, therefore, devolves upon the courts to determine in each instance whether or not the ordinance, either in whole or in part, is invalid. In the determination of this problem two questions present themselves: (1) Is the scheme of zoning as a whole sound, that is to say, is the method of classification and districting reasonably necessary to the public health, safety, morals, or general welfare? and (2) has the scheme of classification and districting been applied fairly and impartially in each instance? * * * It is scarcely necessary to reiterate here the well-recognized principle that courts are loath to substitute their judgment as to the necessity for a particular enactment for the legislative judgment as to the need of such enactment with reference to the exercise of the police power. A large discretion is vested in the legislative branch of the government with reference to the exercise of the police power. * * Every intendment is to be indulged by the courts in favor of the validity of its exercise and, unless the measure is clearly oppressive, it will be deemed to be within the purview of that power. It is only when it is palpable that the measure in controversy has no real or substantial relation to the public health, safety, morals, or general welfare that it will be nullified by the courts. The courts may differ with the Legislature as to the wisdom and propriety of a particular enactment as a means of accomplishing a particular end but as long as there are considerations of public health, safety, morals, or general welfare which the legislative body may have had in mind which could have

justified the regulation, it must be assumed by the court that the legislative body had those considerations in mind and that those considerations did justify the regulation."

We also said in Pacific Palisades Ass'n v. Huntington Beach, supra [196 Cal. 211, 237 P. 540, 40 A.L.R. 782], and repeated in People v. Hawley, supra: "Every intendment is to be made in favor of the lawful exercise of municipal power making such regulations, and it is not the province of courts, except in clear cases, to interfere with the exercise of that authority. But, as was recently said by the Supreme Court of the United States, 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.' * * * Therefore, notwithstanding this general grant of power, it is a thoroughly well-settled doctrine that municipal by-laws and ordinances undertaking to regulate useful business enterprises are subject to investigation in the courts, with a view to determining whether the law or ordinance is a lawful exercise of the police power; or whether, under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with the right to carry on a lawful business, to make contracts, or to use and enjoy property." In the Pacific Palisades case the complaint contained allegations that similar businesses and operations were permitted in even more densely populated areas in the city which otherwise were of the same general character as that in which the plaintiff was prohibited from operating. It was held that a cause of action was stated which if supported by proof would establish the unreasonable and discriminatory character of the alleged zoning ordinance as applied to the plaintiff in that case.

[8, 9] A review of the facts presented to the trial court indicates that it was justified in concluding that there could not have been any considerations of public health, safety, morals, or general welfare which were reasonably or at all related to or promoted by the zoning ordinance applicable to Temple City. The attempt to rezone the major portion of the district to strictly residential purposes after the planning commissioners had laid out the district generally for residential and light commercial purposes proved in fact to be but a futile gesture. This is also eloquently reflected in the board's adoption of an amended zoning map materially reducing the R-1 zone to one-fourth its original area. In addition to the clear lack of any sufficient or real relation to the promotion of the general welfare in the adoption of the zoning ordinance, we have a situation where the board, apparently in belated recognition of the actual requirements of the general welfare, attempted to modify the prior zoning regulations. While the effect of that modification is not before us on the consideration of the merits of the appeal, it is presented in connection with the motion to dismiss the appeal. In that regard it would be well to note that an unlawful discrimination as to the plaintiff herein likewise would ensue unless the zoning requirements of the district are made applicable as of the date of the modification. In other words, in accordance with what was said in Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14, it would be inequitable and confiscatory as to the plaintiff in this case, by a modification of the ordinance, to permit some of the businesses to remain which have come into existence since the adoption of the zoning ordinance while requiring others in an immediate similar neighborhood to be removed. Therefore, if the modification of the ordinance stand as a reasonable exercise of the police power from the standpoint of zoning requirements in relation to the general welfare, it should speak as of the date of the adoption of the modification. Thus speaking, the principles declared in the case of Jones v. Los Angeles, supra, would preclude the application of the modified ordinance to prevent the plaintiff's pursuing his business as it is presently constituted and established at his residence. His would be a nonconforming use in existence at the date of the adoption of the applicable legislative act, and in accordance with well-recognized principles the right to pursue that use could not thus be taken from him. The plaintiff would therefore be entitled to prevail herein either on a consideration of the motion or of the merits of the appeal. An appropriate disposition of the questions raised herein, however, is made pursuant to our conclusions on the consideration of the merits of the appeal.

The judgment is affirmed.

EDMONDS, Justice (dissenting).

I cannot agree that the facts found by the trial court compel the conclusion, as a matter of law, that the ordinance challenged by the respondent property owner is invalid because of the violation of constitutional rights. It is now settled beyond question that although a court may differ from the determination of the legislative body, unless a zoning measure is clearly oppressive, it will be deemed to be within the purview of the police power. There will always be difference of opinion as to the means of accomplishing a particular end, but if there is a reasonable basis for the belief that the establishment of a strictly residential district has substantial relation to the public health, safety, morals or general welfare, a zoning ordinance to accomplish that purpose will be upheld. Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479; Zahn v. Board of Public Works, 195 Cal. 497, 234 P. 388.

In earlier times, zoning regulations were, in the main, enacted to restrict the use of property in districts already partially, or somewhat completely, built up. With the growth of the large cities as the result of motor transportation, governmental authorities have endeavored to set aside areas for residential purposes in advance of their use. Certainly, it is more in the interest of the general welfare that certain districts be set aside to residential uses before there has been any large investment for improvements than to apply restrictions after business has become established. This is wise city planning in the public interest. It has been made possible by general judicial approval of the doctrine that zoning may properly take into consideration those factors which, although they may not be exactly defined as relating to public health, safety or morals, come under the broad term of general welfare.

Also, a zoning plan must be viewed as a whole and the court will not search out individual cases of discrimination or hardship. And it is not necessary, in order to sustain such legislation, to show that the public welfare demands the exclusion of business uses for each individual lot in the area zoned. Rehfeld v. City and County of San Francisco, 218 Cal. 83, 21 P.2d 419; Jones v. City of Los Angeles, 211 Cal. 304, at page 309, 295 P. 14.

In the present case the court found "that Temple City, which notwithstanding its name, is an unincorporated territory, was founded with the intention that its inhabitants would use their residence properties for some light commercial purposes which would enable them to make a living; that chicken raising on a commercial scale has been and is the most extensive of these light, commercial home industries, but throughout the residence district in Temple City there have been and are scattered real estate offices, stonemasons' headquarters, cement contractors' offices, and the like; that this was the state of affairs when the zoning ordinance was passed; the court finds that this zoning ordinance is unreasonable because it attempts to make a strictly residential district out of a district where home industries have always been conducted; that said ordinance purports to prevent the living upon and use of said property for any purpose other than a single family residence and to prevent the living upon and the conduct of any business from and upon said premises; that said premises are in a sparsely built-up community without the corporate limits of any municipality and in the unincorporated section of Los Angeles county; that said section is in the center of a poultry, truck gardening and fruit growing community wherein and whereat all residents, without substantial exception, are poor people who at least must of necessity and do get their living or a large portion thereof from the use of the said property otherwise than in a strictly residential capacity; that much of the property in said restricted and zoned district has, for a long time, and prior to the enactment of said ordinance been and now is, used for residential and business purposes; that said property is closely surrounded by numerous properties so used for residential and business purposes, and is near and in close proximity to railroads and railroad yards and other business areas; that plaintiff has long used his property as hereinbefore alleged; that the use of said property by plaintiff, or by the numerous others using their properties for residential and business purposes, has, in nowise, reasonably or otherwise, impaired or injuriously affected the public health, safety, morals or general welfare of the community of Temple City, or any other community or section of Los Angeles County; that the said Zoning Ordinance is not reasonably or at all necessary to said public health, safety, morals and general welfare, and that the enforcement of said Ordinance, as valid, will jeopardize and deprive the plaintiff of his rights to the free use and enjoyment of his said property as guaranteed by the Federal and State Constitution."

What the intention of the "founders" of Temple City was or how it may now be ascertained is not made clear. Moreover, it is immaterial, for the police power is not subject to the mental state of relators who lay out a subdivision. Nor may the police power be limited by private contract. Thus it has been held that a city and county may not be estopped by its conduct to require the removal of a cemetery, estoppel being no stronger than a contract entered into by the sovereign. Laurel Hill Cemetery Association v. City & County of San Francisco, 152 Cal. 464, 93 P. 70, 27 L.R.A., N.S., 260, 14 Ann.Cas. 1080.

Concerning the next finding chicken raising and "commercial home industries" are probably carried on in most large areas adjacent to cities. There are usually "scattered" real estate offices in such districts but there is no finding that these uses surround the respondent's property or are even near it. But the existence of nonconforming uses does not invalidate a zoning ordinance.

The finding "that much of the property in said restricted and zoned district has, for a long time, and prior to the enactment of said ordinance been and now is, used for residential and business purposes" is so ambiguous and general as to be utterly meaningless. What is meant by "much"? The court did not state the number, nature or extent of the industrial or commercial uses in the district, nor their proximity to the respondent's property. A large part of the land in any district which is zoned is ordinarily used for residential and business purposes. That situation does not forbid zoning.

These findings were made upon evidence which shows, without conflict, that the total area zoned is 2,496 acres, approximately four square miles. The respondent's property lies within the commercial and residential district in the center of this area which comprises four hundred acres. In 1937, fifty-three (53%) per cent of it was vacant; thirty-six (36%) per cent was used for single family residences. Commercial and industrial uses accounted for less than two (2%) per cent, and only six (6%) per cent was devoted to agriculture. In general, the community consists of a commercial district running along a main street immediately surrounded by property chiefly given over to residential uses in the next few blocks, with agricultural pursuits surrounding that area. Like practically every other community, these uses sometimes merge near the boundaries, but the lines of demarcation in Temple City are more sharply drawn than in many other districts where zoning legislation has been upheld. There is a single track passenger line of the Pacific Electric Railway on the main street, Las Tunas boulevard, and a branch line of the Southern Pacific Railroad over a mile away from the respondent's property. No other land within the district zoned is used for railroad purposes. Under the zoning ordinance adopted by the board of supervisors, sixty-seven (67%) per cent of the area was devoted to single family residences, twenty-six (26%) per cent to multiple family dwellings, and the remainder seven (7%) per cent to commercial uses.

The finding that the respondent has long used his property for a commercial purpose is immaterial because that use commenced subsequent to the enactment of the zoning ordinance. No vested right to violate an ordinance may be acquired by continued violations. Also, the court's finding that the use of property by the respondent and others for business purposes, has, in no wise, reasonably or otherwise impaired or injuriously affected the public health, safety, morals or general welfare will not sustain the judgment. Courts do not require that the prescribed use of each individual lot in an area zoned will have this effect if the zoning plan, as a whole, promotes these objectives of the police power. Rehfeld v. City and County of San Francisco, supra.

Unquestionably, in enacting the ordinance zoning Temple City, the purpose of the board of supervisors was to restrict a sparsely settled area near the rapidly growing city of Los Angeles for residential purposes. Zoning regulations look to the future, not to the past, and cannot be made retroactive. Jones v. City of Los Angeles, supra; Biscay v. City of Burlingame, 127 Cal.App. 213, 15 P.2d 784. There was no attempt to interfere with any existing use. But, in effect, the legislative body declared that in the interests of the future development of the metropolitan area surrounding the city of Los Angeles, reasonable city planning required that this section be set aside for residential purposes. Of course, there would not be unanimous agreement among all citizens concerning the desirability of zoning that particular area. But government cannot wait for unanimous approval of its purposes, nor do its enactments depend upon such approval for validity.

Also, the contention of the respondent that the area included within the terms of the ordinance is much less subject to zoning in connection with reasonable desires to preserve the health and welfare than communities of more pretentious character is one which has no place in a judicial proceeding. Considerations of private interest will usually be sufficient to convince one that regulation is much more desirable when applied to property belonging to another than to him. Moreover, as has been pointed out before, the respondent bought the property upon which he lives and maintains his business after the ordinance was adopted; he is not in the position of one who finds that a present use of his land does not conform to the requirements of new legislation.

For these reasons I believe the judgment should be reversed.

We concur: GIBSON, C. J.; TRAYNOR, J.

17 Cal.2d 13

KLOPSTOCK et al. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.

S. F. 16405.

Supreme Court of California.

Jan. 10, 1941.

1. Corporations 🔑207½

A stockholder's representative suit is a "derivative action" for the reason that the wrong to be redressed is one against corporation, and normally corporation would bring the suit, but, where corporation fails or refuses to act after proper demand, stockholder's ultimate interest in corporation is sufficient to justify bringing of "propulsive action", designed to set in motion the judicial machinery for redress of wrong to corporation.

See Words and Phrases, Permanent Edition, for all other definitions of "Derivative Action" and "Propulsive Action".

2. Corporations 🔑207

The legal representative of estate of deceased stockholder obtains authority and powers of stockholder during time of administration, including possession and control of the property, and can sue in stockholder's stead on causes of action which deceased stockholder had at time of death. Civ.Code §§ 318, 320b, 320c, 321, 328b, 328d, 330.1, 330.20; Probate Code, § 573 et seq.; Code Civ.Proc. § 369.

3. Corporations 🔑207

An heir or legatee of deceased stockholder cannot bring derivative action to redress wrong to corporation until actual distribution of shares to heir or legatee.

4. Corporations 🔑207

The legal representative of deceased stockholder, and not executor of will of deceased legatee of deceased stockholder, was the "proper party" to bring derivative action to redress wrong to corporation, prior to actual distribution of stock to legatee's estate.

See Words and Phrases, Permanent Edition, for all other definitions of "Proper Party".

5. Parties 🔑76(5)

Lack of capacity to sue is waived by failure to demur specially. Code Civ.Proc. § 430, subd. 2.

6. Parties 🔑76(7)

A special demurrer for want of capacity to sue raises only the question of whether any general legal disability exists, such as infancy or insanity, or want of title in the plaintiff to the character in which he sues. Code Civ.Proc. § 430, subd. 2.

7. Pleading 🔑193(5)

A general demurrer for failure to state cause of action should be sustained where the complaint may state a cause of action in someone, but not in the plaintiff.

8. Corporations 🔑211(7)

Where executor of will of deceased legatee of deceased stockholder was not the "proper party" to bring derivative action to redress wrong to corporation, complaint by such executor was subject to general demurrer for failure to state cause of action.

See Words and Phrases, Permanent Edition, for all other definitions of "Proper Party".

9. Pleading 🔑230

The statute giving courts the power to permit amendments in furtherance of justice is liberally construed. Code Civ.Proc. § 473.

10. Pleading ⚷225(2)

The sustaining of general demurrer for failure to state cause of action does not affect trial court's power to permit amendment of pleadings in furtherance of justice. Code Civ.Proc. § 473.

11. Pleading ⚷235, 248(1)

The trial court's power to permit amendments of pleadings is not unlimited, and an amendment introducing a wholly different cause of action will not be permitted. Code Civ.Proc. § 473.

12. Pleading ⚷248(2)

The words "cause of action", in rule that amendment introducing wholly different cause of action will not be permitted, mean only the legal obligation which it is sought to enforce against the defendant. Code Civ.Proc. § 473.

See Words and Phrases, Permanent Edition, for all other definitions of "Cause of Action".

13. Pleading ⚷235, 248(2)

The test in determining whether pleading can be amended is not whether under technical rules of pleading a new cause of action is introduced, but whether attempt is made to state facts which give rise to a wholly distinct and different legal obligation against defendant, and the power to permit amendment will be denied only if a change is made in the liability sought to be enforced against the defendant. Code Civ. Proc. § 473.

14. Corporations ⚷210

The particular stockholder who brings derivative suit is merely a "nominal party plaintiff", since corporation is ultimate beneficiary of such suit.

See Words and Phrases, Permanent Edition, for all other definitions of "Nominal Party Plaintiff".

15. Appeal and error ⚷1036(1)

Where District Court of Appeal reversed judgment in derivative action on ground that executor of will of deceased legatee of decedent stockholder was not the "proper party" to bring action, trial court's allowance of amendment substituting legal representative of deceased stockholder as the plaintiff was not abuse of discretion, since amendment did not constitute the statement of a wholly different cause of action. Code Civ.Proc. § 473.

In Bank.

Mandamus proceeding by Frederick Klopstock and others against the Superior Court of the State of California, in and for the City and County of San Francisco, to compel the Superior Court to enter a dismissal of an action filed by Samuel M. Samter, as executor of the will of Grace E. Klopstock, deceased, against the Klopstock Realty Company, and Frederick, Samuel, and David Klopstock.

Alternative writ discharged, and peremptory writ denied as to Frederick, Samuel, and David Klopstock and the Klopstock Realty Company, and peremptory writ granted as to David Klopstock.

For prior opinion, see 99 P.2d 302.

Joseph T. O'Connor and Leo R. Friedman, both of San Francisco, for petitioners.

H. U. Brandenstein and Samuel M. Samter, both of San Francisco (J. J. Posner, of San Francisco, of counsel), for respondent.

GIBSON, Chief Justice.

This is a petition for a writ of mandate to compel the respondent superior court to dismiss an action, after a general reversal of the judgment rendered at the previous trial.

The facts concerning the controversy are fully stated in a prior appeal. Samter v. Klopstock Realty Co., 31 Cal.App.2d 532, 88 P.2d 250. In 1926, Klopstock Realty Company, a corporation, had been organized, with its entire stock held by three brothers, Isaac, Frederick and Samuel Klopstock, who were also its directors. In 1933 Isaac died, leaving a will appointing his wife, Grace, and his brother, Frederick, co-executors. In 1935, while the estate was in probate, Grace Klopstock died, and Samuel Samter was appointed executor of her will.

Thereafter, Samter commenced the present action on behalf of the corporation to compel the two surviving brothers to repay to the corporation certain sums alleged to have been wrongfully withdrawn. Named as defendants were the two brothers, Frederick and Samuel, and the corporation. One David Klopstock was also named as a defendant but he is not important to this action since a judgment in his favor has become final. The complaint followed the usual form of a stockholder's representative suit, and included the allegation that a demand upon the corporation to act would be futile in view of its domination by the other defendants.

The theory upon which the plaintiff Samter proceeded was that the stockholder, Isaac Klopstock, had died leaving his property to his wife, Grace Klopstock, and that she was therefore the beneficial owner of the stock. Upon her death plaintiff, as her executor, brought this action on behalf of the corporation.

Defendants filed a general demurrer to the complaint, which was overruled, and the action was tried without a jury. The trial court gave judgment in favor of the estate of Isaac Klopstock against the two brothers, Frederick and Samuel. The district court of appeal reversed the judgment, holding it void on the ground that Isaac's estate was not a party to the action. The court also declared that plaintiff Samter was not the proper party to bring the action on behalf of the corporation, and that this objection could be raised by general demurrer for failure to state a cause of action and was not waived by failure to demur specially. Samter v. Klopstock Realty Co., supra.

Subsequently Frederick Klopstock was removed as executor in a separate proceeding. See In re Estate of Klopstock, 31 Cal. App.2d 568, 88 P.2d 722. Thereafter plaintiff Samter sought leave from the trial court to file an amended and supplemental complaint in which Flora Short, the newly appointed administratrix of the estate of Isaac Klopstock, was named as plaintiff. Defendants moved to dismiss the action on the ground that under the decision of the District Court of Appeal in Samter v. Klopstock Realty Co., supra, the first complaint did not state a cause of action in the plaintiff, and that this fundamental defect could not be cured by amendment. The trial court nevertheless granted the application to file the amended and supplemental complaint and denied the motion to dismiss.

This petition for mandate to compel a dismissal of the action was then filed. The theory of petitioners, defendants in the original action, is that the action was filed by a stranger wholly without right or interest in the subject of the litigation, and that the addition or substitution of the administratrix of the estate of Isaac Klopstock as plaintiff was, in effect, the institution of an entirely new suit on a different cause of action, which cannot be accomplished by an amendment of the complaint.

[1] It is true that in the original action the plaintiff Samuel Samter was not the proper person to bring an action on behalf of the corporation. A stockholder's representative suit has been called a "derivative action" for the reason that the wrong to be redressed is one against the corporation, and normally the corporation would bring the suit. Where, however, the corporation fails or refuses to act after proper demand, the stockholder's ultimate interest in the corporation is sufficient to justify the bringing of a "propulsive" action designed to set in motion the judicial machinery for the redress of the wrong to the corporation. Hawes v. Oakland, 104 U.S. 450, 26 L.Ed. 827; Difani v. Riverside County Oil Co., 201 Cal. 210, 256 P. 210; Whitten v. Dabney, 171 Cal. 621, 154 P. 312; Ballantine, Private Corporations [1927], sec. 188; Stevens, Corporations [1936], secs. 163 et seq.; 23 Cal.L.Rev. 174.

[2, 3] If the stockholder dies, the legal representative of his estate obtains the authority and powers of the stockholder during the time of administration, including the possession and control of the property (Civ.Code, secs. 328b, 328d, 330.1, 330.20, 318, 321, 320b, 320c; Smith v. San Francisco & North Pac. Ry. Co., 115 Cal. 584, 47 P. 582, 35 L.R.A. 309, 56 Am.St.Rep. 119; Market Street R. R. v. Hellman, 109 Cal. 571, 42 P. 225; see In re Estate of Vance, 152 Cal. 760, 93 P. 1010; McCaughey v. Lyall, 152 Cal. 615, 93 P. 681; In re Estate of Porter, 129 Cal. 86, 61 P. 659, 79 Am.St.Rep. 78; Robertson v. Burrell, 110 Cal. 568, 42 P. 1086), and may sue in his stead on causes of action which the deceased stockholder had at the time of his death. Prob.Code, sec. 573 et seq.; Code Civ.Proc. § 369; Holland v. McCarthy, 177 Cal. 507, 171 P. 421. An heir or legatee cannot bring the action in his own name until actual distribution of the shares to him. In re Estate of Clark, 190 Cal. 354, 212 P. 622; Holland v. McCarthy, supra; Miller v. Ash, 156 Cal. 544, 105 P. 600; Robertson v. Burrell, supra.

[4] Thus, in the original action the suit on behalf of the corporation should have been brought by the legal representative of the deceased stockholder, Isaac Klopstock, and neither a legatee nor anyone representing the legatee (as, in this instance, the plaintiff Samter) was entitled to bring the derivative action to redress the wrong to

the corporation, prior to the actual distribution of such shares to the legatee's estate.

[5] It is contended that this defect was merely one of lack of capacity to sue on the part of the plaintiff Samter. We do not believe that this accurately states the nature of the defect. If it were lack of capacity to sue, the defect would have been waived by a failure to demur to it specially. Moore v. Lauff, 30 Cal.App. 452, 454, 158 P. 557; Spreckels v. Grace Darling Hosp. Ass'n, 28 Cal.App. 646, 153 P. 718; Swamp & Overflowed Land District No. 110 v. Feck, 60 Cal. 403. It has been held, however, under similar code provisions existing in many states that a demurrer for lack of capacity to sue raises only the question of whether the plaintiff is free from general disabilities, such as infancy or insanity, or if he sues in a representative capacity, that he actually possesses the character in which he sues. Brown v. Critchell, 110 Ind. 31, 34, 7 N.E. 888, 11 N.E. 486; Louisville & N. R. Co. v. Brantley's Adm'r, 96 Ky. 297, 302, 28 S.W. 477, 16 Ky.Law Rep. 691, 49 Am. St.Rep. 291; Poe v. Sheridan County, 52 Mont. 279, 290, 291, 157 P. 185; Farrell v. Cook, 16 Neb. 483, 484, 20 N.W. 720, 49 Am.Rep. 721; Lyon County Bank v. Lyon County Bank, 57 Nev. 41, 47, 58 P.2d 803, 60 P.2d 610; Bank of Havana v. Magee, 20 N.Y. 355, 359; Weidner v. Rankin, 26 Ohio St. 522, 525; First Nat. Bank of Watertown v. Eddy, 47 S.D. 297, 298, 198 N.W. 554; McKenney v. Minahan, 119 Wis. 651, 656, 97 N.W. 489; Littleton v. Burgess, 16 Wyo. 58, 71, 91 P. 832, 16 L.R. A.,N.S., 49; Pomeroy, Code Remedies, 5th Ed., sec. 125; cf. Thompson v. Union Fishermen's, etc., Co., 118 Or. 436, 235 P. 694, 246 P. 733, contra, with strong dissent.

[6-8] Decisions under Code of Civil Procedure section 430, subdivision 2, which permits a demurrer for lack of capacity to sue have not answered this question definitively. Dicta are found in some California cases which lend support to the position that a special demurrer for lack of capacity to sue can be used to test whether the plaintiff has stated a cause of action in himself. See, for example, Town of Susanville v. Long, 144 Cal. 362, 364, 77 P. 987. We believe the better rule to be that laid down by the cases cited supra, that such a special demurrer for want of capacity to sue raises only the question of whether any general legal disability exists, such as infancy or insanity, or want of title in the plaintiff to the character in which he sues. In Ward v. Petrie, 157 N.Y. 301, 311, 51 N.E. 1002, 1005, 68 Am.St.Rep. 790, this distinction was explained as follows: "There is a difference between capacity to sue, which is the right to come into court, and a cause of action, which is the right to relief in court. Incapacity to sue exists when there is some legal disability, such as infancy, or lunacy, or a want of title in the plaintiff to the character in which he sues. The plaintiff was duly appointed receiver, and has a legal capacity to sue as such, and hence could bring the defendants into court by the service of a summons upon them, even if he had no cause of action against them. On the other hand, an infant has no capacity to sue, and hence could not lawfully cause the defendants to be brought into court, even if he had a good cause of action against them. Incapacity to sue is not the same as insufficiency of facts to sue upon." This distinction has also been noted in California. Cases have held that a general demurrer for failure to state a cause of action should be sustained where the complaint may state a cause of action in someone, but not in the plaintiff. Dixon v. Gries, 106 Cal. 506, 39 P. 857; People v. Haggin, 57 Cal. 579, 587; Lindsey v. Superior Court, 100 Cal.App. 37, 40, 279 P. 837; see, also, 21 Cal.Jur. 99. It follows, therefore, that the general demurrer originally filed by the defendants in the action of Samter v. Klopstock Realty Co., supra, should have been sustained.

[9, 10] We now come to the decisive question whether, after the reversal by the district court of appeal, it was within the discretionary power of the trial court to permit the amendment of the complaint which, in effect, substituted the proper plaintiff in the action, i. e., Flora E. Short as administratrix of the estate of the deceased stockholder, Isaac Klopstock. Petitioners contend that since no cause of action was stated by the original complaint and since the decision on appeal inferentially held that a general demurrer on that ground should have been sustained, no course was open for the trial court but to dismiss the action. Code Civ.Proc., sec. 473, provides: "The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party * * *." The same section provides further, that the court may, in its discretion and after notice, allow "an amendment to any plead-

ing or proceeding in other particulars * * *." This statutory provision giving the courts the power to permit amendments in furtherance of justice has received a very liberal interpretation by the courts of this state. Rabe v. Western Union Tel. Co., 198 Cal. 290, 300, 244 P. 1077; Frost v. Witter, 132 Cal. 421, 424, 64 P. 705, 84 Am.St.Rep. 53; 21 Cal.Jur. 190 et seq. This position is clearly in accord with the modern theories of code pleading, which would permit amendment in the discretion of the court unless an attempt is made to present an entirely different set of facts by way of the amendment. Clark, Code Pleading, p. 514. Nor is this liberal policy of permitting amendments in furtherance of justice any different merely because a general demurrer for failure to state a cause of action has been sustained. "For the most common kinds of amendments are those in which complaints are amended that do not state facts sufficient to constitute a cause of action." Frost v. Witter, supra, 132 Cal. page 425, 64 P. page 706, 84 Am.St.Rep. 53; Dixon v. Gries, supra; People v. Haggin, supra, 57 Cal. page 583.

[11-13] Of course, the court's power to permit amendments of pleadings is not unlimited. It has generally been said that an amendment may not be permitted where the effect of such amendment is to state "another and distinct cause of action". Dubbers v. Goux, 51 Cal. 153, 155; Clark, Code Pleading, p. 502 et seq. But this court has said: "It is obvious that the unqualified way in which the rule is sometimes stated—i. e. that a new or different cause of action cannot be introduced by amendment—cannot be accepted; for the most common kinds of amendments are those in which complaints are amended that do not state facts sufficient to constitute a cause of action, and in these, and often in the case of new parties, a new cause of action is in fact for the first time introduced. All that can be required, therefore (to use the language of Mr. Pomeroy), is that 'a wholly different cause of action' shall not be introduced * * *." Frost v. Witter, 132 Cal. 421, 424, 64 P. 705, 706, 84 Am. St.Rep. 53; 21 Cal.Jur. 197 et seq. In determining whether a wholly different cause of action is introduced by the amendment technical considerations or ancient formulae are not controlling; nothing more is meant than that the defendant not be required to answer a wholly different legal liability or obligation from that originally stated. As the court says in the Frost case, supra, 132 Cal. page 426, 64 P. page 707, 84 Am.St.Rep. 53, for the purpose of determining whether amendment is possible, the "cause of action" referred to as furnishing the test means only the legal obligation which it is sought to enforce against the defendant. Other courts have used almost identical language; the test is not whether under technical rules of pleading a new cause of action is introduced, but rather, the test is whether an attempt is made to state facts which give rise to a wholly distinct and different legal obligation against the defendant. The power to permit amendment is denied only if a change is made in the liability sought to be enforced against the defendant. See Harriss v. Tams, 258 N.Y. 229, 242, 179 N.E. 476.

[14, 15] In the present case plaintiff Samter sought on behalf of the corporation to enforce against the defendants exactly the same liability which is the basis for the relief now sought on behalf of the corporation. In the furtherance of justice and in the exercise of its discretion, the trial court permitted the amendment which brought Flora E. Short, as administratrix of the estate of the deceased stockholder, into the action as the nominal plaintiff. Since the corporation is the ultimate beneficiary of such a derivative suit, it is clear that the particular stockholder who brings the suit is merely a nominal party plaintiff. Whitten v. Dabney, 171 Cal. 621, 630, 154 P. 312; Russell v. Weyand, 5 Cal. App.2d 259, 260, 42 P.2d 381. The defendants have been fully apprised since the filing of the original complaint of the facts which are relied upon to state a right to relief against them in behalf of the corporation. Under the facts of this case, therefore, we hold that the amendment complained of did not constitute the statement of a wholly different cause of action which would prevent amendment of the complaint, but, on the contrary, was well within the liberal discretion which is granted to the courts by Code of Civil Procedure, section 473.

Our conclusion in this regard is supported by the reasoning of decisions both in California and elsewhere. In Curtis v. Nyc & Nissen, 86 Cal.App. 507, 512, 513, 261 P. 747, 749, the complaint on a written instrument was brought by an individual plaintiff. Upon a showing that a corporation was the party having the right to bring the action, the trial court permitted an amendment of the complaint stating a right of recovery in the corporate plaintiff instead of in the individual who brought the suit. It was held that this was not an attempt to set up a new cause of action and the court quoted from Gray v. Alderson's Adm'r, Ky., 123 S.W. 317: "This pleading in no wise changed the cause of action. It was still an effort to collect the same notes set up and described in the original petition." It is emphasized by the court that the defendant was in no way surprised by the amendment and had been given a full opportunity to make a defense. In Cox v. San Joaquin Light, etc., Co., 33 Cal.App. 522, 166 P. 578, a death action was brought by the heir of the decedent, although the statute required that the action be brought by the personal representative of the decedent. After the running of the period prescribed by the statute of limitations, the trial court permitted the complaint to be amended to state the cause of action in the personal representative. The court held that there was no attempt to state a wholly different cause of action since the same facts were relied upon for recovery in each instance. In Reardon v. Balaklala Consol. Copper Co., 9 Cir., 193 F. 189, which has been cited with approval in many California decisions, the death action was brought by the next of kin of the decedent. After the statutory period of limitations had run, the court permitted an amendment of the complaint which for the first time stated the cause of action in the personal representative of the decedent, a different individual as was required by the statute. Against the same contentions now being advanced in the case before us the court said (page 191 of 193 F.): "It should be borne in mind * * * that the substantive cause of action counted on in the amended complaint has not been changed. It remains precisely the same as that stated in the original pleading. No new facts are alleged as a ground of recovery, the only change being in the name of the plaintiff and the capacity in which he sues; while the father still remains the beneficiary of the recovery sought. This being so, the change effected by the amendment is obviously in no just sense the bringing of a new action. It is one of form rather than of substance, and in the interests of justice is to be treated as such, rather than to adopt a view which would result in an irretrievable bar to all remedy. Under the modern doctrine, the discretionary power of the court to such end is to be liberally exerted in favor of, rather than against, the disposition of a case upon its merits." See, to the same effect, Van Camp v. McCulley, 89 Ohio St. 1, 104 N.E. 1004.

The alternative writ heretofore issued is discharged, and the peremptory writ denied as to defendants Frederick Klopstock, Samuel Klopstock, and the Klopstock Realty Company. The peremptory writ is granted as to David Klopstock, in whose favor the judgment has become final.

We concur: SHENK, J.; CURTIS, J.; EDMONDS, J.; CARTER, J.

16 Cal.2d 838

CAMINETTI, Insurance Com'r, v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.

S. F. 16479.

Supreme Court of California.

Jan. 6, 1941.

Rehearing Denied Feb. 3, 1941.

1. Insurance 🔑3

In enacting the Insurance Code regulating insurance companies, Legislature exercised its power to regulate a "business charged with a public interest".

See Words and Phrases, Permanent Edition, for all other definitions of "Business Charged with a Public Interest".

2. Statutes 🔑231

The several sections of Insurance Code relating to conservatorship for insurance companies and to transferring proceedings to Los Angeles or San Francisco must be considered together and not as unrelated provisions. St.1935, p. 547, § 1040; p. 541, § 1012; p. 497, § 16; St.1937, p. 2563, § 1011.

3. Insurance 🔑44

The statute providing that insurance commissioner, when appointed conservator of insurance company, may remove company's principal office to San Francisco or Los

Angeles, whereupon court in which proceeding was begun "shall" on conservator's application order a transfer of the proceeding to the city chosen, is "mandatory". St.1935, p. 497, § 16; p. 547, § 1040; St.1937, p. 2563, § 1011.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory" and "Shall".

4. Insurance 🔑44

A "conservatorship proceeding" contemplates, not the liquidation of the insurance company involved, but a conservation of company's assets and business over the period of stress by commissioner of insurance, who thereafter yields control to regular officers of company. St.1935, p. 541, § 1012; St.1937, p. 2563, § 1011.

See Words and Phrases, Permanent Edition, for all other definitions of "Conservatorship Proceeding".

5. Insurance 🔑44

The chief purpose of statute providing that, at any time after an order of conservatorship is made, insurance commissioner may remove principal office of insurance corporation involved to San Francisco or Los Angeles, is convenience of commissioner, who, as such, maintains an office and staff in both cities. St.1935, p. 547, § 1040.

6. Constitutional law 🔑70(3)

The propriety of enacting venue statutes for the convenience and assistance of public officials, such as statute providing that, after insurance commissioner is appointed conservator of insurance company, he may remove company's principal office to San Francisco or Los Angeles, is a matter of determination by Legislature, not for the courts. St.1935, p. 547, § 1040.

7. Insurance 🔑44

Under statute providing that, after insurance commissioner is appointed conservator of insurance company, he may "remove" company's principal office to San Francisco or Los Angeles, the removal of principal office lies in discretion of conservator, and any official act or statement, indicative of such removal, is adequate; the word "remove" not requiring removal of all physical property, equipment, books, records, and business activities of company, there being a clear distinction between terms "principal office" and "principal place of business".

See Words and Phrases, Permanent Edition, for all other definitions of "Principal Office", "Principal Place of Business", and "Remove".

8. Insurance 🔑44

Where insurance commissioner, after being appointed conservator of insurance company, removed company's minute books to Los Angeles under a prior written declaration of removal, there was a sufficient showing of "removal" of company's principal office, within statute authorizing such removal in conservatorship proceedings. St.1935, p. 547, § 1040; St.1937, p. 2563, § 1011.

See Words and Phrases, Permanent Edition, for all other definitions of "Removal".

9. Insurance 🔑44

The phrase "said court" in statute providing that order vesting title of insurance company's property and records in insurance commissioner, as conservator, shall continue in force until, after a full hearing, it appears to "said court" that ground for the order does not exist, refers to court in which conservatorship proceeding was commenced only when there is no removal of proceeding to San Francisco or Los Angeles under another section, and, in case of a transfer of such proceeding, term applies to court of transfer. St.1935, p. 541, § 1012; p. 547, § 1040.

See Words and Phrases, Permanent Edition, for all other definitions of "Said Court".

10. Constitutional law 🔑306
Insurance 🔑4

The statute providing that insurance commissioner as conservator of an insurance company may make application to court for an order directing the court to transfer conservatorship proceeding to San Francisco or Los Angeles is purely procedural, and question of "due process of law" is not involved; due process being afforded by hearing authorized by another statute. St.1935, p. 541, § 1012; p. 547, § 1040.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

11. Insurance 🔑44

Under statute authorizing insurance commissioner, as conservator of insurance company, to remove conservatorship proceeding to San Francisco or Los Angeles, the proceeding may be removed to either city, and fact that company's principal office is in San Francisco does not preclude removal to Los Angeles. St.1935, p. 547, § 1040; St.1937, p. 2563, § 1011.

12. Prohibition ⚷30

Where insurance commissioner, as conservator of insurance company, had requested only prohibition to stay further proceeding in superior court in San Francisco after obtaining order vesting title in himself as conservator of company's property, and making application to transfer proceeding to Los Angeles, Supreme Court could grant any appropriate relief within issues presented by pleadings. St.1935, p. 547, § 1040; St.1937, p. 2553, § 1011.

EDMONDS, J., dissenting.

◆

Original proceeding in prohibition by A. Caminetti, Jr., Insurance Commissioner, to restrain the Superior Court in and for the City and County of San Francisco from proceeding with the hearing and determination of the petition of Mount Moriah Life Insurance Company to terminate a conservatorship proceeding.

Peremptory writs of prohibition and mandate issued.

Rehearing denied; EDMONDS, J., dissenting.

Earl Warren, Atty. Gen., W. T. Sweigert, Asst. Atty. Gen., and Neil Cunningham and James A. Arnerich, Deputies Atty. Gen., for applicant.

John H. Riordan and Knight, Boland & Riordan, all of San Francisco, for respondent.

PER CURIAM.

In this original proceeding in prohibition the petitioner, as insurance commissioner of the state, seeks to restrain the respondent Superior Court in and for the City and County of San Francisco from proceeding with the hearing and determination of a cause now pending before it.

An alternative writ of prohibition was issued by this court upon a petition alleging that on August 15, 1940, the petitioner, as insurance commissioner, caused to be filed with the respondent Superior Court, pursuant to section 1011 of the Insurance Code, St.1935, p. 540, as amended by St. 1937, p. 2563, an application for order appointing him conservator of the Mount Moriah Life Insurance Company, a California corporation having its principal office and place of business in San Francisco; that on the same day, and pursuant to such request, the respondent court made its order appointing petitioner conservator, vesting in him as such, title to all of the assets of the company and directing him to take possession of its books, records and property with a view to conducting the business until the further order of the court, to the exclusion of the officers and agents of the company, who were thus precluded from interfering with his activities as conservator; that thereupon petitioner immediately took possession of the company's assets and records as conservator and on the same day removed the principal office of the company to the city of Los Angeles, under the provisions of section 1040 of the Insurance Code, St.1935, p. 547; that on the following day, petitioner made application, under that section, for an order transferring the conservatorship proceeding to the Superior Court in and for Los Angeles county; that respondent Superior Court refused to make such order of transfer but instead, and upon the application of the company, purported to restrain petitioner from removing the principal office of the company from San Francisco to Los Angeles; that respondent thereupon purported to assume jurisdiction and to proceed with the hearing of the company's petition, under section 1012 of the Insurance Code, to terminate the conservatorship proceeding even though it is without jurisdiction other than to transfer the conservatorship proceeding to Los Angeles county.

In defense of its action, the respondent court sets forth in its return and brief in support thereof the contention that it cannot lawfully transfer the conservatorship proceeding to Los Angeles or refrain from hearing the application to terminate the same. The validity of this defense depends upon the proper interpretation of several sections of the Insurance Code.

Section 1011 provides that: "The superior court of the county in which is located the principal office of such person [includes corporation, sec. 19] in this State shall, upon the filing by the commissioner of the verified application showing any of the following conditions hereinafter enumerated to exist, issue its order vesting title to all of the assets of such [corporation], wheresoever situated, in the commissioner * * * and direct the commissioner forthwith to take possession of all of its books, records, property, real and personal, and assets, and to conduct, as conservator, the business of said [corporation], or so much thereof as to the commissioner may seem appropriate, and enjoining said [corporation] and its officers, * * * from the transaction of its business or disposition of its property until the further order of said court: [then follow ten enumerated grounds warranting an order of conservatorship]."

Section 1012 provides that: "Said order shall continue in force and effect until, on the application either of the commissioner or of such [corporation], it shall, after a full hearing, appear to said court that the ground for said order directing the commissioner to take title and possession does not exist or has been removed and that said [corporation] can properly resume title and possession of its property and the conduct of its business."

Section 1040 provides that: "At any time after an order is made under sections 1011 [conservatorship] or 1016 [liquidation], the commissioner may remove the principal office of the [corporation] proceeded against to the City and County of San Francisco or to the city of Los Angeles. In event of such removal, the court wherein the proceeding was commenced shall, upon the application of the commissioner, direct its clerk to transmit all of the papers filed therein with such clerk to the clerk of the City and County of San Francisco or of the county of Los Angeles as the case may require. The proceeding shall thereafter be conducted in the same manner as though it had been commenced in the county to which it had been transferred."

[1, 2] The issues in this case reduce themselves to one of statutory construction. In enacting the Insurance Code the legislature exercised its power to regulate a business peculiarly charged with a public interest. Carpenter v. Pac. Mutual L. Ins. Co., 10 Cal.2d 307, 329, 74 P.2d 761; German Alliance Ins. Co. v. Hale, 219 U.S. 307, 316, 31 S.Ct. 246, 55 L.Ed. 229; In re Bean v. Stoddard, 207 App.Div. 276, 201 N.Y.S. 827, 828. In this light the several sections in question must be considered together and not as unrelated provisions.

[3] The respondent court urges that the commissioner, as conservator, having invoked section 1040, must conform thereto in every particular. That section states that the commissioner, once he is appointed conservator, "may remove the principal office" of the company proceeded against to San Francisco or Los Angeles, in which event the court where the proceeding was begun "shall" upon application of the conservator order a transfer of the proceeding and papers to the city chosen. Section 16 of the Insurance Code declares that as used therein the word "shall" is mandatory unless otherwise apparent from the context. There is nothing in the context of section 1040 to indicate that the word "shall" therein is other than mandatory. Upon removal of the principal office of the company to either city, the court wherein the proceeding was commenced must accordingly transfer the proceeding upon application therefor.

[4-8] In the view of the respondent court the section "clearly contemplates * * * an actual or substantial removal of the principal office of the insurer proceeded against; * * * the word 'remove' in connection with the principal office of an insurance company contemplates the moving or removing of substantially all the physical things and equipment, especially the business records of the company and also the business activities theretofore conducted thereat". Whatever the meaning of the word "remove" in other situations, such a construction falls wide of the legislative intent with respect to conservatorship proceedings. Not only does it confuse the phrase "principal office" with that of "principal place of business", between which there is often a clear distinction (Watters v. Hamilton Gas. Co., D. C., 10 F.Supp. 323, 326; Peters v. Detroit & C. Nav. Co., D. C., 24 F.2d 454, 455; Wiecarver v. Merc. T. M. Ins. Co., 137 Mo.App. 247, 117 S.W. 698, 700; Mason & H. Co. v. Sharon, 2 Cir., 231 F. 861, 863; Fletcher Cyclopedia Corporations, secs. 4373, 4651) but it runs counter to the very purpose of a conservatorship proceeding. Such a proceeding contemplates, not the liquidation of the company involved, but a conservation of the assets and business of the company over the period of stress by the commissioner who thereafter yields the control and direction to the regular officers of the company. It is difficult to believe that the legislature intended that for the duration of a temporary control by the commissioner there should be a complete removal of books, assets and business which would tend to dissipate and ruin the business of a company subjected thereto. The principal purpose underlying the provision for removal of the principal office of the involved in-

surer either to San Francisco or Los Angeles and the consequent removal of the conservatorship proceeding thereto, is unquestionably the convenience of the commissioner who, as such, maintains an office and staff in both cities. Venue statutes enacted for the convenience and assistance of public officials in the discharge of their duties are not unusual. State of Cal. v. Superior Ct., 14 Cal.App.2d 718, 721, 58 P.2d 1322; 67 C.J. 77, sec. 122. The matter rests with the legislature and not with the courts. Under the unqualified language of section 1040 the removal of the principal office of an insurance company to the places designated lies in the discretion of the conservator and, in our opinion, any official act or statement of his indicative of such removal is adequate. It appears in the present case that the conservator removed the minute books of the company to Los Angeles in effective compliance with his prior written declaration of removal of the "principal office" of the Mount Moriah Life Insurance Company from San Francisco to Los Angeles. By affidavit it appears that the transfer of other books and records of the company was impossible because of the auditing thereof by examiners. Then, too, the restraining order issued by the respondent court intervened. Given the purpose of the statute, there is a sufficient showing of removal of the principal office within the legislative meaning to require the respondent court to transfer the conservatorship proceeding under the mandatory language of the statute.

The rehabilitation sections of our Insurance Code trace their origin to the New York statute whose history is pertinent. That statute originally provided that after commencement of a rehabilitation or conservatorship proceeding in the judicial district in which the involved company had its "principal office" (sec. 408), the superintendent of insurance "may remove the principal office of the insurer to the county of Albany" in the event of which removal "the court shall, upon the application of the superintendent, direct the clerk of the county wherein such proceeding was commenced, to transmit all of the papers filed therein with such clerk to the clerk of the county of Albany and the proceeding shall thereafter be conducted in the same manner as though it had been commenced in the county of Albany". McKinney's Consol. Laws N.Y., c. 28, §§ 408, 412. For all practical purposes, this provision and section 1040 here in issue are alike. As thereafter amended, however, the New York statute declared that "Any time after the commencement of a proceeding * * * the superintendent may apply *ex parte* to the court * * * for an order changing the venue of, and removing the proceeding to Albany county, *or, in the discretion of the superintendent, to any other county of this state in which he deems that such proceeding may be most economically and efficiently conducted.* Upon the filing of any such application for removal, the court * * * *shall* direct the clerk of the county wherein such proceeding is then pending to transmit all of the papers filed therein with such clerk to the clerk of the county to which such proceeding is removed, and the proceeding shall thereafter be conducted in such other county as though it had been commenced in such county." McKinney's Consol.Laws N.Y., c. 28, art. 16, § 530. (Italics added.)

This transition of the parent statute from one contemplating the removal of the "principal office" of the insurer to Albany county followed by a transfer of the proceeding to that county, to one permitting the transfer of the proceeding to *any* county "in the discretion of the superintendent" (without any necessity for the prior removal thereto of the principal office of the company involved) strengthens the belief that the transfer of such a rehabilitation proceeding is intended to facilitate the work of the conservator. The complete removal of the principal office and business of the company to another city might not only handicap his work, but frustrate the whole purpose of the rehabilitation proceeding.

[9, 10] The respondent court also urges that before a removal and transfer may be effected the hearing contemplated by section 1012, to determine whether "the ground for said order directing the commissioner to take title and possession does not exist or has been removed", must occur in the county wherein the proceeding was commenced and the conservator appointed. This point is grounded principally upon the language "said court" appearing in section 1012. Such a construction would actually serve to nullify the provision in section 1040 which declares that after removal of the principal office to either county and the consequent transfer of the cause thereto, "The proceeding shall thereafter be conducted in the same man-

ner as though it had been commenced in the county to which it had been transferred." When the relevant sections of the code are read in relation to one another, it is clear that the phrase "said court" in section 1012 refers to the court in which the proceeding was commenced only when there is no removal or transfer as contemplated in section 1040. Otherwise it applies to the court of transfer which under the positive language of section 1040 shall then conduct "the proceeding * * * in the same manner as though it had been commenced in the county to which it had been transferred". Any other construction would violate the plain language and intention of the legislature. Moreover, to restrict under all circumstances the meaning of the words "said court" appearing in section 1012 so as to confine the hearing provided for in that section to the court wherein the proceeding had its inception, would be to nullify in many instances the right of the conservator under section 1040 to remove *"at any time"* after his appointment the insurer's principal office and then to apply for a transfer of the proceeding to one of the two places designated in the latter section. The statute requires only that the commissioner, as conservator, make application to the court for an order directing the clerk to transfer the proceeding. Such action is purely procedural and has no bearing on due process. Due process is afforded by the hearing authorized in section 1012, which can as well be had in the Superior Court to which the proceeding is transferred.

[11] The respondent court contends further that the removal provision of section 1040 was intended to permit removal of the principal office of a company and transfer of a rehabilitation proceeding "to" but not "from" San Francisco. In brief, it urges that such transfer may be made from any county *to* either San Francisco or Los Angeles, the places designated in the statute, but that such transfer may not be made *from* one of said designated places to the other. This contention, far from being borne out by the history of the statute, seems actually to be precluded thereby.

The Liquidation Act, as originally enacted (Stats.1919, p. 268) provided in section 12 that at any time after commencement of a proceeding thereunder the commissioner might remove the principal office of the company involved "to the city and county of San Francisco". At that time, the only office maintained by the commissioner was located in San Francisco by virtue of statutory requirement. Sec. 592, Pol.Code. This section was amended in 1927, St. 1927, p. 859, by adding thereto "and shall also keep an office in the city of Sacramento". In 1935 it was codified and became section 12905 of the Insurance Code, at which time there was added thereto "and an office in the city of Los Angeles". St.1935, p. 773. In conformity with such amendment, the legislature amended the 1919 Liquidation Act and incorporated it in the Insurance Code as section 1040. Since 1935, therefore, the section has required the commissioner to maintain offices in San Francisco, Sacramento and Los Angeles. When the several sections of the Insurance Code are read as a whole, it is clear that they provide that while a conservatorship proceeding must be commenced in the county wherein the insurer has its principal office (sec. 1011), the conservator may remove at any time after his appointment such principal office "to the City and County of San Francisco or to the city of Los Angeles" and that the court "shall", upon application, then order the proceeding transferred to San Francisco or Los Angeles as the case may be (sec. 1040, supra). This provision is clear and unqualified. The absence of any qualifying phrase compels the construction that regardless of where the proceeding is commenced it lies within the discretion of the commissioner, as conservator, to remove the principal office of the insurer to either of the two cities designated in the statute and to petition the court for a transfer of the proceeding to conform thereto. It appears in the commissioner's brief "that the main office of the Bureau of Liquidation has been located * * * in the City of Los Angeles for a number of years and that the said H. A. Benjamin is in charge thereof with a trained staff of personnel experienced and qualified in the handling of all matters appertaining to insurance companies taken over under conservatorship or placed in liquidation; that it is the (Commissioner's) judgment that the conservatorship in all said proceedings can best be handled in the office of the Bureau of Liquidations * * * in the City of Los Angeles". The inconvenience to a San Francisco or Los Angeles company which may result from a transfer of the proceeding to the other county can be no greater than that to a company in the northernmost county of the state resulting from the transfer to Los Angeles county of a like proceeding or the inconvenience to a company in the southernmost county of the state resulting from a transfer to San Francisco. Nowhere in the statute do we find a qualifying phrase to the effect that all proceedings commenced in the northern part of the state can be transferred only to San Francisco while those arising in the southern part of the state can be transferred only to Los Angeles. Likewise there is no qualifying phrase that proceedings commenced either in San Francisco or Los Angeles may not be transferred to the other.

Throughout the proceeding in the respondent court the commissioner repeatedly sought to establish a lack of jurisdiction in the respondent court to proceed after his removal of the principal office of the insurer and his application for a transfer of the proceeding to comply therewith. At no time did he waive the right to claim a lack of jurisdiction in the court. In any event he has the right "at any time" after his appointment as conservator and subsequent removal of the principal office of the company to apply for a transfer of the proceeding, which the court must grant.

[12] While the conservator has requested only prohibition to stay further proceedings in the respondent court, this court has authority to grant any appropriate relief within the issues presented by the pleadings. Board of Trustees v. State Bd. of Equalization, 1 Cal.2d 784, 787, 37 P.2d 84, 96 A.L.R. 775; 9 Cal.Jur. 10-yr. Supp. 567, sec. 29. The respondent court is therefore required not only to refrain from further action in the conservatorship proceeding but to transfer that proceeding to Los Angeles county in conformity with the conservator's removal of the principal office of the insurer and in pursuance of his application for such transfer, as authorized by the statutes in question.

In determining this matter we have had access to and have considered the briefs filed by the respondents in three companion cases. Nothing in those briefs requires a contrary conclusion herein.

Let peremptory writs of prohibition and mandate issue respectively restraining the respondent Superior Court from taking any further steps or proceedings in the conservatorship proceeding, now pending in that court, and directing that court to transfer the proceeding to the Superior Court of the State of California in and for the County of Los Angeles.

GIBSON, C. J., does not participate in the decision.

EDMONDS, Justice (dissenting).

I cannot agree that the Insurance Code allows the commissioner, immediately upon his appointment as conservator of a company having its principal office in San Francisco, to remove that office to Los Angeles. Undoubtedly the purpose of section 1040 is to facilitate the work of the commissioner. But as he maintains an office in San Francisco, removal of the insurance company's office to Los Angeles appears to be a most drastic procedure which should not be approved in the absence of express statutory authority therefor.

By other provisions of the Insurance Code, a company may be summarily seized by the commissioner under an ex parte order of the Superior Court based upon his verified application therefor. Such an order continues in force until, after a full hearing, it appears to the court that the ground for it does not exist or has been removed. Sec. 1012. In other words, the company seized may challenge the grounds asserted by the commissioner as justifying his action, and, in the meantime, he is administering its affairs under the condition that he must eventually establish by judicial decree, after hearing, his right so to do.

During this time, particularly, his work should be accompanied with a minimum of inconvenience to the company whose assets he is conserving. In organizations of any size there may be many thousands of policyholders and creditors. To allow him to summarily remove the company's office from the city where it has been carrying on its business for many years, and where he has a large administrative staff, seems to me to impose hardships which the legislature has not sanctioned.

Until 1935, the Liquidation Act (Stats. 1919, p. 268) authorized the commissioner to remove the principal office of a company whose business he was administering "to the city and county of San Francisco". When the Insurance Code was enacted, the legislature made a requirement that the commissioner shall maintain an office in

Los Angeles and added to the provision authorizing removal the words "or to the city of Los Angeles". To me, these changes indicate a legislative purpose to broaden his power of removal to include the new office at Los Angeles, but I cannot read into them an intention to authorize the removal of an insurance company's office from San Francisco, where the commissioner also maintains an office, to Los Angeles.

For these reasons, I believe that the writs sought by the applicant should be denied.

16 Cal.2d 850

CAMINETTI, Ins. Com'r, v. SUPERIOR COURT IN AND FOR SANTA BARBARA COUNTY.

S. F. 16476.

Supreme Court of California.

Jan. 6, 1941.

Rehearing Denied Feb. 3, 1941.

Insurance 🔑44

Where insurance commissioner, after being appointed conservator of insurance company, removed the general journal and ledger of company from Santa Barbara county to Los Angeles, there was a sufficient showing of removal of company's principal office to Los Angeles to require Superior Court of Santa Barbara to transfer conservatorship proceedings to Los Angeles, notwithstanding commissioner did not execute a prior written declaration of removal of principal office. St.1935, p. 547, § 1040; St.1937, p. 2563, § 1011.

See Words and Phrases, Permanent Edition, for all other definitions of "Removal".

Original proceeding in prohibition by A. Caminetti, Jr., state insurance commissioner, to restrain the Superior Court of Santa Barbara County from proceeding with the hearing and determination of a petition to terminate a conservatorship proceeding for an insurance company, on the ground that the Superior Court was without jurisdiction other than to transfer the conservatorship proceeding to Los Angeles, the commissioner as a conservator, having removed principal office of the company to the city of Los Angeles.

Peremptory writs of prohibition and mandate issue.

Earl Warren, Atty. Gen., W. T. Sweigert, Asst. Atty. Gen., and Neil Cunningham, John L. Nourse, and James A. Arnerich, Deputy Attys. Gen., for applicant.

Hardy & Hardy and Charles R. Thompson, all of Los Angeles, John H. Riordan, of San Francisco, and Robertson & Schramm, of Santa Barbara, for respondent.

PER CURIAM.

The facts and issues involved in this proceeding are substantially similar to those presented in Caminetti v. Superior Court, Cal.Sup., 108 P.2d 911, this day decided. There are but two variations of fact which need be mentioned. First, the commissioner did not here execute a prior written declaration of removal of the principal office of the insurance company involved, though the "general journal and the ledger" of the company were removed to Los Angeles. In view of the reasoning and conclusion in the cited case, however, the absence of a prior written declaration of removal of the principal office of the company does not require a different disposition of this cause.

The second variation of fact has to do with the actual transfer of the conservatorship proceeding by the respondent court to Los Angeles county and the subsequent purported retransfer thereof to the respondent court. In view of what we have said in the cited case, we need not here pass upon the propriety of the retransfer.

It may be noted that this proceeding does not present the issue common to the two proceedings entitled Caminetti v. Superior Court, 108 P.2d 911, supra and 108 P.2d 919, having to do with the transfer of a conservatorship proceeding commenced in either San Francisco or Los Angeles counties to the other of said named counties.

For the reasons advanced in and upon the authority of Caminetti v. Superior Court, 108 P.2d 911, this day decided, let peremptory writs of prohibition and mandate issue respectively restraining the respondent superior court from taking any further steps or proceedings in the conservatorship proceeding pending therein, and directing it to transfer the same to the superior court in and for the county of Los Angeles.

GIBSON, C. J., does not participate in the decision.

16 Cal.2d 852

CAMINETTI, Ins. Com'r v. SUPERIOR COURT IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO.

S. F. 16480.

Supreme Court of California.

Jan. 6, 1941.

Rehearing Denied Feb. 3, 1941.

Earl Warren, Atty. Gen., W. T. Sweigert, Asst. Atty. Gen., and Neil Cunningham and James A. Arnerich, Deputy Attys. Gen., for applicant.

Webb, Webb & Olds, of San Francisco, for respondent.

PER CURIAM.

The acts and issues presented in this proceeding are substantially similar to those involved in Caminetti v. Superior Court, Cal.Sup., 108 P.2d 911, this day decided. For the reasons therein advanced and upon the authority thereof, let peremptory writs of prohibition and mandate issue respectively restraining the respondent superior court from taking any further steps or proceedings in the conservatorship proceeding pending therein, and directing it to transfer the same to the superior court in and for the county of Los Angeles.

GIBSON, C. J., does not participate in the decision.

EDMONDS, J., dissenting.

For the reasons stated by me in Caminetti v. Superior Court of San Francisco, 108 P.2d 911, I am of the opinion that the writs sought by the applicant should be denied.

Rehearing denied; EDMONDS, J., dissenting.

16 Cal.2d 853

A. CAMINETTI, Jr., Insurance Commissioner, Applicant, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF ORANGE, Respondent.

L. A. 17727.

Supreme Court of California.

Jan. 6, 1941.

Rehearing Denied Feb. 3, 1941.

Appeal from District Court of Appeal, Fourth District.

Earl Warren, Atty. Gen., Walter L. Bowers, John L. Nourse, and Neil Cunningham, Deputy Attys. Gen., and William T. Sweigert, Asst. Atty. Gen., for applicant.

Forgy, Reinhaus & Forgy, of Santa Ana, and Sherman & Sherman, Robert W. Kenny, and Morris E. Cohn, all of Los Angeles, for respondent.

PER CURIAM.

The facts and issues presented in this proceeding together with such additional observations as appear in Caminetti v. Superior Court, CalSup., 108 P.2d 918, this day filed, are substantially similar to those presented in Caminetti v. Superior Court, Cal.Sup., 108 P.2d 911, this day decided. For the reasons advanced in and upon the authority of the last-cited case, let peremptory writs of prohibition and mandate issue respectively restraining the respondent superior court from taking any further steps or proceedings in the conservatorship proceeding pending therein, and directing it to transfer the same to the superior court in and for the county of Los Angeles.

GIBSON, C. J., does not participate in the decision.

42 Cal.App.2d 400

FULLER et al. v. VISTA DEL ARROYO HOTEL et al.

Civ. 12683.

District Court of Appeal, Second Appellate District, Division 2, California.

Jan. 10, 1941.

1. Appeal and error ⇨927(7)

On plaintiff's appeal from judgment on directed verdict for defendant, evidence would be viewed in light most favorable to plaintiff.

2. Innkeepers ⇨10

In guest's action against hotel for injuries sustained when guest slipped on damp concrete step which had been worn slick and smooth and which led to walk surrounding hotel's swimming pool, evidence that hotel was negligent in maintenance of stairway was insufficient for jury.

3. Innkeepers ⇨10

In guest's action against hotel for injury sustained when guest slipped on damp concrete steps which had been worn slick and smooth and which led to walk surrounding the hotel's swimming pool, evidence that hotel's negligence was the "proximate cause" of the injury to the guest was insufficient for jury.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

4. Pleading ⇨236(2)

In guest's action against hotel for injuries wherein hotel's counsel through inadvertence failed in original answer to deny negligence of hotel, permitting hotel at time case was first called for trial to file amended answer, in furtherance of justice, denying alleged negligence was not an abuse of discretion. Code Civ.Proc. § 473.

5. Appeal and error ⇨959(1)

Where trial court exercised a sound discretion in permitting an amendment of answer, its order would not be disturbed. Code Civ.Proc. § 473.

6. Appeal and error ⇨1041(3)

In action for injuries, permitting defendant at time case was first called for trial to file an amended answer denying negligence was not prejudicial to plaintiff where the court took the case off the calendar and continued it for two weeks and required defendant to pay the expenses incurred by reason of the delay. Code Civ.Proc. § 473.

7. Appeal and error ⇨1058(1)

In guest's action against hotel for injuries sustained when guest slipped on damp concrete step which had been worn slick and smooth and which led to walk surrounding hotel's swimming pool, exclusion of evidence as to whether witnesses had seen persons other than such guest slip on the step, was harmless, where excluded evidence was merely cumulative.

8. Appeal and error ⇨1056(6)

In personal injury action, exclusion of evidence offered by plaintiff relating to plaintiff's injuries was immaterial, where plaintiff was properly denied recovery.

WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Personal injury action by C. E. Fuller and another against Vista Del Arroyo Hotel and others. From a judgment for the defendants, the plaintiffs appeal.

Affirmed.

Henry P. Goodwin and Daly B. Robnett, both of Los Angeles, for appellants.

Jennings & Belcher of Los Angeles (Louis E. Kearney, of Los Angeles, of counsel), for respondents.

McCOMB, Justice.

From a judgment in favor of defendant predicated upon the granting of its motion for a directed verdict in an action to recover damages for personal injuries, plaintiffs appeal.

The essential facts are:

Plaintiff Nellie E. Fuller had been a guest of defendant hotel at frequent intervals for a period of about five years. At approximately 4:00 o'clock on the afternoon of August 13, 1938, while descending a flight of concrete steps to the walk surrounding the swimming pool owned and operated by defendant, she stepped on the second step which was damp and partly shaded by the shadow of adjacent trees, slipping and falling with a resultant broken leg.

The step where the accident happened was twelve inches wide and had a slope in such distance of approximately ⅜ of an inch. When constructed it had been roughened by brushing, the marks on the step where the accident occurred running the width of the step rather than lengthwise as was the case of marks on other steps in the series. At the time of the accident it was slick and smooth. Both defendant and plaintiff guest knew that the steps were used by bathers and were damp.

Plaintiff Nellie E. Fuller relies for reversal of the judgment on these propositions:

First: There was substantial evidence to sustain a finding of the jury that defendant was negligent in the maintenance of its stairway.

Second: The trial court committed prejudicial error in permitting defendant to file an amended answer denying its alleged negligence at the time the case was first called for trial.

Third: The trial court committed prejudicial error in sustaining objections to evidence offered by plaintiff.

[1-3] The first proposition is untenable. Viewing the evidence, as we have in arriving at the facts above stated, in the light most favorable to plaintiff, we are of the opinion that such facts fail to disclose any act or acts of negligence by defendant nor would they support an inference that any negligence of defendant was the proximate cause of the regrettable injury which plaintiff Nellie E. Fuller has suffered. The case is analogous to the facts in Gold v. Arizona Realty, etc., Co., 12 Cal.App.2d 676, 55 P.2d 1254, wherein plaintiff slipped while descending a stairway in defendant's apartment house. Judgment was given in favor of plaintiff and reversed by this court for insufficiency of the evidence. Mr. Justice Wood, speaking for this court, says at page 677 of 12 Cal.App.2d, at page 1254 of 55 P.2d:

"The evidence upon which plaintiff must rely to support a judgment in her favor comes from her own testimony and that of the manager of the apartment house. Plaintiff testified that as she went down the stairway she 'felt some sort of foreign substance under the sole of my foot, and with that my weight just went from under me.' When asked what she found on the sole of her shoe, plaintiff stated: 'It was a wet spot, and it looked slick on the sole of my shoe, so I rubbed by finger on it, and I put it to my nose to see if I could determine what it was, and it was a soapy or waxy substance of some sort.' The manager of the apartment house testified that the janitors frequently washed the stairway with soap and water. The janitors were not called as witnesses. The record fails to disclose sufficient evidence as a matter of law to charge defendant with responsibility for plaintiff's accident."

To a similar effect see Crawford v. Pacific States S. & L. Co., 22 Cal.App.2d 448, 449, 71 P.2d 333.

[4-6] Plaintiffs' second proposition is likewise untenable. When the above-entitled case was first called for trial and a jury impaneled, the attention of defendant was directed to the fact that its answer failed to deny its negligence, whereupon the following colloquy between the court and counsel occurred:

"(The following occurred in chambers, outside of the hearing of the jury):

"Mr. Belcher: Counsel for plaintiff have indicated to me that upon putting into evidence a tabulation as to the amount of damages, that they propose to rest their case. I was somewhat surprised at that when they so indicated, and upon hastily checking over the pleadings I note that through inadvertence we have failed to deny Paragraph V of the complaint, which is the paragraph which alleges negligent acts on the part of the defendant. I will say to the Court that it is purely a typographical error and simply an oversight, and I am taken very much by surprise upon ascertaining the matter at this time. The answer in question was drawn by Mr. Fargo; and that being true, we ask leave of the Court at this time to be permitted to deny generally and specifically the allegations of Paragraph V of the plaintiffs' complaint.

"Mr. Robnett: To which motion we object upon the ground that it is too late. No sufficient ground is shown for allowing an amendment, and this places the plaintiff in a very disadvantageous position for the reason that this case has been at issue since sometime in July, 1939; and the answer is now on file which does not deny two paragraphs of the complaint, being Paragraphs IV and V, Paragraph IV being the one which states that the defendant owned, operated and maintained the hotel and bungalows and these walks, and paths, where this injury occurred, and where guests and other employees traversed this stairway and promenade from the swimming pool; and Paragraph V which states that it was maintained in a dangerous and negligent condition, defective condition, wilfully and carelessly, and that they allowed water to be spilled thereon, making it slippery; and other items set forth specifically therein, namely, being the paragraph that sets forth their liability, and they have never denied that nor have they denied Paragraph IV, as I have stated. Neither one of them is denied. That answer has been on file all this time. We prepared for trial only because of the issues as they are. In the meantime we did not take any depositions of certain witnesses. One witness cannot attend court at this time. We would have to have her deposition. She is very, very important here. Her condition and health is such that we could not possibly have her in court. I don't know whether she could even give a deposition. She is just ready to be confined. Then, we have never examined the plaintiff on that proposition, although counsel for defendants took her deposition under 2055. Counsel for plaintiff did not go into the matter at all with her, and she is now unable to either give a deposition or to testify in court. She is in a very bad condition; and any delay in this case might be a total defeat of justice so far as the plaintiffs are concerned for the reason that the plaintiff, Nellie E. Fuller, is very seriously ill at the present time, and, in fact, so seriously ill that it may prove fatal at any time. Therefore a delay would be to our great disadvantage. Counsel has not shown any excuse other than mere negligence on their part, which is not excusable negligence, in examining the pleadings or in knowing what the issues were. Further than that we had no intimation that there would be anything of this nature brought up at the trial because there had been some discussion of a settlement. The defendant has been very friendly to the plaintiff. The plaintiffs still live over there with them, in fact, at their place. They have been very friendly. There has been an effort to settle. The only thing apparently between the parties was the question of the amount. I now am informed this morning of two other witnesses that would be very material witnesses and that they have suffered some illness in their family where they have to be in attendance —maybe one of them is ill. They are in attendance at the hospital at the present time and could not attend here. Further than that; in the selection of the jury we took into account the issues as they were, and not otherwise. We made no examination of the jury on anything other than merely the general examination, and were not specific as to going into these phases at all. We do not know whether this jury would have been satisfactory, and our challenges would have probably been entirely different had we known that the question of negligence would be an issue at the time. It was not in issue. I made no opening statement to the jury purposely because there was no necessity for an opening statement. I expected an instruction on that phase of the matter, namely, that the defendant had admitted liability and it was only a question of amount. For that reason the motion should not be granted. It would place us in a very hazardous position in the trial of this case. We could not be ready to proceed, for the jury has already been selected and we have presented our case. I do not believe there is any good or sufficient ground for granting the motion. I would like to cite your Honor some authorities to this effect:

"The Court: That would be all right if it were not an oversight.

. . . . . .

"The Court: I am going to allow you to amend, and I am going to put it off calendar to give you a chance to get your witnesses in, and make the defendant pay all the expenses of the delay.

"Mr. Belcher: I think that is entirely fair.

"Mr. Robnett: May I say this: That there would be an item of expense for the doctor that we had to have here, which was a special item.

"The Court: Mr. Robnett, let me finish. He is going to pay all expenses you incurred up to date. You are entitled to and you will get the doctor's expense and anybody else that you hired to come here to testify. You are entitled to that, and all the other expenses you have.

"Mr. Robnett: There is another item, and that is the jury list that we had to select from.

"The Court: That is all right. He will pay you everything you incurred.

"Mr. Goodwin: Suppose, Your Honor, this condition arises: You put it off calendar and it will be a matter of a month before we can get back in.

"The Court: I will continue it definitely for two weeks if you can get ready in that time."

From the foregoing it is apparent that defendant's counsel through inadvertence failed by the original answer to deny negligence upon the part of defendant. It was therefore the trial court's duty, under section 473 of the Code of Civil Procedure, to permit defendant to file an amended answer, in the furtherance of justice, so that the facts might properly be brought before the court. The trial court having exercised a sound discretion in its ruling, its order will not be disturbed. We fail to see wherein prejudice has resulted to plaintiffs from the trial court's ruling.

Plaintiff's final proposition is likewise without merit.

[7] (a) The trial court sustained objections to questions asked three different witnesses by plaintiff relative to whether or not they had seen other persons slip on the steps. Evidence of this character had already been received by the court and, if it had any bearing upon the present case, it was cumulative evidence upon the same point and its exclusion was harmless (Pomper v. Behnke, 97 Cal.App. 628, 639, 276 P. 122).

[8] (b) Other evidence offered by plaintiff, which was excluded by the trial court upon objection, related to the injuries which plaintiff had suffered and is therefore immaterial, in view of the conclusions which we have previously stated.

For the foregoing reasons the judgment is affirmed.

I concur: MOORE, P. J.

WOOD, Justice (dissenting).

I dissent.

In my opinion the question of the alleged negligence of defendant should have been submitted to the jury. The steps upon which plaintiff slipped had been allowed to become slick and smooth and had remained in that condition for a long time notwithstanding bathers had frequently dampened them. At the time of the accident the steps were "damp in some places and dry in others"; there were spots of water which appeared to have been made by wet feet. The case of Gold v. Arizona Realty, etc., Co., cited in the majority opinion, can be readily distinguished. In that case the plaintiff slipped upon some substance which had been placed or left in some manner upon a stairway and it was not shown that the substance had been left on the stairway for a sufficient length of time to charge the defendant with notice. The judgment of the court was based upon the following statement which appears in the opinion: "It was not shown that the 'substance' which caused plaintiff's fall had been on the stairway any length of time or that it had been left there by an agent of defendant".

In my opinion the question of the alleged contributory negligence of plaintiff should have been submitted to the jury. Plaintiff testified that she had not used the stairway for "fully a year" before the accident; that she was not accustomed to bathing at the pool; that the steps were "neutral in color * * * sort of a tan"; that the steps appeared to be dry; that she noticed nothing unusual or extraordinary about the surface of the steps. Plaintiff was not guilty of contributory negligence as a matter of law.

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42 Cal.App.2d 409

PEOPLE v. STANDARD ACC. INS. CO. et al.

Civ. 6487.

District Court of Appeal, Third District, California.

Jan. 11, 1941.

Hearing Denied March 12, 1941.

1. Officers 🔑114

Generally, a public officer is not liable for erroneously performing an act which is not merely a ministerial act but one in relation to which he must exercise judgment and discretion, even though an individual may suffer by his mistake, where he acts in good faith within the scope of his authority and without malice, corruption, or sinister motives.

2. Officers 🔑114

Though public policy demands that an officer be protected from the consequences of erroneous judgment in performing an act requiring the exercise of sound judgment and discretion, there is a common-law liability against a public officer in favor of one injured through his failure to perform a ministerial duty.

3. States 🔑79

The doctrine of "respondeat superior" does not apply in the relation between state officers or officials and their deputies and subordinates, but a superior officer is liable for the tortious act of the subordinate if he participates in or directs the act, since in that case the act is in contemplation of law the act of the superior.

See Words and Phrases, Permanent Edition, for all other definitions of "Respondeat Superior".

4. Officers 🔑118

Public officers are not civilly liable for torts of deputies who are themselves statutory officers or not under the superior's unrestricted control or right of hiring and discharging, but an officer whose appointee is selected from a restricted list and is under civil service regulations may be liable for the acts of the appointee if he has directed the act to be done or has otherwise personally cooperated in the doing of the act.

5. States 🔑119

Where the California Commission for the Golden Gate International Exposition was required to select and employ its personnel pursuant to the State Civil Service Act, a potential tort liability against the commission and its members existed, and the cost of insuring against that possible liability was a legitimate governmental cost, the payment of which was for a "public purpose" and was not a "gift of public funds" contrary to constitutional inhibition. St.1937, p. 2085; St. 1938, Ex.Sess., p. 99; Const. art. 4, § 31; art. 24.

See Words and Phrases, Permanent Edition, for all other definitions of "Gift of Public Funds" and "Public Purpose".

6. States 🔑119

In determining whether an expenditure constitutes a gift of public funds contrary to constitutional inhibition, the primary and fundamental subject of inquiry is whether the money is to be used for a public or private purpose, and, if it is for a public purpose within the jurisdiction of the appropriating board or body, it is not, generally speaking, to be regarded as a "gift". Const. art. 4, § 31.

See Words and Phrases, Permanent Edition, for all other definitions of "Gift".

7. States 🔑119

The question presented in determining the constitutionality of a statute authorizing the expenditure of money to pay a premium on a policy of insurance is, not whether it is possible to condemn the statute, but whether it is possible to uphold it, and it should not be declared invalid because, incidental to the main purpose, there results an advantage to individuals. St.1938, Ex.Sess., p. 99; Const. art. 4, § 31.

8. Constitutional law 🔑70(1)
States 🔑119

The legislature is vested with a large discretion in determining what is for the public good and what are public purposes for which public moneys can be rightfully expended, and that discretion cannot be controlled by the courts except when the legislative action is clearly evasive. Const. art. 4, § 31.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Action by the People against the Standard Accident Insurance Company and others, to recover premiums paid on a policy of insurance. A general demurrer to the complaint was sustained, and, from a judgment of dismissal entered upon failure of plaintiff to amend, plaintiff appeals.

Affirmed.

Hearing denied; CURTIS and EDMONDS, JJ., dissenting; GIBSON, C. J., not participating.

Earl Warren, Atty. Gen., and R. L. Chamberlain, Deputy Atty. Gen., for appellant.

Myrick & Deering and Scott and James Walter Scott, all of San Francisco, for respondent.

PER CURIAM.

This action was brought to recover the sum of $9,647.40, which represented the premium paid by appellant to respondent, Standard Accident Insurance Company, upon a policy of insurance. A general demurrer to the complaint was sustained, and upon the failure of appellant to amend, judgment of dismissal was entered. The appeal is from said judgment.

The opinion of the trial judge is set forth in the clerk's transcript. After considering all the contentions made upon this appeal, we have come to the conclusion that said opinion correctly disposes of all the issues raised. We therefore adopt it as the opinion of this court. It reads as follows:

"The demurrer in this case presents primarily the question as to whether the payment of an insurance premium authorized by the legislature, 1938 Statutes, extra session, at page 99, constitutes a gift of public funds contrary to the inhibition expressed in section 31 of article IV of the state Constitution.

"The parties to the action are in accord upon the proposition that there can be no liability against the state for any act insured against under the policy. The policy, however, protects the California Commission for the Golden Gate International Exposition, the commissioners and the executive officers of the commission from all loss from liability created by law for any damage to persons or property done by the agents, servants or employees upon premises under control and management of the commission. Two problems are presented and discussed in the briefs, namely: 1. The existence of any possible tort liability against the commission or its members, and 2. The right to expend public funds to insure against such liability.

"Defendant contends that the members of the commission are public officers and that as such might be liable for failure to perform ministerial duties as well as negligence in the performance of such duties and also for negligence in the selection of employees.

[1, 2] "Generally, a public officer is not liable to an action if he falls into error, in a case where the act to be done is not merely a ministerial one but is one in relation to which it is his duty to exercise judgment and discretion, even though an individual may suffer by his mistake, when he acts in good faith, within the scope of his authority and without malice, corruption or sinister motives. When the law trusts to the sound judgment and discretion of an officer, public policy is said to demand that he be protected from the consequences of erroneous judgment. 21 Cal.Jur. 911. But there is a common-law liability against a public officer in favor of one injured through the failure of the officer to perform a ministerial duty. Mock v. City of Santa Rosa, 126 Cal. 330, 58 P. 826.

[3] "Although the doctrine of respondeat superior does not apply in the relation between the officers or officials of the state and their deputies and subordinates, a superior officer is liable for the tortious act of the subordinate if he participates in or directs the act. Van Vorce v. Thomas, 18 Cal.App.2d 723, 64 P.2d 772. The act is in contemplation of law the act of the superior. An officer may also be liable for negligence in the selection of subordinates. The attorney-general replies that under article XXIV of the Constitution the commission must select and employ its personnel pursuant to the state Civil Service Act, St.1937, p. 2085, which act provides for the actual selection of employees by the state personnel board.

[4] "The modern view adopted in this state is that public officers are not civilly liable for torts of deputies, when the latter are themselves statutory officers or not under the superior's unrestricted control or right of hiring and discharging. Michel v. Smith, 188 Cal. 199, 205 P. 113; Van Vorce v. Thomas, 18 Cal.App.2d 723, 64 P.2d 772; Union Bank and Trust Co. v. Los Angeles County, Cal., 74 P.2d 240. However, an officer whose appointee is selected from a restricted list and who is under civil service regulations may be liable for the acts of such appointee if he has directed such act to be done, or has otherwise personally cooperated in the doing of the act. Lorah v. Biscailuz, 12 Cal.App.2d 100, 54 P.2d 1125. Also, provision is made in the act and the rules adopted by the personnel board under the authority of the statute for temporary and emergency appointments under certain specified conditions.

[5] "The conclusion must be reached that there existed, during the time the policy was in force, a potential tort liability against the commission and its members. There is sufficient in what has been here said to answer the first problem favorable to the defendant.

"Defendant contends that a statute authorizing the payment of the cost of insurance against such liability does not violate the constitutional provision and cites Heron v. Riley, 209 Cal. 507, 289 P. 160. There, the state had by statute waived its immunity as to negligence of its officers, agents and employees in the operation of motor vehicles within the scope of employment. The policies of insurance there concerned indemnified the state against that responsibility and were authorized by the statute. It was the statutory liability of the state thus created which was insured against. That case is not authority where as here no liability is created against the state and none exists. The cost of insuring against possible liability is a legitimate and proper governmental cost. The payment of the cost is for a public purpose and is not a donation. To pay for insurance where there is no liability is a waste of public funds; such payment is not a public purpose, and is a donation to the insurer.

"Finally, there is to be determined whether the payment of the cost of insuring the commission and its members against their possible tort liability is a prohibited expenditure of public revenues.

[6] "The test as stated in City of Oakland v. Garrison, 194 Cal. 298, 228 P. 433, 434, is, 'The primary and fundamental subject of inquiry is as to whether the money is to be used for a public or a private purpose. If it is for a public purpose within the jurisdiction of the appropriating board or body, it is not, generally speaking, to be regarded as a gift.' It was there held that the improvement of a public street is a public purpose and an appropriation by a county to a city therefor is not a gift within the meaning of the constitutional inhibition. Payment of bounties for the destruction of coyotes (Ingram v. Colgan, 106 Cal. 113, 38 P. 315, 39 P. 437, 28 L.R.A. 187, 46 Am.St.Rep. 221), payment of police pensions (O'Dea v. Cook, 176 Cal. 659, 169 P. 366), payment of cost of free text books (Macmillan Co. v. Clarke, 184 Cal. 491, 194 P. 1030, 17 A.L.R. 288), expenditures for a memorial hall for the use of veteran soldiers and sailors (Allied Architects' Assn. v. Payne, 192 Cal. 431, 221 P. 209, 30 A.L.R. 1029), and expenditures under the Veterans' Farm and Home Purchase and Veterans' Educational Acts (Veterans' Welfare Board v. Riley, 188 Cal. 607, 206 P. 631), have been sustained.

"It may well be argued that any decrease in the potential liability of an official will increase the willingness of competent people to assure the risk of office and an expenditure to that end is for a public purpose.

"California has been placed with the minority in the application of the constitutional provision as to claims arising out of past transactions and based upon moral obligations. Mills v. Stewart, 76 Mont. 429, 247 P. 332, 47 A.L.R. 424. Attempt is made in Veterans' Welfare Board v. Riley, supra, to explain and limit this rule to such cases as Stevenson v. Colgan, 91 Cal. 651, 27 P. 1089, 14 L.R.A. 459, 25 Am.St.Rep. 230; Bourn v. Hart, 93 Cal. 327, 28 P. 951, 15 L.R.A. 431, 27 Am.St. Rep. 203, and Conlin v. Board of Supervisors, 99 Cal. 17, 33 P. 753, 21 L.R.A. 474, 37 Am.St.Rep. 17, where the claims were made by public employees and it is there held that those cases are governed by article IV, section 32 of the Constitution, which prohibits the granting of extra compensation or allowance to a public servant after service rendered. Nevertheless such cases as Mills v. Stewart, supra, a Montana case, where a statute permitted a student injured in a dormitory at a state university through negligence of a state employee to sue the state, and United States v. Realty Co., 163 U.S. 427, 16 S.Ct. 1120, 41 L.Ed. 215, where an act appropriated money to pay bounties to persons who were prevented by the repeal of a prior act from obtaining bounties for the production of sugar before the repeal, illustrative of the application of the majority rule, have their basis in a moral obligation owed by the state and are in direct conflict with Chapman v. State, 104 Cal. 690, 38 P. 457, 43 Am.St.Rep. 158, and possibly McClure v. Nye, 22 Cal.App. 248, 133 P. 1145. In those California cases relief of state employees for past injuries was not involved and a moral obligation was not deemed sufficient to take the cases outside of the operation of the provision in the Constitution.

[7, 8] "Although we are not here dealing with a statute which relieves an employee from and subjects the state to an obligation, nevertheless the language of Judge Cardozo is pertinent: 'The readjustment of these burdens along the lines of equality and equity is a legitimate function of the state as long as justice to its citizens remains the chief concern.' And in considering the constitutionality of the statute the question presented is not whether it is possible to condemn it, but whether it is possible to uphold it. It is not to be declared invalid, because, incidental to the main purpose, there results an advantage to individuals. Patrick v. Riley, 209 Cal. 350, 287 P. 455. The legislature is vested with a large discretion in determining what is for the public good and what are public purposes for which public moneys can be rightfully expended and that discretion cannot be controlled by the courts except when its action is clearly evasive. Daggett v. Colgan, 92 Cal. 53, 28 P. 51, 14 L.R.A. 474, 27 Am.St.Rep. 95.

"The early decisions in this state indicate a strict construction of the constitutional provision under consideration, section 22, of article IV, due no doubt to the failure to give proper application to article IV, section 32. The later tendency is to adopt a more liberal view as shown by the Veterans' Welfare Board Case, supra, and such cases as City and County of San Francisco v. Collins, 216 Cal. 187, 13 P.2d 912.

"I conclude that defraying the cost of insurance to protect a state officer against a potential liability as such officer is a public expenditure and not prohibited by the Constitution."

From what has been said, it follows that the trial court properly sustained the demurrer, and the judgment is therefore affirmed.

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42 Cal.App.2d 354

ATHERLEY v. MARKET STREET RY. CO. et al.

Civ. 11366.

District Court of Appeal, First District, Division 1, California.

Jan. 9, 1941.

Hearing Denied March 7, 1941.

1. Carriers 🔑318(8), 346(1)

Evidence *held* to support the trial court's findings that plaintiff, attempting to board a streetcar, was injured when the car was negligently started, and hence plaintiff was not, as contended, contributorily negligent in attempting to get on a moving streetcar in violation of a city ordinance.

2. Appeal and error 🔑1011(1)

It is the function of the trial court in a trial without a jury to resolve conflicts in the evidence, and not part of the function of the reviewing court to weigh such evidence.

3. Appeal and error 🔑1011(1)

A street railway, claiming that plaintiff, injured while attempting to board a streetcar, was contributorily negligent as matter of law, could not establish its contention on the basis of isolated portions and unwarranted interpretations of the testimony and thus demonstrating, as contended, to a mathematical certainty, that the streetcar was in motion; the trial court having resolved the conflict in the evidence in favor of plaintiff.

4. Evidence 🔑560

A slight error in a physician's testimony that he examined the injured plaintiff at the hospital within three hours after the accident was immaterial, where the evidence showed that the accident happened after 8 o'clock and at some time close to 8:30, and that plaintiff was received at the hospital at 11:40.

5. Appeal and error 🔑1011(1)

Testimony of a physician who examined the injured plaintiff at an emergency hospital within half or three-quarters of an hour after the accident, that plaintiff was alcoholic, and the testimony of a physician who examined plaintiff at another hospital a little more than three hours after the accident, that there was no evidence of intoxication of plaintiff, who testified that he had had only one glass of beer about an hour before the accident, presented a conflict peculiarly and entirely for determination by the trial court in a trial without a jury.

6. Carriers 🔑347(5)

Testimony that the injured plaintiff had had only one glass of beer about an hour before the accident, with conflicting medical testimony regarding intoxication after the accident, *held* not to show as matter of law that plaintiff was so intoxicated as to require the disregarding of his testimony that the streetcar which he attempted to board was at a standstill.

7. Witnesses 🔑327

That plaintiff's original complaint and deposition stated that the accident happened near "Eddy" street, while the evidence showed that it happened near "Ellis" street, did not establish the unreliability of plaintiff's testimony, claimed by defendants to be unworthy of belief because of his alcoholic condition, where plaintiff's counsel on the day after the deposition was taken notified defendants' counsel by letter of the error, which was properly corrected before the trial.

8. New trial 🔑105

In an action for injuries suffered while attempting to board a streetcar, a new trial on the ground of a police officer's newly discovered evidence, which was merely cumulative and tended only to impeach the testimony of plaintiff and his daughter-in-law, was properly denied.

9. New trial ⚷151

Where the affidavit supporting a motion for a new trial on the ground of newly discovered evidence stated that the injured plaintiff and his daughter-in-law were under the influence of liquor and that the latter, contrary to her testimony that she went to the hospital in a police car, accompanied plaintiff in the ambulance, the failure of plaintiff and his daughter-in-law to file counter affidavits could not be deemed an admission that they were intoxicated, in view of their testimony indicating the contrary at the trial.

10. New trial ⚷99

Whether a new trial should be granted on the ground of newly discovered evidence rests in the sound discretion of the trial court.

11. New trial ⚷99

Motions for a new trial on the ground of newly discovered evidence are regarded with distrust and disfavor.

12. Appeal and error ⚷981

An order denying a new trial on the ground of newly discovered evidence will not be disturbed on appeal where such evidence is cumulative, or merely affects the credibility or contradicts the testimony of a witness.

13. New trial ⚷151

There was not a sufficient showing of due diligence in support of a motion for a new trial on ground of the newly discovered evidence of a police officer whose affidavit stated that he arrived at the scene of the accident before plaintiff had been taken to the hospital, where the counter affidavit of plaintiff's attorney averred that the officer's report was filed with the police department on the day of the accident and was at all times available.

14. Appeal and error ⚷1173(1)

A judgment against a street railway and the conductor and motorman of a streetcar which plaintiff was attempting to board when injured would be reversed as to the motorman, in the absence of any evidence of negligence on his part, where it was contended that he had nothing to do with the conductor's giving the signal to start prematurely.

Appeal from Superior Court, City and County of San Francisco; Pat R. Parker, Judge.

Action by Henry Atherley against the Market Street Railway Co., Chester Von Boden, and John Berry, for injuries suffered by plaintiff when attempting to board a streetcar. From a judgment for plaintiff on a trial to the court without a jury, defendants appeal.

Affirmed as to the first two defendants named, and reversed as to the last-named defendant.

Wm. M. Abbott, Cyril Appel, and Ivores R. Dains, all of San Francisco, for appellants.

Henry C. Clausen, of San Francisco, for respondent.

PETERS, Presiding Justice.

From a judgment for $3,422.38 in favor of plaintiff, defendants Market Street Railway Company, Chester Von Boden and John Berry prosecute this appeal. The injuries forming the basis of the action were received sometime after 8 p. m. on August 7, 1936, while plaintiff was attempting to board a southbound Fillmore street streetcar at the northwest corner of Fillmore and Ellis streets in San Francisco. The streetcar was operated by defendant company, and in charge of the two individual defendants. The case was tried before the court without a jury.

[1] On this appeal defendants contend that the only possible interpretation of the evidence is that the plaintiff was injured while attempting to board a moving streetcar in violation of a city ordinance, and, hence, was guilty of contributory negligence as a matter of law, and that the trial court erred in denying defendants' motion for a new trial on the ground of newly discovered evidence. Neither of these contentions is sound. So far as the defendant company, and the defendant Von Boden, the conductor of the streetcar, are concerned, the evidence amply supports the finding that plaintiff was injured when the streetcar negligently was started while plaintiff was attempting to board it. It is true that there is a conflict, but that conflict was resolved by the trial court.

Plaintiff was seventy-seven years of age in August of 1936, and was then employed by a steamship company as a special policeman at its docks. Some years before this accident his leg had been broken in two places causing him to move slowly, and preventing him from running. The accident occurred on his day off. On that day he had attended an afternoon movie, and then had dinner at the home of his son, Walter Atherley, husband of Gertrude Atherley. After dinner, plaintiff, his son, and his daughter-in-law took a streetcar to Fillmore street where the plaintiff desired to do some shopping. They first visited a beer parlor where they all had one glass of beer. This was the only liquor the plaintiff or his daughter-in-law had that day. This was about 7 o'clock in the evening. Thereafter, the son went home, leaving the plaintiff and Gertrude Atherley to continue their shopping expedition. They shopped until about, or after, 8 o'clock, when plaintiff decided to take a streetcar home. He and his daughter-in-law stood on the northwest corner of Fillmore and Ellis streets awaiting the arrival of a southbound car. On that corner is a drugstore with an entrance on Fillmore street. The drugstore extends along Fillmore street about thirty feet from the corner, and the entrance thereto is in the middle. The actual doors to the drugstore, according to a diagram inserted in appellants' brief, are seven feet, ten inches, wide. However, the diagram also shows that the entrance is a widely tapering one, fanning out so that where it meets the sidewalk it is fifteen or sixteen feet wide. The plaintiff testified that he and his daughter-in-law stood, waiting for the car, "just about the entrance to the drugstore". Both he and Gertrude Atherley testified that, when the southbound streetcar arrived, the plaintiff proceeded straight out in the street to board it; that Gertrude Atherley stood at the curb to watch him board the car; that there were two or three passengers preceding the plaintiff; that after these other passengers boarded the car, and while the car was still at a standstill, the plaintiff placed his foot on the lower step and was reaching for the stanchion when the car started with a sudden jerk, throwing the plaintiff to the street. Plaintiff suffered a skull fracture, which almost completely encircled his head at the level of his eyes, concussion, head abrasion and nervous shock. The injury caused permanent deafness in one ear, and recurring dizziness. No contention is made that the amount of the judgment is excessive.

According to the testimony of defendant Chester Von Boden all passengers were on the streetcar when he gave the signal to the motorman to proceed. He testified that he first observed the plaintiff between two automobiles parked on the west curb of Fillmore street; that plaintiff stepped out into the street and attempted to grab the car as it went by; that plaintiff did not get his foot on the step or his hand on the stanchion; that the streetcar hit him on the left shoulder, and, as a result, he was thrown against one of the parked automobiles. There was no evidence that plaintiff had a bruised shoulder after the accident.

Fred Harr, a newsboy with a stand on the southwest corner of the intersection (the accident happened at the northwest corner) testified that he saw plaintiff lunge for the streetcar after it was in motion; that at the moment of the accident he was in the street, having just sold a paper to a customer in an automobile, and that he was looking northerly to see if his boss was coming with more papers for him.

[2, 3] Faced with this direct conflict in the evidence, the trial court resolved the conflict in favor of plaintiff, and made its findings accordingly. That was its function. It is no part of the function of this court to weigh that evidence. Appellants, however, argue that the physical circumstances of the accident as testified to by respondent and his daughter-in-law demonstrate, as a matter of law, that he attempted to board the streetcar while it was in motion. Appellants arrive at this conclusion, which is directly contrary to the evidence of respondent above recited, by taking a few isolated statements from respondent's and Gertrude Atherley's testimony, by completely disregarding other portions of their testimony which tend to explain the portions relied upon by appellants, by then applying a yardstick to the isolated portions of the testimony chosen by them, and then demonstrating, as they contend, to a mathematical certainty, that respondent must have attempted to board the streetcar after it started up. Thus, they refer to the testimony of the respondent that the streetcar stopped with its front end at the north property line of Ellis street; that he was standing in front of the entrance to the drugstore; that after the car had stopped he walked straight out into Fillmore street to board

the car at the rear platform; that no one was standing between him and the conductor as he attempted to get on the car. His daughter-in-law also testified that he did not walk at an angle. It is also contended that respondent testified that he did not proceed out into the street until after the car had stopped. Using this testimony as their major premise, and, assuming that from that testimony the only inference is that respondent attempted to board the car opposite the entrance to the drugstore, appellants contend that when the rear platform of the streetcar was opposite the drugstore entrance it had to be moving—ergo, say they, the respondent attempted to board a moving streetcar. In support of this argument appellants have included in their opening brief diagrams based on undisputed measurements with the purpose of showing that, with the car stopped with its front end along the north property line of Ellis street, the rear of the car would be some feet north of the drugstore, and that respondent could not possibly reach the rear entrance by walking straight out into the street from his position at the entrance of the drugstore.

This argument is not only unfair to respondent, in that it attempts to reduce the testimony of respondent and Mrs. Atherley to feet and inches when their testimony as to places and distances was obviously an approximation, but it completely disregards other more explicit testimony given by these witnesses. As already pointed out, the entrance to the drugstore is a wide, tapering one. Respondent testified that before the streetcar arrived that, "The place where my daughter-in-law and I were standing was just about the entrance to the drugstore," and again, "I was standing on the sidewalk in front of the entrance to the drugstore, * * *" The north line of this entrance where it meets the sidewalk would be about twenty feet south of the rear entrance of the streetcar, if it stopped with its front fender along the north property line of Ellis street. Respondent did not testify that he proceeded out into the street after the car had stopped. It is true that respondent testified that, "I was standing on the sidewalk when the car came down there and stopped; I shook hands with my daughter-in-law and went out toward the streetcar." But this general testimony was fully explained by the more explicit testimony of respondent that other people were waiting out in the street to get on the car before it came to a stop; that, "I had waited some fraction of time with those other people. I stood on the sidewalk there, and after I left the sidewalk I went over and stood with these people on the street until she came to a standstill." Gertrude Atherley testified that respondent was "standing there with" the other passengers waiting to get on. Although it is true that plaintiff and Mrs. Atherley testified that respondent walked straight out into Fillmore street and did not proceed at an angle, he did not testify, as claimed by appellants, that he boarded the car directly in front of the entrance of the drugstore. His testimony, when read as a whole, was to the effect that he walked straight out into Fillmore street and waited with the other passengers. Then, when the car stopped, he turned and walked a few yards north to the rear entrance of the streetcar. Thus, after testifying that he walked straight out into Fillmore street and stood waiting with the other passengers, he stated: "I had to step a few yards in front of the drugstore to go to the end of the car. * * * I went straight over to the car, and the place where I intended to board that streetcar was at the rear end. You might have to walk five yards to get onto the back of the car." He also testified that the rear end of the streetcar was not in front of the entrance of the drugstore, but that, "The rear end of it just goes beyond that drugstore. Then you have to step up two or three yards to get onto it, * * *. The place where the rear end of the streetcar was when it was stopped was up about north of the building line of the drugstore there." According to appellants' own computations, the rear entrance of the streetcar, if the car stopped exactly with the edge of its front fender along the north property line of Ellis street, would be but twelve feet north of the property line of the drugstore. This corresponds very closely with respondent's testimony.

Enough has been stated to demonstrate that appellants' contentions on the point under discussion are without merit. They are based on an unwarranted and unfair interpretation of the evidence. The language of the Supreme Court in Albaugh v. Mt. Shasta Power Corp., 9 Cal.2d 751, at page 773, 73 P.2d 217, at page 229, is peculiarly applicable here. It was there stated: "Before directly discussing this subject [sufficiency of the evidence], it should be pointed out that appellant on this point, as well as on several of the other points already discussed, has disregarded the rules of law applicable to appellate procedure. Appellant by argument based on its view of the evidence, by disregarding conflicting evidence, and by the contention that certain adverse evidence has been 'completely destroyed,' in its briefs makes a quite convincing showing on this issue. Of course, the jury is the sole judge of the effect, sufficiency, and weight of the evidence, and the sole judge of the credibility of the witnesses. Whatever our opinion may be as to the weight of the evidence, if there is material, credible evidence to support the verdicts, this court is without power to disturb them. As was said in Crawford v. Southern Pac. Co., 3 Cal.2d 427, 429, 45 P.2d 183, 184: 'In reviewing the evidence on such an appeal, all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary, but often overlooked, principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury.' These principles are elementary."

[4-6] Appellants also urge that the testimony of respondent and of Mrs. Atherley is unworthy of belief because of their alleged alcoholic condition. It is to be noted that this contention is not that respondent was guilty of contributory negligence in being intoxicated, but that, because of his condition, he did not know what had happened, and, consequently, his testimony cannot support the judgment in his favor.

Respondent testified that he had one glass of beer about an hour before the accident, and that he had had no other liquor that day. Mrs. Atherley testified that she had one glass of beer with respondent, and that was all the liquor she had had that day. Dr. Milton B. Lennon examined respondent on the night of the accident, after he had been removed from the Central Emergency Hospital to St. Mary's Hospital. He was most emphatic in stating that there was no evidence of intoxication at the time of his examination; that in examining respondent's head and eyes he did not notice an alcoholic breath; that, considering the extent and nature of the injuries, respondent talked remarkably well. The doctor testified that he made this examination, at most, within three hours of the accident. On their motion for a new trial appellants produced the affidavit of the record librarian at St. Mary's Hospital to the effect that the records of that hospital show that respondent was not received there until 11:40 p. m. It is urged that, if the accident happened at 8 p. m., or shortly thereafter, as respondent testified, it was more than three hours later when Dr. Lennon examined him. It should be mentioned that all of the witnesses testified that the accident happened "about" or "after" 8 p. m. The accident report of Officer Charles S. Denike gives the time of the accident as 8:30 p. m. This is also the time fixed by Fred Harr, appellants' witness. He states it was "about somewhere between eight and eight-thirty in the evening"; that the reason he was looking north at the time of the accident was because he was looking for his boss who always "is due to come down at 8:30". The report of the Emergency Hospital shows that respondent was received there at 8:50 p. m. Obviously, the evidence shows the accident occurred sometime close to 8:30 p. m. Under such circumstances, the slight error in Dr. Lennon's testimony is immaterial.

On behalf of appellants, Dr. William A. Sumner, who treated respondent at the Central Emergency Hospital, testified that he noted on the official record made by him at that time that respondent was "alcoholic" when he arrived there. He also testified that from independent recollection the respondent was alcoholic.

It would seem quite clear that on the issue of the sobriety of the respondent there is a direct conflict. That was a question peculiarly and entirely for the trial court. Certainly it cannot be said, as a matter of law, that respondent was so intoxicated that his testimony that the car was at a standstill must be disregarded.

[7] As further tending to indicate the unreliability of respondent's testimony, appellants make much of the fact that in the original complaint, and in his deposition, respondent stated that the accident happened at Eddy and Fillmore streets, while the evidence shows that it happened at Ellis and Fillmore streets. However, the record also shows that the day after the deposition was taken, counsel for respondent notified counsel for appellants, by letter, of

the error in the complaint and deposition, and requested a stipulation that the complaint could be amended. Appellants' counsel did not stipulate, but the complaint was later properly amended and the deposition properly corrected before the trial. The argument of appellants on this point is without any sound foundation.

[8-13] In support of their motion for a new trial on the ground of newly discovered evidence, appellants offered the affidavit of Officer Denike that he arrived at the scene of the accident in a police radio car, before respondent had been taken to the hospital; that respondent was under the influence of liquor; that his speech was grumbled and incoherent (which is not surprising in view of the nature and extent of his injuries); that the daughter-in-law was also under the influence of liquor and gave the impression that she did not know what she was doing; that she accompanied the respondent to the hospital in the ambulance. On the trial she had testified that she had gone to the hospital in a police radio car. The effect of this evidence, according to appellants, would be to "nullify" the whole of Mrs. Atherley's testimony by showing that she did not know what had taken place. It is also urged that, because respondent and Mrs. Atherley did not file counter-affidavits, the truth of the averments in the Denike affidavit was admitted. Respondent's attorney filed a counter-affidavit in which he averred that, with the exercise of due diligence, the evidence of Denike could have been produced on the trial; that Denike's report of the accident had been filed with the police department on August 7, 1936, and was at all times available.

There cannot be any doubt but that the trial court acted well within its powers in denying the motion for a new trial on the ground of newly discovered evidence. In view of the testimony of respondent, Mrs. Atherley and Dr. Lennon, given at the time of trial, their failure to file counter-affidavits cannot, and should not, be held to be an admission that respondent and Mrs. Atherley were intoxicated. At most, the evidence of Denike would tend to impeach the testimony of respondent and Mrs. Atherley. It is elementary that it rests in the sound discretion of the trial court as to whether a motion for a new trial should be granted on the ground of newly discovered evidence. Motions on that ground are regarded with distrust and disfavor. See cases collected and commented on in 20 Cal. Jur. p. 80 et seq., sec. 57 et seq. In the instant case the facts to which Denike would testify, are, as to respondent, cumulative of the testimony of Dr. Sumner. As to Mrs. Atherley, the proffered testimony merely tends to impair her credibility and to contradict her testimony. The order of the trial court denying a motion for a new trial on the ground of newly discovered testimony will not be disturbed by an appellate court where the proffered newly discovered evidence is cumulative, or merely affects the credibility or contradicts the testimony of a witness. See cases collected and commented on in 20 Cal.Jur. p. 81, sec. 58. Nor do we think there was a sufficient showing of due diligence. See cases collected and commented on in 20 Cal.Jur. p. 84, sec. 59.

[14] There is only one other matter necessary to consider. Respondent secured a judgment not only against the Market Street Railway Company and the conductor, Chester Von Boden, but also against John Berry, the motorman. It is urged on his behalf that there is no evidence that he was guilty of negligence, since he was on the front end of the streetcar and had nothing to do with the conductor giving the signal to start prematurely. Respondent does not contend that there is any evidence to support the judgment against the motorman. The judgment as to him will have to be reversed.

After reading the record and considering the law applicable to the facts, we are of the opinion that there is no merit in any of the contentions urged, except as to appellant Berry.

The judgment as to defendants Market Street Railway Company and Chester Von Boden is affirmed; the judgment as to John Berry is reversed; respondent to recover his costs on this appeal.

We concur: KNIGHT, J.; WARD, J.

PEOPLE v. HEADLEE.*

Cr. 3392.

District Court of Appeal, Second Appellate District, Division 2, California.

Jan. 10, 1941.

Hearing Granted Feb. 6, 1941.

1. Kidnapping ⚷5
Robbery ⚷24(1)

Evidence that defendant by his acts took taxicab from driver into his own immediate possession and control and that he directed movements of taxicab from time he placed gun in driver's back until they arrived at auto court showed a "taking" of taxicab by defendant constituting "robbery" and, together with other evidence, was sufficient to sustain conviction for kidnapping for purpose of robbery. Pen.Code, § 211.

See Words and Phrases, Permanent Edition, for all other definitions of "Robbery" and "Taking".

2. Robbery ⚷24(1)

Evidence that taxicab driver at defendant's direction and through fear gave $2.50 to proprietor of auto court for rental of cabins sustained conviction for "robbery" even though defendant at no time had the $2.50 in his own hands. Pen.Code, § 211.

3. Rape ⚷51(4)

Victim's testimony that she entered cabin upon defendant's order, undressed at his order when he pointed a gun at her, and permitted him to have intercourse with her because she feared he would harm her if she resisted, sustained conviction for "rape".

See Words and Phrases, Permanent Edition, for all other definitions of "Rape".

4. Criminal law ⚷1159(3, 4)

Inherent improbability of witness' testimony and conflicts therein are for jury and cannot be considered by the reviewing court.

◆

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Orville M. Headlee was convicted of kidnapping for the purpose of robbery, of robbery in the first degree and of rape, and he appeals from the judgments and from orders denying his motions for a new trial.

Affirmed.

Mark F. Jones and W. L. Engelhardt, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

After trial before the court without a jury, from judgments of guilty of (1) kidnapping for the purpose of robbery, (2) robbery in the first degree, and (3) rape, defendant appeals.

He also appeals from orders denying his motions for a new trial.

Viewing the evidence in the light most favorable to the people (respondent), the essential facts are:

April 14, 1940, defendant asked the bartender at McDonald's Party House to call a taxi cab. This the bartender did. Defendant entered the cab, which was operated by John Fontana. Sitting in the front seat with the driver were a Miss Cash and Mrs. Goodwin. Defendant stated that he wished to go to Southgate. When the cab reached the intersection of Long Beach Boulevard and Rosecrans Avenue in the city of Compton, defendant put a gun against the driver's neck and ordered him not to slow down for a boulevard stop but to keep going. From this point on defendant dictated the movements of the cab, frequently threatening to do physical harm to the occupants thereof if they disregarded his orders. He finally directed that they stop at an auto court. He forced the driver to precede him to the proprietor's office, where two rooms were rented and, at defendant's direction, the driver turned over to the proprietor of the auto court $2.50 in partial payment for the rooms. During the renting of the rooms the two women remained outside in the cab. Defendant then ordered Mr. Fontana and Mrs. Goodwin to enter one of the cabins, lock the door and stay there. He ordered Miss Cash to enter the other cabin. There he told her to undress, undressed himself, ordered her to lie on the bed, put one of his revolvers under the pillow, and proceeded to have sexual intercourse with her, she testifying that she permitted the act because she thought defendant would kill her if she resisted.

Defendant relies for reversal of the judgments on this proposition:

The evidence is insufficient to sustain the judgment on the charges of (a) kidnapping

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* Subsequent opinion 115 P.2d 427.

for the purpose of robbery, (b) robbery, and (c) rape.

The foregoing proposition is untenable.

[1] (a) There can be no question from the facts set forth above that defendant kidnapped Mr. Fontana and his two companions. It is likewise clear that by his acts he took Mr. Fontana's cab from him and into his own immediate possession and control as set forth above, and that he directed the movements of the cab from the time he placed the gun in the driver's back until they arrived at the auto court. Hence, there was a taking of the cab by defendant, which constituted robbery.

[2] (b) The evidence discloses that Mr. Fontana, at defendant's direction and through fear, gave $2.50 to the proprietor of the auto court where they rented cabins. This Mr. Fontana did at the order of defendant and because he feared him. Certainly this falls within section 211 of the Penal Code, providing that robbery is the feloniously taking of personal property in the possession of another from his person or immediate presence and against his will, accompanied by means of force or fear. There is no merit in defendant's contention that he was not guilty of robbery because he at no time had the $2.50 in his own hands. It would be as reasonable to argue that, if defendant had marched his victim at the point of a gun to the end of a pier and then told him to throw his watch into the sea, which the victim did because of fear, defendant would not be guilty of robbery. The gist of this crime is defendant's unlawfully depriving his victim of his personal property feloniously.

[3, 4] (c) Miss Cash testified that she entered the cabin upon the order of defendant, undressed at his order when he pointed a gun at her, and permitted him to have intercourse with her, for the reason that she feared he would harm her if she resisted. Clearly such evidence sustains the conviction on the charge of rape. The arguments which counsel has addressed to this court upon the subject of the inherent improbability of the witness' testimony and the conflicts therein are proper matters to present to a trial jury but cannot be considered by us.

For the foregoing reasons the judgments and orders are and each is affirmed.

MOORE, P. J., concurred.

GATES et al. v. McKINNON.*

Civ. 12739.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1940.

Hearing Granted Feb. 27, 1941.

1. Automobiles ⚷162(1), 168(1)

Where seven year old boy while descending stairway leading to street level lost his balance while on the third or fourth step and fell onto sidewalk and seemed to shoot out into the street on his hands and knees in front of automobile traveling about 18 miles per hour, and was hit and injured by the automobile, motorist was not liable on ground of negligence.

2. Appeal and error ⚷931(1)

On appeal from a judgment for plaintiff after a trial before the court, the evidence will be viewed in the light most favorable to plaintiff, indulging every inference favorable to him and disregarding all evidence and inferences favorable to defendant.

3. Automobiles ⚷162(1)

The driver of an automobile which has collided with a child is not to be held to have been responsible for the calamity, where the evidence shows that he could not have foreseen and prevented the occurrence thereof as, for example, where it appears that the child was concealed from view of the driver at the side of the highway or street and without warning ran in front of the on-coming automobile.

◆

Appeal from Superior Court, Los Angeles County; Orlando H. Rhodes, Judge.

Action by Lloyd W. Gates, etc., and others, against Melvin E. McKinnon, to recover damages for personal injuries sustained by the named plaintiff when struck by defendant's automobile. From a judgment in favor of the plaintiffs, after trial before the court without a jury, the defendant appeals.

Judgment reversed.

Kenneth J. Murphy, of Los Angeles (Henry E. Kappler, of Los Angeles, of counsel), for appellant.

John L. Flynn and Roger Arnebergh, both of Los Angeles, for respondent.

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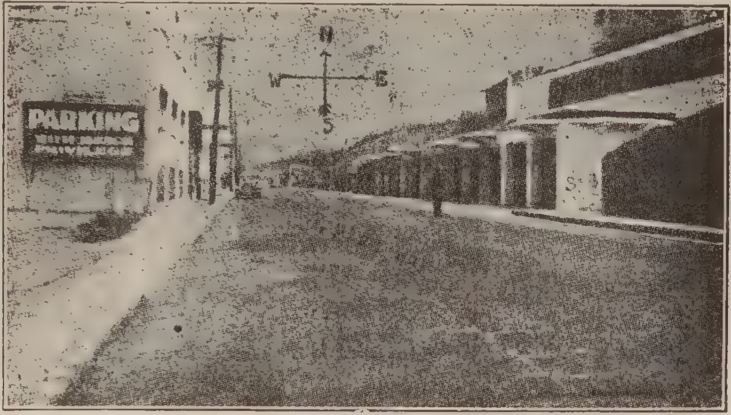
* Subsequent opinion 114 P.2d 576.

McCOMB, Justice.

From a judgment in favor of plaintiffs after trial before the court without a jury in an action to recover damages for personal injuries defendant appeals.

Viewing the evidence most favorable to plaintiffs (respondents), the essential facts are:

The following is a picture of the scene of the accident, which is the subject of the present litigation.



July 23, 1939, about 5 p. m., defendant was driving his automobile at a speed of approximately eighteen miles per hour in a northerly direction along Appian Way (which is thirty feet in width) in the city of Santa Monica just south of the point marked "S" in the above picture. There were no cars parked on the east side of Appian Way and defendant was following a car approximately sixty feet in front of him. There were also a number of other cars traveling both north and south on the thoroughfare. On the east side of the street there is a stairway leading from a large group of bungalow courts to the street level, which is concealed on its southerly side by a high hedge. This stairway is indicated by the letter "S" in the above picture.

Immediately preceding the accident plaintiff Lloyd W. Gates, a minor seven years of age, was on a stairway leading down to the roof of the garages bordering the east side of Appian Way, watching some other boys playing ball on the garage roof. Their ball went into the street and said plaintiff was asked to retrieve it. He proceeded down the stairway to the garage roof, then down the stairway indicated by the letter "S" in the above picture, and according to the testimony of the witness Williams, who was in his automobile driving south on Appian Way and was directly opposite the point "S", said plaintiff, while on the third or fourth step appeared to lose his balance and hit the sidewalk. From there on, crawling on his hands and knees, he seemed to shoot like a bullet into the street in front of defendant's car, where he was hit and injured.[1] At the time the boy came onto the sidewalk defendant's car was less than ten feet south of the stairway indicated by the letter "S".

The other eye-witness to the accident, Dr. W. F. Jameson, who was driving his car in a southerly direction on Appian Way, and was at the time of the accident on the west side of the street just north of the point "S", corroborated the testimony of the witness Williams. Defendant testified that he did not see said plaintiff until after the boy had hit his car. Plaintiff Lloyd W. Gates testified that he did not remember anything concerning the accident.

This is the sole question presented for our determination:

Was there substantial evidence to sustain the trial court's finding of fact that negli-

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[1] The following are excerpts from the testimony of Witness Williams: "Q. Can you describe how Lloyd Gates was crossing that distance from the curb out to the left front wheel of Mr. McKinnon's car? A. He was on all fours right on his hands and knees shooting right forward trying to get up. Trying to stop himself I suppose. Q. In other words he was diving out there? A. That's right. Not diving. Going on all fours. Just pulling himself forward. Q. Crawling would you say? A. Yes, it looked just like crawling."

gence of defendant was the proximate cause of the injuries received by plaintiff?

[1, 2] This question must be answered in the negative. Viewing, as we have in stating the facts above, the evidence in the light most favorable to the plaintiff indulging every inference favorable to him, and disregarding all evidence and inferences favorable to defendant, we are of the opinion that the facts fail to disclose any conduct, act, or acts of defendant which would support a finding that he was negligent and that as a result thereof plaintiff was injured.

[3] The present case falls within the statement of the law as found in vol. two, Cal.Jur.Supp. (1935), page 451, section 282, title, Automobiles, reading thus:

"Of course, the driver of a car which has collided with a child is not to be held to have been responsible for the calamity where the evidence shows that he could not have foreseen and prevented the occurrence thereof * * * as for example, where it appears that the child was concealed from the view of the driver at the side of the highway or street and without warning ran in front of the oncoming vehicle."

For the foregoing reasons the judgment is reversed.

We concur: MOORE, P. J.; WOOD, J.

42 Cal.App.2d 329

McDONALD v. GRAVENSTEIN APPLE GROWERS CO-OPERATIVE ASS'N OF SONOMA COUNTY et al.

Civ. 6311.

District Court of Appeal, Third District, California.

Jan. 7, 1941.

Rehearing Denied Feb. 6, 1941.

Hearing Denied March 7, 1941.

1. Guaranty 🔑16(2)

Where apple marketing association refused to sign marketing contract with tenant unless owner of orchard property who leased to tenant on a share rental basis would also sign and owner thereupon did sign, owner signed as a "guarantor" rather than as a principal and was personally liable for tenant's indebtedness to association for advances made under the contract, notwithstanding owner did not personally receive any of the money or goods advanced. Civ.Code, §§ 2787, 2792.

See Words and Phrases, Permanent Edition, for all other definitions of "Guarantor".

2. Guaranty 🔑16(2)

Where apple marketing association refused to sign marketing contract with tenant unless owner of orchard property who leased to tenant on a share rental basis would also sign and owner thereupon did sign as guarantor, the guaranty was supported by a legal "consideration", since the guaranty arose out of the original contract. Civ.Code, § 2792.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

3. Guaranty 🔑16(1)

The delivery of goods upon faith of a guaranty that they shall be paid for constitutes a sufficient "consideration" for the guaranty. Civ.Code, § 2792.

4. Guaranty 🔑77(2)

Where guarantor's promise to pay is absolute and unconditional, his liability is fixed when the principal obligation matures and is not predicated upon the exhaustion by the creditor of his remedy against the original debtor.

5. Agriculture 🔑6
Guaranty 🔑77(2)

Where apple orchard owner who leased to tenant on a share rental basis signed tenant's 15-year marketing contract only after marketing association refused to contract with tenant unless owner also signed, and contract provided that it constituted a lien upon apples for repayment of all advances made by association, there was an implied promise by tenant to reimburse association for advances and a "guaranty" by owner that such reimbursement would be made, hence action could be maintained against owner as "guarantor", as against contention that contract was a "chattel mortgage" as to owner and that action could not be brought until security was exhausted allegedly at end of the 15-year contract period.

See Words and Phrases, Permanent Edition, for all other definitions of "Chattel Mortgage" and "Guaranty".

6. Guaranty ⚷36(2)

Where owner of apple orchard who leased to tenant on a share rental basis signed tenant's contract with marketing association and guaranteed reimbursement of association for all advances made to tenant, owner was primarily liable as guarantor for repayment of entire amount advanced to tenant, regardless of how expenses were to be apportioned under the contract as between owner and tenant.

7. Contracts ⚷93(2)

A party who signs a written contract is presumed to have assented to all of its terms.

Appeal from Superior Court, Sonoma County; Donald Geary, Judge.

Action by J. G. McDonald against the Gravenstein Apple Growers Co-operative Association of Sonoma County and others, wherein defendants cross-complained to recover advances made under a marketing contract. From judgment for defendants for $586.24 on the cross-complaint, plaintiff appeals.

Affirmed.

Barrett & McConnell, of Santa Rosa, and L. G. Scott, of Sebastopol, for appellant.

Libby & Finn, of Sebastopol, for respondents.

TUTTLE, Justice.

Plaintiff commenced an action to recover the sum of $159.66 from respondents. The latter filed a cross-complaint for $586.24. After trial by the court, findings were made in favor of defendants upon all the issues raised in the cross-complaint, and judgment was entered in their favor for the amount demanded. Plaintiff now appeals from the judgment.

Plaintiff was, during all the times herein mentioned, the owner of a ranch consisting of some 30 acres of bearing apple trees. On February 10, 1937, he leased the property to one Edward King, upon a share rental basis. Shortly thereafter King entered into negotiations with respondent association for the purpose of securing an agency to handle his coming crop. He was told by the latter that they would not enter into a marketing contract with him unless *appellant* executed and signed it. This was explained to appellant, and he thereupon executed the contract as one of the parties of the second part, King being the other. The agreement was in the following language:

"This agreement, made this *4th day of March, 1937,* by and between Gravenstein Apple Growers Cooperative Association of Sonoma County, a corporation, hereinafter called first party, and J. G. McDonald *and* Edward E. King, hereinafter called second party,

"Witnesseth:

"1. That said second party hereby agrees to sell exclusively to or through the first party, or any facilities to be created by first party, all of the apples raised and produced during the period of *15* years from and after the date hereof on that certain property situate in the County of Sonoma, State of California, more particularly described as follows:

"30 acres Gravenstein apples located 1 1/2 west of Sebastopol—estimated lugs 8000—10,000 including 1 acre of Late Apples—J. G. McDonald to receive 1/3 and Ed King 2/3—All spray materials except fertilizer 1/2 to come out of Ed King's part. * * *

"4. It is agreed that said first party may sell or re-sell the apples delivered to it by second party with or without taking title thereto, and pay over to second party the resale price after deducting all necessary selling, overhead and other costs, expenses, and deductions provided for in the by-laws of said first party. * * *

"5. It is further agreed that this contract shall constitute a lien upon all of said apples for the repayment to first party of any and all advances made to said second party, or which shall be made to said second party, and that any and all of such advances may be withheld by first party from the proceeds of such apples. * * *

"7. Said first party agrees to pay to second party the net proceeds of all sales of said apples, after making the deductions authorized by the by-laws of said first party. * * *"

When the crop was sold it brought $561.37. When appellant demanded his share of the proceeds, he was notified that advances had been made to King totalling $1,147.61—$432.61 in goods, wares, and merchandise, and $715 in cash; that since the proceeds from the crop were not large enough to cover the advances, his share was being withheld as an offset against them, and that he would be held personally liable for the remaining deficiency of $586.24.

It is the contention of appellant that the finding to the effect that *both* appellant and King, under said contract, received advances of cash from respondent association, and that certain articles were delivered to them by said respondent, is not supported by the evidence. He states that the record shows, without dispute, that such advances and merchandise were all received by King *alone*. We agree that appellant is correct, but as will hereafter appear, such a finding is not material in establishing the liability of appellant under said agreement and upholding the judgment.

[1-4] It appears that respondent association would not sign the marketing agreement unless it was signed by appellant. This was clearly understood by appellant when he affixed his signature. The gist of the chief contention made by appellant is that he is not *primarily* liable upon the contract in the same manner and to the same extent as his co-signer, King, for the reason that he received none of the advances or supplies which are the basis of this action. In other words, appellant says he should not be forced to pay for something he never received. Assuming that there is merit in such contention, we are of the opinion that appellant, under the evidence, could be held primarily liable as a guarantor.

"A surety or guarantor is one who promises to answer for the debt, default, or miscarriage of another, or hypothecates property as security therefor." (Civ.Code, sec. 2787.)

The trial court could have impliedly found that appellant signed the contract, not as a principal, but as a guarantor, in order that his tenant could procure the capital and supplies for the properly carrying out of the lease. "Where a guaranty is entered into at the same time as the original obligation, or with the acceptance of the latter by the guarantee, and forms with that obligation a part of the consideration to him, no other consideration need exist." (Civ.Code, sec. 2792.) The guaranty here arises, out of the original contract, and hence is supported by a legal consideration. Furthermore, "the delivery of the goods, upon the faith of a guaranty that they shall be paid for, constitutes a sufficient consideration for the guaranty". 12 R.C.L., § 29, p. 1078. The promise to pay is absolute and unconditional; therefore, the liability of the guarantor is fixed when the principal obligation matures, and is not predicated upon the exhaustion by the creditor of his remedy against the original debtor. 13 Cal.Jur., § 22, p. 110. Applying the foregoing legal principles to the facts as established here, there was ample evidence to support an implied finding that appellant was primarily liable for the indebtedness, notwithstanding that he did not personally receive any of the money or goods which are the basis of the account.

[5, 6] It is contended by appellant that the contract is, in effect, a mortgage as to him, because there is no express promise to pay for the advances and supplies. This court has held that a contract containing almost identical terms, "necessarily implies that the grower will reimburse the association for all such advances". California B. G. Ass'n v. Williams, 82 Cal.App. 434, 255 P. 751, 754. Here there was an implied promise upon the part of the tenant to reimburse respondent-association, and appellant guaranteed that such reimbursement would be made. This, accepting the theory of appellant, would take the agreement out of the category of a chattel mortgage. We might add that we can find no substantial evidence in the record to support a finding that the agreement was in fact a chattel mortgage, either between appellant and King, or with reference to third parties.

Next, it is contended by appellant that the foregoing italicized portion of the agreement limits the liability of appellant to one-half of the fertilizer expense. It was immaterial to respondent-association how King and appellant apportioned, between themselves, the indebtedness to it. If King were personally responsible for the entire amount, appellant would still be liable as a guarantor for the repayment of such amount.

Finally, appellant refers to the provision of the contract which gives the association a lien upon all the apples, and contends that no action can be brought until the security is exhausted, which, he says, would be fifteen years from the date of the agreement. This theory is based upon conclusion that the evidence shows, without dispute, that the whole transaction was intended to be a mortgage. The trial court impliedly found otherwise, upon sufficient evidence, as we have pointed out above.

[7] In view of the foregoing, we deem it unnecessary to discuss the view of respondents that appellant can be held liable under the rule that: "A party is presumed to have assented to all the terms of a written contract when he signs it." Eldridge v. Mowry, 24 Cal.App. 183, 140 P. 978, 981.

Appellant has received the benefit of a considerable amount of the supplies furnished for the proper care of his property. He knew exactly what he was signing, and it can be reasonably inferred that respondents entered into the contract relying upon the fact that appellant had signed it in the capacity of guarantor. Both justice and equity require that appellant should reimburse respondent-association.

The judgment is affirmed.

We concur: THOMPSON, J.; PULLEN, P. J.

FOLEY et al. v. SONOMA COUNTY FARMERS' MUT. FIRE INS. CO. OF SONOMA. *

Civ. 6300.

District Court of Appeal, Third District, California.

Jan. 9, 1941.

Rehearing Denied Feb. 8, 1941.

Hearing Granted March 7, 1941.

1. Insurance 🔑323(1)

Where a fire policy provides that there will be no coverage if building is vacant "or" unoccupied beyond a specified time, both conditions need not be shown in order to avoid the policy.

See Words and Phrases, Permanent Edition, for all other definitions of "Or".

2. Insurance 🔑323(1)

The provision in a fire policy that coverage shall not exist while building is vacant or unoccupied beyond a specified time is valid, and a breach thereof will avoid the policy.

3. Insurance 🔑323(1)

Where fire policy provides that coverage does not exist while the building is vacant or unoccupied beyond a specified time, and building is vacant or unoccupied for specified time and a fire occurs, it is immaterial whether the building was vacant or unoccupied for a long or short time, and in either case the policy is voided.

4. Insurance 🔑146(3)

A policy, such as a fire policy, will be interpreted in the light of the fact that policies are drawn by the insurer, and are rarely understood by the insured, to whom every rational indulgence should be given, and in whose favor the policy should be liberally construed, but the rule will not be applied to nullify an express and unequivocal provision, where the terms are plain and explicit and the meaning is clear.

5. Insurance 🔑323(1)

Where fire policy provided that there should be no coverage while insured building was "vacant or unoccupied" beyond the period of 10 days and owners of building left for a visit, and 13 days thereafter the building and its contents burned, no recovery could be had under the policy, since it had lapsed.

The term "vacant" has been construed to mean empty, deprived of contents, without inanimate objects. It implies entire abandonment, nonoccupancy for any purpose. On the other hand, "unoccupied" has been held to mean without animate objects, and implies that no actual use is being made of the premises by anyone corporeally present or in possession.

See Words and Phrases, Permanent Edition, for all other definitions of "Vacant" and "Unoccupied".

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Action by Ellen Foley and others against the Sonoma County Farmers' Mutual Fire Insurance Company of Sonoma, California, to recover under a policy of fire insurance. From a judgment in favor of the plaintiffs, the defendant appeals.

Judgment reversed, with directions to enter judgment for defendant.

Geary & Geary and C. J. Tauzer, W. A. Weske, and J. N. DeMeo, all of Santa Rosa, and A. Dal Thomson, of San Francisco, for appellant.

Rutherford, Rutherford & Rutherford, of Napa, for respondent.

* Subsequent opinion 115 P.2d 1.

TUTTLE, Justice.

This action was brought to recover under a policy of fire insurance. Findings were made in favor of plaintiffs, and judgment in the sum of $1,247 was entered against appellant. The latter appeals from said judgment.

The sole question on appeal is whether or not the following finding had sufficient evidentiary support: "That it is not true 'that no person resided upon, inhabited and/or occupied the dwelling house on said real property from and after the 14th day of October, 1934, or that said dwelling house remained uninhabited, unused and/or unoccupied from the 14th day of October, 1934, to the 28th day of October, 1934'."

The facts present no dispute. Plaintiffs absented themselves from the insured property on *October 15, 1934*. They left for the purpose of visiting a daughter, and with the intention of remaining away three or four days. This daughter resided in Pittsburg, California. While at Pittsburg, plaintiffs decided to visit another daughter at Stockton, California, and went to Stockton for that purpose. During the presence of the plaintiffs at Stockton, and on the evening of *October 28, 1934*, the dwelling house and the personal property contained therein were destroyed by a fire of unknown origin.

It is thus seen that at the time of the fire, plaintiffs had been away from the premises from the 15th to the 28th of October,—a period of thirteen days. It was stipulated that there was no notice of, or consent by, the defendant, concerning plaintiffs' absence from the premises.

[1, 2] The policy, under the heading of "Matters Suspending Insurance", provided that the coverage would not exist while the building therein described was "vacant or unoccupied beyond the period of ten (10) consecutive days". In 26 C. J., pages 208, 209, paragraph 253, it is said: "A new stage in the development of the law on this question was reached by the insertion in the policy, in terms of various character, of an express prohibition of vacancy or nonoccupancy. The linking together by the copulative conjunction of the two words 'vacant' and 'unoccupied', each of which had formed the principal member of previous clauses, was the next change in phraseology, under which it was held that both vacancy and nonoccupancy must occur. Finally the modern and standard policy, using the alternative conjunction, provides that the contract of insurance shall be void if the building insured shall become 'vacant or unoccupied' and so remain for a specified number of days; and under this provision the policy is avoided if either vacancy or nonoccupancy occurs. These specific provisions have uniformly been upheld as reasonable and valid, and a breach thereof will avoid the policy."

As stated in 29 American Jurisprudence, page 537, section 689: "It is generally and uniformly held that conditions or stipulations in policies of insurance, providing that the same shall be rendered void if the premises insured shall be, become, or remain vacant or unoccupied for a specified length of time, are reasonable and valid conditions, a breach of which will provide a ground of forfeiture of the policy and preclude the insured from recovering upon it. Both conditions need not be shown in order to avoid a policy of insurance under a clause making it void when 'vacant or unoccupied'."

In 26 C. J., page 212, section 258, it is said: "The term 'vacant' has been construed to mean empty, deprive of contents, without inanimate objects. It implies entire abandonment, nonoccupancy for any purpose. On the other hand, 'unoccupied' has been held to mean without animate objects, and implies that no actual use is being made of the premises by anyone corporeally present or in possession. * * * Whether a building is vacant or unoccupied within the meaning of a policy is a question of fact for the jury; but what is meant by the terms 'vacant' and 'unoccupied' is a question of law."

Appellant does not contend that the dwelling was "vacant" when the fire occurred, but earnestly maintains that it was "unoccupied". As to the latter contention, we are in accord.

[3] The question is not a novel one in this state. The point was squarely decided by this court in the case of Mauck v. Northwestern National Insurance Co., 102 Cal. App. 510, 283 P. 338, where we reviewed numerous authorities supporting the view that where the period of nonoccupancy is definitely limited in the contract of insurance, and the insured property is burned while unoccupied beyond the prescribed period, no recovery can be had. It is true the building *there* destroyed was not occupied for a period of a year, but we do not believe that the length of time when it was unoccupied, in excess of the ten-day permissive period, affected the application of

the legal principle laid down in the foregoing quotations from Corpus Juris and American Jurisprudence. Whether the breach is long-continued or of short duration is immaterial. In either case the policy is voided. The following cases support the rule enunciated in the Mauck case: Hudson Ins. Co. v. McKnight et al., Tex.Civ. App., 58 S.W.2d 1088; Liverpool & London Globe Insurance Co. v. Baker, Tex.Civ. App., 198 S.W. 632, 633; Kinneer v. Southwestern Mutual Fire Ass'n, 322 Pa. 100, 185 A. 194.

All the cases relied upon by respondents relate solely to the clause used in the earlier period of the history of insurance, where the period of unoccupiedness was not definitely limited as to time. Respondents then point to the finding here,—"That plaintiffs were temporarily absent from their said residence and place of abode from on or about the 15th day of October, 1934, to the 28th day of October, 1934, a period of about thirteen days * * *." Under the older form of policy referred to above, there being no time limit for nonoccupancy, the question as to what was a temporary absence from the premises, was left to the court or jury. In many of the earlier of the cases, the insurer, to make out a breach of the policy relating to occupancy, was called upon to prove a practical abandonment of the insured property. Such is the holding in the case of Covey v. National Union Fire Insurance Co., 31 Cal.App. 579, 161 P. 35, decided by this court in 1916. There, although the policy contained a clause similar to the one under discussion, a rider was subsequently attached which provided that the property was insured "while occupied only as a private dwelling". The trial court found that the insured property was totally destroyed by fire "while occupied as a private dwelling", and appellant contended that there was not sufficient evidence to support such finding. No mention is made in the opinion of the clause with the ten-day limitation, (except as it appeared in the quoted policy), and the decision was evidently based upon the legal principle that the rider supplanted such clause. The dwelling was burned October 1st. The evidence shows that the tenant of the insured actually lived there up to *September 28th*, when he started to move therefrom. His wife was there the night of *September 30th*. This court held that the premises were "occupied" when the fire occurred on October 1st, and cited those cases which do not involve the time limitation, and which hold that under such a policy the insured must prove that the dwelling was *abandoned*, and that a mere temporary absence will not prevent a recovery. Under the policy here, a temporary absence is permitted, but it is limited to ten days. The distinction is clearly pointed out in the Kinneer case, supra [32 Pa. 100, 185 A. 195]: "It is a matter of common knowledge that there is more danger of an unoccupied house being destroyed by fire than of one occupied. The reason that suggests itself is that when human beings occupy a house they are on guard against a fire hazard. When a company insures a house against fire, it is entitled to have the property occupied, and therefore presumably protected by the occupants, except when the occupants are away for brief periods. The period during which this insurance company was willing to tolerate unoccupancy, unless special permit was asked for and obtained, was ten days. When the insurance company stipulated in its contract that the policy would be voided by a vacancy continuing more than ten days and unconsented to by the company, the insured could not have been in doubt as to exactly what was meant. In the present instance, no permit for a vacancy of more than ten days was granted to the owner in 1931, yet no human being occupied this house for a period of thirteen days before the fire which destroyed it in November of that year."

The lengthy excerpts from Cooley's Brief on Insurance (2d), volume 3, commencing at section 2566, and relied upon by respondents, all relate to the old form of policy, which has no time limitation for nonoccupancy, and the conclusion is reached that a recovery will be permitted unless it is proven that the insured premises have been entirely abandoned. Sec. 2581, volume above cited.

[4] Respondents urge, in support of the judgment, that the terms of the policy should be construed most favorably to the insured. It is true that "such contracts are to be interpreted in the light of the fact that they are drawn by the insurer, and are rarely understood by the insured, to whom every rational indulgence should be given, and in whose favor the policy should be liberally construed." 14 Cal.Jur., p. 444, sec. 24. But we do not see how there could be any misunderstanding concerning the import and meaning of the clause under discussion here. The ten-day limitation upon nonoccupancy was clearly set forth and

easily comprehended. The rule sought to be invoked will not be applied to nullify an express and unequivocal provision, where the terms are plain and explicit and the meaning clear. 14 Cal.Jur., p. 446, sec. 24.

[5] Our conclusion is that as the undisputed evidence shows that the property was unoccupied for a period of thirteen days, the policy lapsed, and no recovery can be had thereunder.

The judgment is reversed, with directions to the trial court to enter judgment in favor of defendant.

We concur: PULLEN, P. J.; THOMPSON, J.

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42 Cal.App.2d 320

EVANS et al. v. FONG POY et al.

Civ. 11479.

District Court of Appeal, First District, Division 2, California.

Jan. 7, 1941.

1. Civil rights 🔑13

In action for damages for alleged denial of plaintiffs' rights under statute, evidence that other persons were served with food and drinks at bar in defendant's cafe, but that plaintiffs were refused such service because they were colored, sustained judgment for plaintiffs. Civ.Code, §§ 51, 52.

2. Appeal and error 🔑1010(1)

Trial court's findings of fact sustained by substantial evidence may not be disturbed on appeal.

3. Civil rights 🔑8

The Civil Code provisions guaranteeing to all citizens full and equal accommodations, advantages, facilities and privileges of enumerated establishments "and all other places of public accommodation" or amusement covers public bars or saloons and hence covers refusal to serve a person at a public bar in cafe because of his color or race. Civ.Code, §§ 51, 52.

◆

Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Action by Ethel Mae Evans and another against Fong Poy and others, for damages for the alleged denial of plaintiffs' rights under Civil Code, §§ 51, 52. From judgment for plaintiffs, the named defendant appeals.

Affirmed.

Frank M. Carr, F. Bert Fernhoff, and John W. Collier, all of Oakland, for appellants.

Vaughns & Larche, of Oakland, for respondents.

SPENCE, Justice.

The action was brought by plaintiffs to recover damages for the alleged denial of their rights under sections 51 and 52 of the Civil Code. The cause was tried by the court sitting without a jury and resulted in judgment in favor of plaintiffs Ethel Mae Evans and Mack Bufford for $100 each against defendant Fong Poy. Said defendant appeals.

[1, 2] There are no headings in appellant's briefs (rule VIII, section 2, rules of the Supreme Court and District Courts of Appeal), but it appears that appellant contends that the evidence was insufficient to sustain the findings. The disputed findings appear to be those in which the trial court found that at the time and place in question, defendant and his employees refused to serve food and drink to plaintiffs because plaintiffs were persons of the colored race. While there was a conflict in the evidence, our review of the record leads us to the conclusion that there was ample evidence to sustain said findings of the trial court.

Defendant operated a public establishment known as the New Shanghai Cafe. Plaintiffs entered the establishment and ordered drinks and sandwiches at the bar. It is conceded that they were refused such service. The testimony introduced by plaintiffs showed that they were told by the bartender and the floor manager that they could not be served at the bar because they were colored people. The testimony introduced by defendants tended to show that the refusal of such service was based upon an alleged rule against serving food to anyone at the bar. The existence of any such rule was denied by the bartender when called as a witness, and he testified that it was customary to serve food as well as drinks at the bar. There was also uncontradicted testimony showing that other persons were eating and drinking at the bar at the time that such service was denied to plaintiffs. There was therefore substantial evidence to sustain said findings of the trial court, and under these circumstances said findings may not be disturbed on appeal.

[3] Defendant apparently further contends that the refusal to serve a colored person because of his color or race in a bar or saloon does not come within the purview of said sections 51 and 52 of the Civil Code. We believe, however, that said sections are plain and unambiguous. Said section 51 guarantees to all citizens "full and equal accommodations, advantages, facilities and privileges of inns, restaurants, hotels, eating-houses, places where ice cream or soft drinks of any kind are sold for consumption on the premises, barber shops, bath houses, theatres, skating rinks, public conveyances *and all other places of public accommodation* or amusement * * *." (Italics ours.) Such sweeping language as that italicized obviously covers public bars or saloons.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

42 Cal.App.2d 326

ETS–HOKIN et al. v. APPELLATE DEPARTMENT OF SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 11597.

District Court of Appeal, First District, Division 2, California.

Jan. 7, 1941.

1. Appeal and error 🔑158(1)

The satisfaction of a judgment does not in all cases terminate the litigation and deprive an appellant of his right of appeal.

2. Certiorari 🔑36

Where it was claimed that there had been a satisfaction of judgment under such circumstances as to deprive appellant of his right of appeal, the issue should have been presented by way of motion to dismiss the appeal in appellate tribunal in which appeal was pending, and, in absence of such motion, no other court would be justified in holding, in a proceeding in certiorari, that such appellate tribunal was without jurisdiction to determine the appeal.

3. Courts 🔑101

Under statute providing that appellate department of superior court shall consist of three judges, one of whom shall be designated by chairman of judicial council as presiding judge, appellate department of superior court was legally constituted to hear an appeal from municipal court, though only two judges participated on the appeal, neither of whom was designated as the presiding judge, in view of further statutory provision requiring the presence of only two judges to transact business of the appellate department of the superior court. Code Civ. Proc. §§ 77a, 77b.

4. Appeal and error 🔑830(1)

Failure of appellate department of superior court to place petition for rehearing upon calendar would at most be a mere "irregularity" in the procedure and would not affect jurisdiction of the court.

See Words and Phrases, Permanent Edition, for all other definitions of "Irregularity".

Original proceeding in certiorari by Louis Ets-Hokin and others against the Appellate Department of the Superior Court of the State of California in and for the City and County of San Francisco, and others, to annul proceedings of the respondent court on an appeal from a judgment of the municipal court.

Judgment of respondent court reversing judgment of the municipal court and order denying a rehearing affirmed.

H. W. Hutton and John H. Crabbe, both of San Francisco, for petitioners.

Maurice E. Gibson, of San Francisco, for respondents.

SPENCE, Justice.

This is an original proceeding in certiorari in which the petitioners seek the annulment of the proceedings of the respondent court on a certain appeal from a judgment of the municipal court.

In a replevin action in the municipal court, petitioners herein obtained a judgment against Trebor Corporation for the recovery of possession of certain personal property or the sum of $325 in case delivery thereof could not be had, together with $50 damages and costs. Trebor Corporation took an appeal to the respondent court, which court reversed the judgment and thereafter denied a petition for a rehearing.

The respondent court filed its opinion which read in part: "Respondents' contention that the judgment has been satisfied is without merit on this appeal. There is nothing in the record on appeal which discloses this to be a fact, but counsel for appellant admitted in the oral argument that the judgment had been paid *involuntarily* and after a writ of execution had been issued. We have no way of determining this question in the record. If the payment was voluntary the appeal would be dismissed upon motion, if involuntary the motion to dismiss would be denied." (Italics ours.)

In the petition herein, petitioners purported to set forth said portion of the opinion but in doing so they misquoted said opinion. The word "voluntarily" was substituted for the word "involuntarily". This court ordered the writ to issue but when the return was filed, the error in the petition became apparent. As indicated in the opinion of the respondent court, the record on appeal from the municipal court did not disclose to the respondent court that there had been any satisfaction of judgment, voluntary or involuntary. No motion to dismiss the appeal was made and the issue of whether there had been a voluntary or involuntary satisfaction of the judgment was never presented to the respondent court. All that was before the respondent court was the admission of appellant made on oral argument that the judgment had been paid involuntarily. Petitioners now seek to have the proceedings of the respondent court annulled upon the theory that the appellant had voluntarily paid the judgment; that such payment had terminated the litigation; and that the respondent court thereafter was without jurisdiction to hear and determine the appeal.

[1,2] We find nothing to justify this court in holding that the respondent court was without jurisdiction. The satisfaction of a judgment does not in all cases terminate the litigation and deprive an appellant of his right of appeal. Levin v. Saroff, 54 Cal.App. 285, 201 P. 961; Warner Bros. v. Freud, 131 Cal. 639, 646, 63 P. 1017, 82 Am.St.Rep. 400. And if it is claimed that there has been a satisfaction of judgment under such circumstances as to deprive an appellant of his right of appeal, the issue should be presented by way of a motion to dismiss the appeal in the appellate tribunal in which the appeal is pending. If no such motion is made, we do not believe that any other court would be justified in holding, in a proceeding in certiorari, that such appellate tribunal was without jurisdiction to hear and determine the appeal.

[3] Petitioners make the further contention that the respondent court was not legally constituted at the time of hearing said appeal. Reference is made to sections 77a and 77b of the Code of Civil Procedure providing for a department to be known as the "Appellate department of the superior court" to consist of "three judges * * * one of whom shall be designated by the chairman of the judicial council as presiding judge * * *". In this connection, petitioners state that there were but two judges participating on the appeal, and that neither of said two judges was a judge designated by the chairman of the judicial council as the presiding judge. We find no merit in petitioners' contention. Said section 77b provides that "The presence of two judges of such department shall be necessary to transact any business * * *", thereby implying that the presence of two judges is sufficient for that purpose. The portion of said section which provides that the presiding judge "may convene the court at any time" does not prevent the convening of the court by an acting presiding judge during the absence of the regularly designated presiding judge.

[4] Finally petitioners contend that they were deprived of the right to argue their petition for rehearing. They point to rule 7 of the rules prescribed by the judicial council for procedure in the appellate departments of the superior court. It is a sufficient answer to this contention to state that if it be assumed that the petition for rehearing was not placed upon the calendar for hearing, this was at most a mere irregularity in the procedure which did not affect the jurisdiction of the court.

The judgment of the respondent court reversing the judgment of the municipal court and the order of the respondent court denying a rehearing are affirmed.

We concur: NOURSE, P. J., STURTEVANT, J.

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41 Cal.App.2d 874

JOHNSON v. FARMER et al.

Civ. 2496.

District Court of Appeal, Fourth District, California.

Jan. 7, 1941.

Hearing Denied Feb. 6, 1941.

Appeal and error ⚷832(4)

Where causes of action under Unfair Trade Practice Act for price discriminations by plaintiff's competitors against plaintiff and between their own customers were not separately treated in trial court's findings and judgment for plaintiff, point that portion of judgment as to discrimination between such customers should be affirmed was not raised in plaintiff's brief on defendant's appeal, but first presented in plaintiff's petition for rehearing after reversal of judgment, and record does not support such portion of judgment, petition must be denied, as parties to appeal should not be allowed to present their contentions piecemeal on successive hearings, and such matter is incidental to main relief sought.

◆

Appeal from Superior Court, Orange County; Ben R. Ragain, Judge.

On Petition for Rehearing.

Petition denied.

For prior opinion, see 107 P.2d 959.

Schooling & Wayte, of Huntington Park, and West & Crookshank, of Santa Ana, for appellants.

Blodget, Kuchel & Tobias, of Santa Ana, and Harry R. Simon, of Los Angeles, for respondent.

PER CURIAM.

In requesting a rehearing herein the respondent argues that a portion of the judgment related to separate causes of action, involving price discrimination by the appellants, as between their own customers; that this matter was not considered in our opinion; and that this portion of the judgment should be affirmed.

The causes of action were not separately treated in the findings and judgment, the point now made was not raised in respondent's brief and is here presented for the first time, and a casual inspection indicates that the record does not support the portion of the judgment now sought to be sustained. Not only should parties to an appeal not be allowed to present their contentions piecemeal on successive hearings, but it here clearly appears that the matter now relied on is incidental to the main relief sought, and that it is one which, in all fairness, should be considered with the other issues on a retrial of the entire action.

The petition for a rehearing is denied.

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42 Cal.App.2d 406

SHELDON et al. v. SUPERIOR COURT, LOS ANGELES COUNTY, LONG BEACH DEPARTMENT, et al.

Civ. 12868.

District Court of Appeal, Second District, Division 2, California.

Jan. 10, 1941.

1. Motions ⚷59(1)

A valid order made ex parte may be vacated only after a "showing of cause" for the making of a subsequent order, which means that there was inadvertence, mistake, or fraud.

See Words and Phrases, Permanent Edition, for all other definitions of "Showing of Cause".

2. Executors and administrators ⚷20(9)

Where there was neither inadvertence, mistake, nor fraud in connection with the making of an ex parte order appointing a special administrator, a subsequent order vacating his appointment was void.

3. Certiorari ⟹37

The real party in interest is a "proper party" to a petition for writ of review.

See Words and Phrases, Permanent Edition, for all other definitions of "Proper Party".

4. Executors and administrators ⟹20(10)

A sister of deceased was a "real party in interest", and hence a "proper party" to writ of review for review of court order removing deceased's special administrator and appointing another in his place.

See Words and Phrases, Permanent Edition, for all other definitions of "Real Party in Interest".

Proceeding by Raymond L. Sheldon and others against the Superior Court of the State of California, Los Angeles County, the Long Beach Department, and others, for a writ to review an order of the Superior Court removing a special administrator and appointing another in his place. The respondents entered a general demurrer and a special demurrer, and moved to quash or modify the writ of review.

Demurrers overruled, motion to quash denied, and orders annulled.

Russell H. Pray and Leroy A. Broun, both of Long Beach, for petitioners.

Marshall & Farnham, of Long Beach, for respondents.

McCOMB, Justice.

This is an application for a writ of review of an order of respondent court removing a special administrator and appointing another in his place and stead. Respondents have entered (1) a general demurrer, (2) a special demurrer on the ground that Marie Babb is not a proper party respondent in the present proceeding, and (3) a motion to quash or modify the writ of review.

The essential facts are:

July 25, 1940, Judge Desmond made an order appointing petitioner, a legatee in decedent's will, special administrator of the estate of Lena L. Stokes. After due notice respondent Marie Babb, a sister of decedent, on September 13, 1940, sought to have petitioner removed as special administrator of said decedent's estate and herself appointed as special administratrix of the estate, on the sole ground that she had the prior right to act as special administratrix.

It was stipulated by the parties that the question presented for the decision of the probate court was its jurisdiction to remove a special administrator theretofore appointed, for the single reason that another might have a prior right to be appointed such special administrator. The matter was heard before George A. Hart, Sr., sitting as a judge pro tem. Said judge pro tem made an order removing petitioner as special administrator and appointing Marie Babb as special administratrix of decedent's estate.

This is the sole question presented for determination:

Does the probate court have power to remove without a showing of cause therefor a special administrator who has been appointed ex parte?

[1] This question must be answered in the negative. The law is established in California that a valid order made ex parte may be vacated only after a showing of cause for the making of the latter order, that is, that in the making of the original order there was (1) inadvertence, (2) mistake, or (3) fraud. Klokke Inv. Co. v. Superior Court, 39 Cal.App. 717, 720, 179 P. 728; Wiggin v. Superior Court, 68 Cal. 398, 402, 9 P. 646; Sullivan v. Superior Court, 185 Cal. 133, 139, 195 P. 1061; Nason v. Superior Court, 39 Cal.App. 448, 453, 179 P. 454.

[2] Applying the rule of law just stated to the facts of the instant case, it appears by the stipulation of the parties that there was neither inadvertence, mistake, or fraud shown in connection with the making of the original order appointing petitioner as special administrator. Therefore, the latter order vacating his appointment was improperly made and is null and void.

[3, 4] There is no merit in respondents' contention in their special demurrer that respondent Marie Babb is not a proper party to the proceeding. The real party in interest is a proper party to a petition for a writ of review. Lee v. Small Claims Court, 34 Cal.App.2d 1, 5, 92 P.2d 937. Clearly in this case respondent Marie Babb was one of the real parties in interest.

For the foregoing reasons (1) the general and special demurrers are overruled, (2) the motion to quash is denied, and (3) the orders removing petitioner as special administrator of the Estate of Lena L. Stokes and appointing respondent Marie Babb as special administratrix of said estate are and each is hereby annulled.

MOORE, P. J., and WOOD, J., concurred.

42 Cal.App.2d 334

HOPPE v. BRADSHAW et al.

Civ. 2481.

District Court of Appeal, Fourth District, California.

Jan. 7, 1941.

Hearing Denied March 7, 1941.

1. Automobiles 🔑242(8)

If the jury concluded, as it might properly do from the evidence, that a pedestrian, because of loss of memory due to the accident, was unable to testify concerning his conduct immediately prior thereto, he would be presumed to have exercised ordinary care.

2. Automobiles 🔑245(6, 41)

Evidence that a motorist, approaching a busy industrial establishment where automobiles were parked on both sides of the highway, was traveling about 45 miles an hour in the middle of the highway, and that the left front fender of the automobile struck a pedestrian who, having come through a pedestrian gate, started across the highway from behind a row of parked automobiles, *held* sufficient for the jury on the question of negligence. St.1935, p. 176, § 510; St.1937, pp. 169, 619, §§ 525, 671(b).

3. Automobiles 🔑245(6)

The testimony being in conflict, the question of a motorist's negligence should be submitted to the jury, unless the injured pedestrian was contributorily negligent as a matter of law.

4. Trial 🔑173

That the court has denied a motion for nonsuit will not prevent it from subsequently directing a verdict for defendant, if the evidence warrants.

5. Trial 🔑178

On a motion for a directed verdict, the adversary's evidence must be deemed true, together with all fair and rational inferences and deductions which may reasonably be drawn therefrom.

6. Negligence 🔑136(9)

A court may direct a verdict for defendant on the ground of contributory negligence only when the evidence conclusively establishes such negligence, and no deductions or inferences other than contributory negligence may be drawn by the jury from the evidence.

7. Automobiles 🔑242(8)

A pedestrian whose injuries caused loss of memory was entitled to the presumption of due care until dispelled by evidence opposed thereto, where there was no evidence as to whether the pedestrian looked before stepping onto the pavement with the intention of crossing the highway.

8. Automobiles 🔑242(8)

Where a pedestrian was entitled to the presumption of due care, the defendant motorist's testimony that the pedestrian failed to look as he stepped from behind a parked automobile onto the paved highway, though evidence which the jury could consider, did not of itself destroy the probative weight of the fact presumed, especially in view of testimony that the motorist stated he did not see the pedestrian until "right on him".

9. Automobiles 🔑245(72)

Where a pedestrian was entitled to the presumption of due care, the question whether the defendant motorist's testimony creating a conflict in certain particulars was sufficient to overcome the presumption was for the jury.

10. New trial 🔑71

On a motion for a new trial for insufficiency of the evidence, as distinguished from a motion for a directed verdict, the court is authorized to weigh the conflicting evidence produced.

11. Appeal and error 🔑867(1)
Trial 🔑178

In considering a motion for a directed verdict, neither the trial court nor the reviewing court can be guided by the rules governing motions for a new trial.

12. Automobiles 🔑245(72)

Contributory negligence of a pedestrian who had some impairment of sight and hearing and started across the highway from behind a row of parked automobiles *held* for the jury where the pedestrian was unable to

testify concerning his conduct immediately prior to the accident because of loss of memory resulting therefrom.

◆

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by George H. Hoppe against Charles B. Bradshaw and the Southern California Edison Company, Limited, for injuries suffered by plaintiff when struck by an automobile belonging to the last-named defendant. From a judgment on a directed verdict for defendants, plaintiff appeals.

Reversed and remanded for a new trial.

Hearing denied; EDMONDS, J., dissenting.

Davidson & Bartlett, of Ontario, and Fred A. Wilson, of San Bernardino, for appellant.

Swing & Swing, of San Bernardino, for respondents.

GRIFFIN, Justice.

Plaintiff and appellant George H. Hoppe, while walking across a public highway, was struck by an automobile belonging to defendant and respondent Southern California Edison Co., Ltd., and then being driven by defendant and respondent Charles B. Bradshaw.

This action was instituted to recover damages because of injuries thus received. The court directed a verdict in favor of defendants. From the judgment upon such directed verdict the plaintiff has taken this appeal.

The collision occurred at about 10:30 a. m. on October 3, 1938, on California boulevard, a paved highway about 18 or 20 feet in width, extending east from the city of Ontario. On the north side of California boulevard, at this point, the land is unimproved. On the south side is the property of the Cucamonga Co-Operative Winery, which is enclosed by a wire fence. The fence along the north side of the winery property is parallel to and about 7 feet south of the south edge of the pavement on California boulevard. The fence above described has four truck gates and one pedestrian gate, by means of which vehicles and pedestrians on the boulevard gained access to the winery.

At the time of the accident there were located on the south side of California boulevard between the south edge of the pavement and the fence enclosing the winery property six or seven parked automobiles which were parked parallel with the highway and about one foot apart. The left front fenders on some of these parked automobiles extended over the south edge of the pavement from six to eight inches. Between the buildings on the winery property which were immediately south of the fence and the parked automobiles was a row of eucalyptus trees. The pedestrian gate above described, leading from the buildings to the highway, was located about nine feet to the rear of the most westerly car in the row of cars above described. There were no marked or unmarked crosswalks on the highway.

On the day in question, the appellant had driven his truck loaded with grapes into the winery, and after unloading it had driven out through one of the gates, and according to one witness stopped on the north shoulder of the highway, off the pavement a few inches, at a point opposite the pedestrian gate. He then walked from his truck south across the boulevard and into the winery building. After some first aid had been administered to him because of a slight cut on the head, he left the building and walked north across a platform leading to the pedestrian gate for the purpose of returning to his truck on the north side of the boulevard. This platform was at least 20 feet square and was elevated above the surface of the ground about 1½ or 2 feet. From this platform the exhibits and other evidence indicate that appellant could have observed an oncoming automobile over the tops of the parked cars, just before he stepped to the ground at the entrance to the gate. The record is silent as to whether he made any observation from this point. As appellant was starting across the boulevard from behind the parked cars the automobile operated by Bradshaw, which was traveling westerly, collided with him and knocked him to the pavement. As a result the appellant sustained a compound comminuted fracture of one leg, a fracture of the skull and a brain injury. The brain injury resulted in a loss of memory to such an extent that he had no recollection of any of the incidents from the time he crossed the winery building platform until he regained consciousness in the hospital six days later.

The motion for a directed verdict was based upon the asserted absence of negligence on the part of defendants and respondents and the asserted contributory negligence on the part of plaintiff and appellant.

As to respondent Bradshaw's negligence the record discloses, from the evidence of one of the witnesses produced by appellant, that certain skid marks of respondents' automobile started about 12 feet east of the pedestrian gate and continued westerly for 75 feet and that these marks were "straddle of the center of the road * * right straddle of the middle of the road".

Another witness testified that the appellant was lying on the south edge of the pavement with his feet "close to the edge or on the dirt"; that the skid marks were "practically about in the middle of the road" and about 70 or 75 feet long; that these marks began 15 or 16 feet east of the pedestrian gate; and that the left front fender of the respondents' automobile was damaged; that the distance between appellant's parked truck and the south edge of the pavement was approximately 15 feet.

Appellant contends that this evidence conclusively shows that the respondent Bradshaw was traveling on the wrong side of the highway at the time of the accident, citing section 525 of the Vehicle Code, St.1935, p. 181, as amended by St. 1937, p. 619.

In reference to the speed of respondents' automobile one of the appellant's witnesses testified that he was walking westerly along the inside of the north fence at a point 200 feet east of the pedestrian gate when the respondents' automobile went past traveling "45 miles an hour at least".

Appellant contends that a lower rate of speed was imperative under section 510 of the Vehicle Code, St.1935, p. 176, for the reason that the roadway was narrow; that the pavement at the point of the accident was not over 18 or 19 feet wide; that the south edge of the pavement was filled with a string of automobiles extending east from the pedestrian gate, leaving only a traveled surface of 18 feet between this row of automobiles and the north edge of the pavement; that on the north shoulder there were three or more parked automobiles; that the appellant's truck was also parked on the north edge of that same pavement; that the highway was being used extensively due to the fact that it was the busy season at the winery and that this fact was obvious from the activities in and about the premises, the coming and going of trucks with grapes, and other commodities incident to operation, and the presence of many parked vehicles of workmen and patrons on both sides of the street, all of which was known to the respondent Bradshaw, who traveled over this portion of the boulevard biweekly for five years and had driven past the winery earlier that same day; that the visibility was poor; that the view of the pedestrian gate and the scale gate, from which the approach of others onto the highway should be anticipated, was obstructed to motorists coming from the east by the row of parked automobiles on the south shoulder, and by the fence; that respondent Bradshaw admitted that he did not blow his horn because "it was split second between the time I saw him and the time I hit him"; that there was no reason why Bradshaw could not have blown his horn before he saw the appellant and that under section 671 (b) of the Vehicle Code, St.1935, p. 223, as amended by St.1937, p. 169, it was his duty so to do; and that he failed to keep a lookout and anticipate the presence of others on the highway.

The record discloses from the testimony of one of appellant's witnesses that he had a conversation with the respondent Bradshaw immediately after the accident and that Bradshaw told him that he (Bradshaw) "didn't see him (Hoppe) until he was right on him".

Appellant, after narrating the extent of his injuries, testified as follows:

"Q. (By Mr. Wilson): What is the first recollection you have of anything at all after the accident occurred * * * A. The first I can recall is when I came to in the hospital. * * *

"Q. Do you have any recollection of any events at all which transpired from the time you were on the platform until you regained consciousness in the hospital? A. No.

"Q. (By Mr. Swing): And you came out of the door onto the platform? A. Yes, sir.

"Q. Where were you going? A. All I can remember is going across this platform right here.

"Q. Where were you going— A. I was headed for the truck.

"Q. Do you remember looking in either direction along the highway? A. I don't remember.

"Q. Do you remember seeing any cars coming? A. No.

"Q. Do you remember stopping and making any observations at all? A. I don't know."

In corroboration of appellant's testimony the physician who attended him testified:

"Q. (By Mr. Wilson): What can you say relative to his mental condition following the accident? A. We didn't get very much out of him until the 8th or 9th. He remembered nothing for the period of time that he was in the hospital, and it was practically a week before that when he started talking that he didn't know anything that had gone on prior to that week.

"Q. What do you call that? A. That is a period of what we call aphasia, in which there has been enough temporary or permanent brain damage that the individual cannot remember things that happened during the accident immediately or for a given period prior to it. Roughly speaking the amount of damage to the brain can be measured with a loss of memory prior to the accident at the time the brain was struck. In this case the loss of memory prior to the accident decreased as he improved and it was a period of a day or a portion of a day that he had completely lost out. For some months afterwards he did not remember what had happened during that day or the day prior."

[1] It is appellant's contention that when he, because of loss of memory, is unable to testify respecting his conduct immediately prior to the accident, he is presumed to have exercised reasonable and ordinary care for his own safety, and in support of the applicability of this rule to the facts in the instant case he cites Borum v. Graham, 4 Cal.App.2d 331, 40 P.2d 866; Whicker v. Crescent Auto Co., 20 Cal.App.2d 240, 66 P.2d 749; Parker v. Manchester Hotel Co., 29 Cal.App.2d 446, 85 P.2d 152; Smellie v. Southern Pac. Co., 212 Cal. 540, 299 P. 529; Mar Shee v. Maryland Assurance Corp., 190 Cal. 1, 210 P. 269, and Scott v. Sheedy, 39 Cal.App.2d 96, 102 P.2d 575, where the District Court of Appeal extended the rule announced in the Mar Shee and Smellie cases to a case where loss of memory was the direct result of a brain injury sustained in the collision. The justification for the rule there announced was based upon the fact that the injured person died and therefore could not testify. In extending the rule in Scott v. Sheedy, supra, the court predicated its opinion upon the same principle, that is, that the person was deprived of his testimony because of the injuries received in the accident. In the instant case there appears to be sufficient evidence, if believed by the jury, to justify the conclusion, if drawn by the jury, that the appellant was deprived of his memory because of a head injury. If the jury so concluded, appellant would then be entitled to the benefit of the presumption.

Respondents thereafter produced certain witnesses who testified in their behalf. The respondent Bradshaw testified generally that he was driving in a westerly direction on California boulevard and that just before he approached the scene of the accident he slowed down to 35 miles an hour; that he saw the parked automobiles and the parked truck; that when he was "a short distance east of the small gate Mr. Hoppe came out from behind a parked car, to my best recollection, on a jog, he was trotting, a slow run * * * he came from behind the parked car, he looked neither right nor left, and in the split second I had I applied my brakes and started to swerve to the right to avoid hitting him"; that at that time he (Bradshaw) was traveling "on the northern half" of the highway; that when he first saw Hoppe he had reached the edge of the south pavement; that Hoppe "trotted" six or eight feet toward the center of the highway; and that appellant was struck when he was near the center of the highway.

[2, 3] It is apparent that the evidence produced by the appellant, viewed in its most favorable light and if believed by the jury, would be sufficient to show negligence on the part of the respondent Bradshaw. Bradshaw's testimony merely created a conflict on this question and unless the appellant was guilty of contributory negligence as a matter of law the question should have been submitted to the jury.

We next approach the question of the contributory negligence of appellant. The evidence shows that appellant, prior to the accident, had some impairment of hearing and was accustomed to wearing a device known as a "bone conductor" as an aid to his hearing; and that prior to the injury he wore glasses, due to "spasm of the eye * * * blinking of the eye".

The testimony of respondent Bradshaw constituted all of the evidence respecting appellant's conduct prior to the collision and this testimony only covered an interval of not more than a second or two, as appellant proceeded forward three or four steps from behind the parked automobile onto the highway. Appellant's conduct from the time he crossed the platform to the time he reached the south edge of the pavement is not revealed.

Respondents insist that at the time the motion for a directed verdict was granted appellant was no longer entitled to the benefit of the presumption of due care; that the evidence in the instant case dispelled any such presumption and established negligence on appellant's part as a matter of law; that had appellant exercised the care that the law imposed upon him he would have seen respondents' automobile and avoided the accident; that had his hearing not been affected he would have heard the oncoming automobile before leaving the platform or at least before stepping onto the highway, and would have accorded it the right of way, and that his failure to look was negligence as a matter of law; that when he failed to look while in a position where he could see, and without looking voluntarily placed himself in a position where he could neither see nor hear and then, without looking, walked onto the highway in front of a plainly visible oncoming automobile, he abandoned caution and thoughtlessly placed himself in a position of imminent peril from which there was no escape. It is then argued that even where the presumption of due care is indulged in, still such a presumption is not equivalent to a presumption that a person is free from contributory negligence, citing Speck v. Sarver, Cal.App., 106 P.2d 49; Morris v. Purity Sausage Co., 2 Cal.App.2d 536, 38 P.2d 193; Deike v. East Bay Street Rys., Ltd., 7 Cal.App.2d 544, 46 P.2d 812; Wing v. Kishi, 92 Cal. App. 495, 268 P. 483; Gibb v. Cleave, 12 Cal.App.2d 468, 55 P.2d 938; Casey v. Delelio, 39 Cal.App.2d 91, 102 P.2d 557; Lindley v. Southern Pacific Co., 18 Cal. App.2d 550, 64 P.2d 490; Horton v. Stoll, 3 Cal.App.2d 687, 40 P.2d 603; Chase v. Thomas, 7 Cal.App.2d 440, 46 P.2d 200, and Mundy v. Marshall, 8 Cal.2d 294, 65 P. 2d 65.

Appellant in reply argues that respondents fail to appreciate the limitations upon the powers of the trial court when directing a verdict and that under the rule laid down in Re Estate of Flood, 217 Cal. 763, 21 P.2d 579, the trial court has no power to weigh the evidence, must disregard conflicting evidence, indulge in every legitimate inference and presumption, and may not judge the credibility of witnesses but must give plaintiff's evidence all of the value to which it would be legally entitled if the witnesses were believed, and in this connection it is argued that there were not any witnesses who could establish the conduct of the appellant from the time he crossed the platform until he was first seen by Bradshaw on the pavement; that appellant himself, because of his injuries, had no recollection of the events during this interval and that under the rule applied in Scott v. Sheedy, supra, the law presumes that during that period appellant exercised due care for his own safety; that in the absence of evidence on the subject this presumption prevails; that the trial court is required to accept all inferences and presumptions in favor of the appellant and the question of whether a presumption is dispelled or overcome is one for the jury, citing Duehren v. Stewart, 39 Cal.App.2d 201, 102 P.2d 784; that it was a question for the jury to determine whether the presumption had been overcome by evidence offered in contradiction thereof; that appellant was entitled to the benefit of the presumption above-mentioned, as his own evidence was reconcilable with it and such presumption remains evidence in the case until dispelled or overcome by evidence offered in contradiction thereof; and that the trial court erred in directing the verdict in favor of the respondents.

[4-6] Of course, the mere fact that the court in the instant case denied a motion for a nonsuit would not prevent it from subsequently directing a verdict for the defendant if the condition of the evidence so warranted. Sellers v. Solway Land Co., 31 Cal.App. 259, 160 P. 175. In considering a motion for a directed verdict, the evidence of the adverse party must be deemed to have been true, together with all fair and rational inferences and deductions

which may reasonably be drawn therefrom. Seperman v. Lyon Fire Proof Storage Co., 97 Cal.App. 654, 275 P. 980. The rule in reference to a directed verdict for a defendant laid down in Johnson v. Southern Pacific Railroad Co., 154 Cal. 285, 97 P. 520, has been repeatedly cited to the effect that a court may instruct the jury to return a verdict for the defendant on the ground of contributory negligence of the person injured only when the evidence conclusively establishes such contributory negligence, and no deductions or inferences other than contributory negligence may be drawn by the jury from the evidence.

In Rinker v. Carl, 102 Cal.App. 436, at page 441, 283 P. 317, 319, the court said: "* * * it is now well established that it is not contributory negligence as a matter of law for one crossing a paved highway from the south to the north not to look to the left or to the west after reaching the medial line. * * * The plaintiff was not under obligations to look both ways at all times. He was under obligations to look to the left while crossing the southerly half of the boulevard and to look to the east when crossing the northerly half thereof. A failure to look both ways while he was crossing the respective halves of the boulevard did not, and would not,' constitute negligence per se. At most it would only present the question of contributory negligence to the jury as a matter of fact, by reason of the rule prevailing that automobile drivers, under ordinary circumstances, must propel their cars on the half of the highway prescribed by section 122 of the Motor Vehicle Act as well as the authorities which we have here cited."

In Nickell v. Rosenfield, 82 Cal.App. 369, 255 P. 760, it was held that the duty of the pedestrian is to look in the direction from which traffic is to be expected. Failing so to do, he would be guilty of contributory negligence; but if he fails to observe an automobile approaching from the wrong direction, the pedestrian is not guilty as a matter of law for failing to observe the same. To the same effect see Henry v. Lingsweiler, 81 Cal.App. 142, 253 P. 357; Wright v. Foreman, 86 Cal.App. 595, 261 P. 481; Rignell v. Font, 90 Cal.App. 730, 266 P. 588; Genola v. Barnett, 14 Cal.2d 217, 93 P.2d 109; Varner v. Skov, 20 Cal.App.2d 232, 67 P.2d 123, and Wickman v. Lowenstein, 136 Cal.App. 279, 284, 28 P.2d 681, 683, where it is said that the general rule is: "Where the injured party fails to look at all, or looks straight ahead without glancing to either side, or is in a position where he cannot see, or, in other words, where he takes no precaution at all for his own safety, it is usually a question for the court. Where he looks but does not see an approaching automobile, or, seeing one, erroneously misjudges its speed or distance, or for some other reason assumes he could avoid injury to himself, the question is usually one for the jury."

Other cases might be cited, but the rules are well established, just as we have stated them, by the authorities cited.

In Eastman v. Rabbeth, 128 Cal.App. 534, 17 P.2d 1009, this court had before it for consideration a similar question to the one here presented. In upholding the judgment we there held that the plaintiff, who stepped out from behind a palm tree and was injured by a passing car, was rendered unconscious by the accident, and did not testify, and only remembered that he had been walking on a public street in Redlands, was entitled to the benefit of the presumption that he (the injured party) used ordinary care for his own safety and that, in so doing, he looked.

In Duehren v. Stewart, supra [39 Cal.App.2d 201, 102 P.2d 787], which is similar in principle, this court, after reviewing many of the cited cases, approved an instruction to the effect that "it is presumed that the deceased used proper care; that he made reasonable lookout for his own safety and protection, and that at the time he proceeded across the intersection conditions were such that it was safe to do so". We there held that "Respondents produced no evidence to determine what observations Mr. Duehren made just before he attempted to cross the street. Appellant offered no evidence as to whether the deceased looked prior to the time he stepped off the curb. Respondents were therefore entitled to the benefit of the presumption above mentioned, as their own evidence was reconcilable with it, and such presumption remained as evidence in the case until dispelled or overcome by evidence offered in contradiction thereof." So in the instant case there was no evidence as to whether the appellant looked prior to the time he stepped onto the pavement.

[7-9] We therefore conclude that appellant was entitled to the benefit of the presumption here claimed until dispelled by evidence opposed to it. It is true that Bradshaw's testimony created a conflict in certain particulars and the testimony of other witnesses to certain facts differed in some respects. It will be remembered that one witness for appellant testified that Bradshaw stated that he did not see appellant "until he was right on him". Assuming the truth of this statement, then Bradshaw's testimony that appellant failed to look as he stepped from behind the parked car was, as least, open to question. Bradshaw's testimony, though evidence in the case which the jury might have considered, did not of itself destroy the probative weight of the fact presumed. The question whether his testimony proved facts sufficient to overcome the presumption was one for the jury. Whicker v. Crescent Auto Co., supra, 20 Cal.App.2d page 242, 66 P.2d 749.

[10, 11] We are not here confronted with nor called upon to determine the question whether the trial court under the evidence here presented, might have been fully justified in granting a motion for a new trial for insufficiency of the evidence, where it is authorized to weigh the conflicting evidence produced, had a verdict been rendered in favor of appellant. In view of the differences in the consequences flowing from a directed verdict and from an order granting a motion for a new trial, the trial court, as well as this court, cannot, in determining whether a motion for a directed verdict should be granted, be guided by the rules applicable in determining a motion for new trial. McCarthy v. Pacific Elec. Ry. Co., 82 Cal.App. 503, 255 P. 868.

[12] In the light of the decisions and the facts related, the question of the negligence of the defendants and the contributory negligence of the plaintiff should have been submitted to the jury under proper instructions.

The judgment is reversed and the cause remanded for a new trial.

We concur: BARNARD, P. J.; MARKS, J.

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42 Cal.App.2d 322

BURNS v. DOWNS et al.

Civ. 11541.

District Court of Appeal, First District, Division 2, California.

Jan. 7, 1941.

Hearing Denied March 7, 1941.

1. Judgment 🔑101(1)

Where neither title nor body of complaint named association as defendant and an individual was named as defendant and served with summons, plaintiff was not entitled to default judgment against such individual and another, doing business under name of association, on ground that he sued association and also members thereof named in title of complaint. Code Civ.Proc. § 388.

2. Judgment 🔑148

Where association, under name of which complaint alleged that individual defendants were doing business, was not named as defendant in complaint, summons, or default judgment against such individuals doing business under such name, judgment was properly set aside on motion of one of such individuals after dismissal of action against him as against plaintiff's contentions that trial court had no jurisdiction to set aside judgment, that motion was not made by proper parties, and that demurrer of one party cannot inure to another party's benefit, since association was not party to action.

3. Judgment 🔑97

Where complaint alleged that individual defendants were doing business under name of association, plaintiff was not entitled to default judgment against such individuals doing business as association named on ground that he alleged existence of association of two or more persons transacting business under common name, as he did not expressly do so and such allegation was not substance or effect of complaint.

4. Associations 🔑20(2, 4)

A plaintiff, not charging association as defendant in complaint alleging that individual defendants were doing business under name of such association, could not make it a defendant by having process server deliver copy of summons and complaint to one of such individuals and state to him that such papers were for association.

5. Judgment ⚷101(1)

Allegations of complaint that individual defendants were doing business under association's name, registered with county clerk as required by law, did not support default judgment against such individuals doing business as association named, but only judgment against individual defendant, who moved to set it aside.

6. Judgment ⚷144

A default judgment against individual defendants doing business as association, not named in caption of summons and complaint, nor charged in complaint, as defendant, was properly set aside as against contention that lack of partnership or common name in such caption could not nullify judgment, as attack on judgment was based on entire absence of material allegations in body of complaint, nor merely words in caption.

◆

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson and Robert W. Kenny, Judges.

Action by Robert C. Burns against Bertram W. Downs, B. W. Downs and Paul L. Van Brunt, doing business as Westcraft Laboratories, and others. From an order setting aside a default judgment against defendants Downs and Van Brunt, doing business as Westcraft Laboratories, plaintiff appeals.

Affirmed.

Charles J. Wendland, of Pasadena, for appellant.

Catlin & Catlin, of Los Angeles, for respondent.

STURTEVANT, Justice.

From an order setting aside a default of the defendant the plaintiff has appealed. He makes one point which is that he sued an association and also the members thereof and that his judgment was regular and it was error to set it aside. The defendant controverts the point. The record is, in brief, as follows:

The title of the complaint was: "Robert C. Burns, Plaintiff, vs. Bertram W. Downs, also known as B. W. Downs; B. W. Downs and Paul L. Van Brunt, doing business as Westcraft Laboratories; B. W. Downs doing business as Western Aircraft Manufacturing Company, and John G. Canfield, John Doe, Jane Doe, One Doe, Black & White, a co-partnership, Blue Company, a corporation, Defendants." Paragraphs I and II thereof were as follows:

"That B. W. Downs and Paul Van Brunt are doing business under the fictitious name and style of Westcraft Laboratories, and that such fictitious name has been registered with the county clerk of Los Angeles county as required by law; that B. W. Downs is doing business under the fictitious name of Western Aircraft Manufacturing Company, that such fictitious name has been registered with the county clerk of Los Angeles county as required by law.

"That the defendants, John Doe, Jane Doe, One Doe, as individuals and Black and White, a co-partnership, doing business under the fictitious firm name and style of Black Company, and Blue Company, a corporation, are sued herein under the fictitious names because their true names are unknown to the plaintiff and that when the true names are ascertained plaintiff asks leave of court to substitute such true names for the fictitious names."

With the complaint he served a summons which designated the defendants in the same words as recited in the title of his complaint. The complaint and summons were served in Los Angeles on April 22, 1938, on "Bertram W. Downs, doing business as Westcraft Laboratories." On the same date the plaintiff delivered to "Bertram W. Downs, also known as B. W. Downs" a copy of the complaint and summons. On May 3, 1938, Bertram W. Downs filed a demurrer. On May 25, 1938, the plaintiff filed a request that the default of "B. W. Downs doing business as Westcraft Laboratories" be entered. On June 2, 1938, the trial judge caused to be entered a default judgment against "B. W. Downs and Paul L. Van Brunt doing business as Westcraft Laboratories." On June 5, 1938, B. W. Downs served notice that on June 8, 1938, he would move to set aside the default judgment entered June 2, 1938. In his notice he recited that his motion would be based "* * * upon this notice and the records, papers, and files in this case, including the affidavits of Frank D. Catlin filed herewith." Said affidavits recite the facts we have above set forth. The plaintiff filed the affidavit of Frank Freytag which does not controvert any one of the facts above set forth. He also filed the affidavit of Fred C. Glawe which does not controvert any one of said facts. He also filed the affidavit of Charles J. Wendland, his attorney, which does not controvert any one of said facts. However, it recites, "That at no time was an appearance ever made in the action by Westcraft Laboratories, defendant herein. On June 8, 1938, the plaintiff dismissed the action as to B. W. Downs. On June 9, 1938, the trial court granted the motion of Bertram W. Downs to set aside the default judgment. It is from that order that this appeal was taken.

[1] The plaintiff contends he followed the provisions of section 388 of the Code of Civil Procedure and that he had sued an association, Westcraft Laboratories, and that he also had sued Bertram W. Downs and the other individuals named in the title to his complaint. That contention may not be sustained. Neither in the title nor in the body of the complaint was Westcraft Laboratories named as a defendant. B. W. Downs was named as a defendant and was served with summons.

[2] But, relying on the fact that he had dismissed the action as to B. W. Downs, the plaintiff contends (1) the trial court had no jurisdiction to set aside the judgment; (2) the motion was not made by the proper parties; and (3) that the demurrer of one party cannot inure to the benefit of another party. The vice in each of those contentions is the assumption that an association, Westcraft Laboratories, was a party to the action. The defendant B. W. Downs claims it was not. It was not named as a defendant in the complaint, nor in the summons, nor in the judgment which was set aside. Fairly construed the judgment roll purported to set forth a judgment against B. W. Downs and Paul L. Van Brunt, but not against Westcraft Laboratories. Nicholls v. Anders, 13 Cal.App.2d 440, 443, 56 P.2d 1289.

[3] The plaintiff asserts that he alleged the existence of an association of two or more persons transacting business under a common name. He did not expressly do so nor was such the substance or effect of his complaint. Davidson v. Knox, 67 Cal. 143, 7 P. 413; Billings v. Finn, 55 Cal.App. 134, 136, 202 P. 938.

[4] Still claiming that in his complaint he sued Westcraft Laboratories, plaintiff asserts he served his summons on it. But, as we have shown above, the allegations of his complaint did not charge Westcraft Laboratories as a defendant and plaintiff could not make Westcraft Laboratories a defendant by having his process server deliver a copy of the summons and complaint to B. W. Downs and stating to him that such papers were for the Westcraft Laboratories.

[5] Again the plaintiff contends the allegations of the complaint support the judgment. That is true, but a judgment against B. W. Downs, the party who moved to have it set aside.

[6] Finally it is said that lack of a partnership or common name in the caption of the summons and complaint cannot nullify the judgment. No such question is involved. The question before us presents an attack on the entire absence of material allegations in the body of the plaintiff's complaint, not merely words in the caption.

We find no error in the record. The order appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

EASTON v. ASH et al. *

Civ. 2492.

District Court of Appeal, Fourth District, California.

Jan. 7, 1941.

Rehearing Denied Feb. 6, 1941.

Hearing Granted March 7, 1941.

1. **Witnesses** 🔑316

The fact that a witness' testimony was considerably shaken on cross-examination affected only the weight to be given to her evidence and her credibility.

2. **Appeal and error** 🔑994(3), 1012(1)

The trial judge must pass on the weight of the evidence and the credibility of the witnesses.

3. **Appeal and error** 🔑1011(1)

Whether mortgage extension agreement was signed on date which agreement bore or several years later was for trial judge under conflicting evidence.

4. **Appeal and error** 🔑1008(3)

Where there are uncertainties in an instrument so that it will support two reasonable interpretations, it is the province of the

* Subsequent opinion 116 P.2d 433.

trial judge to construe it, and if the construction put on it by the trial judge is not unreasonable, even though there is another equally reasonable, the trial judge's decision on that question cannot be disturbed on appeal.

5. Contracts 🔑164

Where two or more writings are executed by the same parties at the same time and refer to the same subject, they form part of one agreement and should be construed together.

6. Mortgages 🔑105, 319(3)

A mortgage extension agreement, an installment note, and an unrecorded mortgage all signed at the same time by the same parties and an unrecorded release relating to the same transaction of refinancing the debt were required to be construed together as writings forming part of the same transaction, and as so construed evidence supported finding that they were signed to carry out parties' expressed intent to extend time for payment of debt by new note and unrecorded mortgage and not by extension of time of payment of original 1924 note and mortgage and preservation of the lien of that mortgage.

7. Appeal and error 🔑882(3)
Mortgages 🔑408

In action to foreclose mortgage of 1924, plaintiff's statements that he was not relying on new unrecorded mortgage dated December 10, 1930, showed the "waiver" of any right to recover anything under new note or unrecorded mortgage, and where trial court acted on that waiver, plaintiff could not withdraw or abandon it for the first time on appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

8. Limitation of actions 🔑151(1)

In action to foreclose mortgage of 1924, plaintiff's waiver of any rights under note and unrecorded mortgage of December 10, 1930, was a "waiver" of rights of the entire contract entered into on that date, including an extension agreement evidencing another part of the same indivisible contract, and plaintiff's right of recovery from mortgagors was barred by the statute of limitations.

9. Limitation of actions 🔑172

The liability of the guarantor of payment of interest on 1924 mortgage note was equal to but did not exceed the liability of the principals, and the plea of the statute of limitations was available to guarantor and was properly sustained as to guarantor where the bar of the statute had arisen in favor of her principals.

10. Mortgages 🔑205

Where plaintiff and his predecessors in interest had lost the right of recovery on a note and mortgage long before any trees growing on mortgaged property had been cut, plaintiff was not damaged by reason of any waste committed by any of the defendants and was not entitled to recover damages therefor.

11. Appeal and error 🔑347(1)

Where motions for nonsuits as to certain defendants were made on July 22, 1938, and were granted by an order entered on the minutes on the same day, plaintiff gave notice to those defendants and their attorneys on September 21 of his intention to move for a new trial, and no formal ruling was made on that motion, notice of appeal filed on December 28 was filed too late as to those defendants, since order granting nonsuits became the "final judgment" regardless of the fact that a more formal judgment was subsequently entered. Code Civ.Proc. §§ 581, 939.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment".

Appeal from Superior Court, Riverside County; R. A. Moore, Judge.

Action by Charles M. Easton against Kenneth K. Ash and others, to foreclose a mortgage and for damages for cutting trees on the mortgaged property. Judgments of nonsuit were rendered in favor of some defendants, and judgment on the merits in favor of other defendants, and from those judgments, plaintiff appeals.

Affirmed.

Ray Howard and Chas. M. Easton, in pro. per., both of Los Angeles, for appellant.

Meserve, Mumper, Hughes & Robertson and Leo E. Anderson, all of Los Angeles, and James A. Hall, of Hemet, for respondents.

MARKS, Justice.

Plaintiff brought this action to foreclose a mortgage, and for damages for cutting trees on the mortgaged property. Judgments of nonsuit were rendered in favor of George F. Scott, Warren L. Holbrook and Margaret Cross, and judgment on the merits went in favor of Kenneth K. Ash and Ada Gertrude Ash. Plaintiff has attempted to appeal from these judgments.

The complaint was filed on May 22, 1937. In a first cause of action plaintiff sought to foreclose a mortgage dated June 23, 1924, given by the defendants Ash to Henry Hileman, since deceased, to secure a note of even date for one thousand dollars, due six months thereafter. A copy of the mortgage containing a copy of the note is attached to the complaint. This is the only mortgage sought to be foreclosed.

It is alleged that at some time before the death of Henry Hileman on June 22, 1930, Margaret Cross executed a writing whereby she agreed to pay "all interest due and that may become due in the future" on the note. It is also alleged that interest on the note was paid in full up to June 29, 1930, but that none was paid thereafter.

It is further alleged that on December 10, 1930, defendants Ash executed an instrument in writing with Rena Hileman, legatee of Henry Hileman and subsequent distributee of this portion of his estate, to extend and renew the note and mortgage for a period of forty months from and after February 1, 1931. A copy of a written agreement which plaintiff claims had that effect is attached to the complaint as is a promissory note dated December 10, 1930, for $1,000, payable to Rena Hileman or order in instalments of $25 per month commencing on February 1, 1931. This note bears the heading "Instalment Note Secured by Mortgage".

A second cause of action alleges damages for waste caused by certain defendants cutting eucalyptus trees growing on the mortgaged premises shortly after May 25, 1935.

Defendants interposed numerous defenses to the action among which are various pleas of the statute of limitations, as well as lack of consideration for the extension agreement.

Plaintiff testified, and defendants denied, that the extension agreement was actually executed in August, 1934, and not on December 10, 1930, the date it bears. At all times material, Margaret Cross was acting for the defendants Ash under a general power of attorney. She testified that the extension agreement, the instalment note and the unrecorded mortgage securing it were all signed at the same time. It is undisputed that on or about December 10 or 11, 1930, defendants Ash, acting through Miss Cross, signed the instalment note and unrecorded mortgage; that the acknowledgment on the mortgage is dated December 11, 1930; that this mortgage, together with a release of the mortgage of June 28, 1924, were delivered to a title company in Riverside with instructions to record the documents when title could be certified showing the mortgage dated December 10, 1930, a first lien on the property; that this mortgage and the release were never recorded because of the condition of the title of the property.

The mortgage and note of June 28, 1924, and the extension agreement and promissory note dated December 10, 1930, were distributed to Rena Hileman by a decree of distribution of the superior court of Los Angeles county dated April 7, 1936.

Under date of April 9, 1936, Rena Hileman assigned to plaintiff the promissory note and mortgage dated June 10, 1924, the extension agreement dated December 10, 1930, and the instalment note bearing the same date.

The trial court found that the extension agreement, the instalment note and the unrecorded mortgage were all signed on December 10, 1930, the date they bear, and that the extension "agreement was intended and it was the agreement of the parties thereto that it did not and would not change the provisions of said note and mortgage of 1930"; that "plaintiff, in open court during the trial of this action, expressly waived any right to recover under or by virtue of said promissory note or the mortgage on said real property securing the same" referring to the mortgage and note of 1930. It was also found that the extension agreement was not supported by any consideration and that plaintiff's causes of action were barred by the statute of limitations.

From this statement of facts it is at once apparent that the first important question for our consideration is the meaning and effect of the extension agreement. If it was part and parcel of the attempted execution of the new note and mortgage of 1930 and was not a valid extension of the note and mortgage of 1924 which is sought to be here foreclosed, then the statute of limitations barred plaintiff's cause of action to foreclose the mortgage of 1924 long before this action was filed in 1937.

[1-3] Much of plaintiff's argument is based on the assumption that the extension agreement was signed in 1934 and not on the date it bears. It is true that plaintiff testified in considerable detail that the document was signed in 1934. Miss Cross testified that it was signed at the same time as the instalment note and the unrecorded mortgage, that is, about December 10, 1930, the dates the three instruments bear. It is true that this testimony of Miss Cross was considerably shaken on cross-examination. This only affected the weight to be given to her evidence and her credibility. The trial judge, to whom is given the duty of passing on the weight of the evidence and the credibility of the witnesses, accepted her evidence as true and found in accordance with it. As there is a conflict in the evidence on this question we cannot disturb that finding here.

[4] In approaching the question of the construction to be placed on the extension agreement it should be borne in mind that where there are uncertainties in an instrument so that it will support two reasonable interpretations, it is the province of the trial judge to construe it; that if the construction put upon it by the trial judge is not unreasonable, even though there is another equally reasonable, the decision of the trial judge on that question cannot be disturbed on appeal. Adams v. Petroleum Midway Co., Ltd., 205 Cal. 221, 270 P. 668.

To us the agreement seems uncertain. There are several "Whereas" clauses in the opening paragraph of the contract which refer to the mortgage of 1924 and from which an intention to extend that instrument can be inferred. However, in the body of the contract it is recited that Rena Hileman extends the mortgage and note for a period of forty months from and after February 1, 1930, which is the exact term of the instalment note which was signed at the same time and place and which was to be secured by the unrecorded mortgage, also signed at the same time.

[5] It is accepted as a general rule that when two or more writings are executed by the same parties at the same time and refer to the same subject they form part of one agreement and should be construed together. Symonds v. Sherman, 219 Cal. 249, 26 P.2d 293; People v. Ganahl Lumber Co., 10 Cal.2d 501, 75 P.2d 1067; Hawes v. Lux, 111 Cal.App. 21, 294 P. 1080; C. I. T. Corp. v. Hawley, 34 Cal.App.2d 66, 93 P. 2d 216.

[6] When we apply this rule to the facts before us as found by the trial court, we must construe the three instruments and the unrecorded release of the 1924 mortgage together as writings forming part of the same transaction. With the exception of the release they were signed at the same time, by the same parties, and the four of them dealt with the same transaction, namely, the refinancing of the debt. This conclusion is strongly supported by the testimony of plaintiff. While he denied that the extension agreement was executed at the same time as the other three documents, he testified that it was the intention of the parties in 1930 to extend the time for payment of the debt by satisfying the 1924 mortgage and releasing the property from its lien by executing the new note and mortgage and the satisfaction of mortgage, and recording the latter two documents. When we couple with this evidence the testimony of Miss Cross that the extension agreement was signed at the same time (accepted as true by the trial court) we must conclude that the four instruments pertained to the same transaction and were signed to carry out the expressed intent of the parties to extend the time for the payment of the debt by the new note and unrecorded mortgage and not by the extension of the time of payment of the 1924 note and mortgage and the preservation of the lien of that mortgage. This evidently was the theory of the trial judge in deciding the case and as there is evidence to support that theory we must accept it on appeal.

Plaintiff complains of the finding to the effect that he waived his rights to any recovery under the note and unrecorded mortgage dated December 10, 1930. He argues that this finding is contrary to the evidence. An examination of the record demonstrates the lack of any factual foundation for this argument. It is also true that the action was brought to foreclose the mortgage of 1924 and not the one dated December 10, 1930.

[7, 8] Mr. Easton, an attorney at law, represented himself during the trial. Among other statements made by him we find the following: "The Court: Well, if the plaintiff is relying solely upon the mortgage dated December 10th, 1930—

"Mr. Easton: We are not relying on that your Honor. * * *

"The Court: Now, then if you are relying upon the new mortgage which you must rely on, an unrecorded mortgage, then does not the release of the old mortgage which is likewise not recorded, an important element in the transaction?

"Mr. Easton: No, for this reason, your Honor, the execution of the new mortgage, well, we will call it a new mortgage, the one in possession of Mr. Holt, is nothing more than evidence of the fact of the execution of the mortgage and the attempted or contemplated, we will say, substitution of that mortgage at the time in lieu of the one that existed in 1924. * * * We are not relying on that new mortgage as a part of the foreclosure, excepting a chain and circumstances showing execution and subsequent execution of renewal and extension agreement whereby there was a change to the renewal of that which was of record, whatever release there was in there, does not amount to anything, or it has no legal effect or significance, except to show what was contemplated to be done but which never was done—I think I can clarify that. * * *

"The Court: Well, let's see, you have introduced that note for $1000.00 dated December 10th, 1930.

"Mr. Easton: As evidence only, your Honor—

"The Court: Now then, is it fair, is it fair to let the plaintiff take the benefit of the new unrecorded mortgage?

"Mr. Easton: I am not taking any benefit—

"The Court: And still, or hold her accountable for the—executing the release.

"Mr. Easton: We are not relying on the execution of the mortgage in question, in possession of the title company, as having any binding force and effect as will be shown by the papers placed in evidence, we are not seeking to foreclose on that."

These statements clearly show the waiver of any right to recover anything under the note or unrecorded mortgage of December 10, 1930. The trial court acted on that waiver and plaintiff cannot withdraw or abandon it here for the first time. As these instruments formed only part of those evidencing the agreement of the parties, and as the extension agreement was only a document evidencing another part of the same indivisible agreement, the waiver of any rights under the note and mortgage must be held to be a waiver of rights under the entire contract, including the extension agreement. Mitchell v. Samuels, 39 Cal. App. 134, 178 P. 336.

It follows that plaintiff's right of recovery from the defendants Ash was barred by the statute of limitations and the judgment in their favor must be affirmed.

[9] The sole liability of Miss Cross arose under her guarantee of the payment of interest on the 1924 note. This guaranty was executed prior to the death of Mr. Hileman on June 22, 1930. Her liability was that of a guarantor which is equal to but does not exceed the liability of the principals. The plea of the statute of limitations was available to her and the bar of the statute having arisen in favor of her principals it was properly sustained as to her. Anderson v. Shaffer, 98 Cal.App. 457, 277 P. 185; County of Sonoma v. Hall, 132 Cal. 589, 62 P. 257, 312, 65 P. 12, 459.

[10] As plaintiff and his predecessors in interest had lost the right of recovery on the note and mortgage long before any trees growing on the mortgaged property had been cut, plaintiff was not damaged by reason of any waste committed by any defendant.

[11] Defendants Cross, Scott and Holbrook urge that the appeal is ineffective as to them because the notice of appeal was filed after the time prescribed by statute. This contention is probably correct.

Their motions for nonsuits were made and granted on July 22, 1938. On that same day the order of the trial court granting the nonsuits was entered on the minutes of the court. This became the final judgment of the court as to those three defendants regardless of the fact that a more formal judgment was subsequently entered. § 581, Code Civ.Proc.; Southern Pacific R. Co. v. Willett, 216 Cal. 387, 14 P.2d 526; Tromanhauser v. Grisemer, 123 Cal.App. 153, 11 P.2d 32.

On September 21, 1938, plaintiff gave notice to defendants Scott, Holbrook and Cross and their attorneys of his intention to move for a new trial. No formal ruling was made on this motion. The notice of appeal was filed on December 28, 1938. It is clear that the notice of appeal from the judgment of nonsuit was filed too late. § 939, Code Civ.Proc.

The judgments are affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

42 Cal.App.2d 364

MILOVICH v. CITY OF LOS ANGELES et al.

Civ. 12135.

District Court of Appeal, Second District, Division 1, California.

Jan. 9, 1941.

Rehearing Denied Feb. 3, 1941.

Hearing Denied March 7, 1941.

1. Appeal and error 🔑110

An order denying motion for new trial of action to recover damages for an alleged breach of a construction contract awarded to plaintiff by the Board of Water and Power Commissioners of the City of Los Angeles was not appealable.

2. Municipal corporations 🔑374(2)

The terms "board" and "department", within the names applied to the "department" of water and power of the City of Los Angeles and the "board" of water and power commissioners, are synonymous for purpose of filing a claim against the city for breach of contract.

See Words and Phrases, Permanent Edition, for all other definitions of "Board" and "Department".

3. Municipal corporations 🔑1021

The purpose of provision in charter of the City of Los Angeles, requiring that claims against city be presented to and approved in writing by the board, officer or employee authorized by the charter to incur the expenditure before suit is brought thereon, is to enable public officials to make proper investigation concerning the merits of the claim and to settle the claim without lawsuit if in their opinion settlement is proper.

4. Municipal corporations 🔑1021

A substantial compliance with requirement in charter of the City of Los Angeles that every claim against the city be first presented to and approved in writing by the board, officer or employee authorized by the charter to incur the expenditure or liability before suit is brought thereon is sufficient, in absence of an intention to mislead.

5. Municipal corporations 🔑374(2)

Where contract awarded by the department of water and power of the City of Los Angeles for construction of water supply project required that any claim by contractor for damages be filed with the chief engineer and general manager of the bureau of water works and supply, a claim presented to the chief engineer and rejected by him on stationery bearing letterhead of the department substantially complied with charter requirement that claim against city for damages be presented to board or officer authorized to incur the liability, and was sufficient in absence of evidence of intention or desire to mislead or evidence that city or board were in fact misled.

6. Pleading 🔑34(7)

In action for breach of contract which had been awarded to contractor by the department of water and power of the City of Los Angeles, where city and department did not file either a general or special demurrer, and did not set up as an affirmative defense the alleged failure of contractor to comply with provision in contract requiring that claim for damages be made within ten days after the damages had been sustained, the pleading of contractor would be construed liberally by the District Court of Appeal and every reasonable intendment would be indulged in its favor.

7. Municipal corporations 🔑374(2)

Where contract with city for construction of water supply project provided for forfeiture of damages in event of contractor's noncompliance with requirements as to filing of claims therefor, the provision regarding claims for damages would be strictly construed against city and department for whose benefit the clause was inserted. Civ.Code, § 1442.

8. Contracts 🔑318

Forfeitures are not looked upon with favor by either law or equity and will not be enforced unless the right thereto is clear and certain, nor will a contract be construed so as to effect or provide for a forfeiture unless no other interpretation is reasonably possible. Civ.Code, § 1442.

9. Municipal corporations 🔑374(2)

Where department of water and power was required by contract for construction of water supply project to deliver steel pipe by April 1, but delivery was not made until May 24, and objection that claim for damages was not filed within ten days after breach on April 1 was not made until after trial had commenced when objection was made to introduction of evidence, although claim was filed within ten days after the delivery on May 24, contract would be interpreted so as to avoid a forfeiture of damages under forfeiture clause, if it could reasonably be so interpreted. Civ.Code, § 1442.

10. Municipal corporations 🔑374(2)

Where contract with city for construction of water supply project required that contractor within ten days after sustaining damage make a written statement to chief engineer regarding nature of the damage and that on or before last day of month succeeding that in which damage was sustained, he file with engineer an itemized statement of the details and amount of such damages, and contract then provided that unless such statement should be filed, claim for compensation should be forfeited, the penalty of forfeiture applied only to a failure to file itemized statement on or before last day of month succeeding that in which damage was sustained.

11. Time 🔑10(10)

Where contract with city for construction of water supply project required contractor on penalty of forfeiture to file statement regarding damages on or before last day of month succeeding that in which damage was sustained, but in that year Decoration Day fell on Sunday, and Monday, May 31, was observed as a holiday, filing on June 1 of statement for April damages was timely. Civ.Code, § 7; Pol.Code, §§ 10, 11.

12. Municipal corporations 🔑374(1)

Where contract for construction of water supply project permitted city to make deductions for defaults of contractor and provided that justifiable delay would authorize extension of time for completion, but expressly provided that such provision did not exclude recovery of damages for delay by either party, extension of time for completion of contract was not sole remedy of contractor for delay caused by city's failure to furnish pipe, during which contractor was required to keep his machinery on the ground, but contractor was entitled to recover damage sustained by him in absence of plain, unequivocal intention expressed in the contract to restrict contractor's remedy to that of obtaining an extension of time.

13. Municipal corporations 🔑374(4)

The alleged fact that city's delay in furnishing pipe under contract for construction of water supply project permitted contractor to complete project without renting an additional crane would not warrant deducting from contractor's damages for delay the alleged rental value of a crane for a period of 60 days, in absence of evidence as to reasonable rental value of a crane, or basis in record for asserting that such crane if used would have been in service for 60 days.

DORAN, J., dissenting.

Appeal from Superior Court, Los Angeles County; Walter Desmond, Judge.

Action by S. M. Milovich against the City of Los Angeles, and another to recover damages for an alleged breach of a construction contract awarded to plaintiff by the Board of Water and Power Commissioners of the City of Los Angeles. Judgment for plaintiff and defendants appeal.

Affirmed.

Hearing denied; SHENK and TRAYNOR, JJ., dissenting.

Ray L. Chesebro, City Atty., S. B. Robinson, Chief Asst. City Atty. for Water and Power, Francis H. Lindley, Asst. City Atty., and Alfred H. Driscoll, Deputy City Atty., all of Los Angeles, for appellants.

Charles R. Holton, of San Francisco, Paul G. McIver, of Montebello, and Burke, Hickson, Burke & Marshall, of Los Angeles, for respondent.

WHITE, Justice.

[1] This is an appeal from a final judgment in favor of plaintiff and against the City of Los Angeles and the Department of Water and Power of said city, rendered after trial by the court without a jury in an action for damages for an alleged breach on the part of said department of a construction contract awarded to plaintiff by the Board of Water and Power Commissioners of the City of Los Angeles. Appellants also attempt to appeal from the order denying a motion for a new trial. There is no appeal from such an order in a civil action of this nature.

[2] At the trial the parties stipulated to the following facts: That the contract in question was awarded respondent on February 25, 1937, and called for the construction of a project known as Sunland and Tujunga Water Supply Project; that by the terms thereof appellant department agreed to furnish respondent with certain materials necessary to said construction; that under the terms of the contract con-

struction work was to be started within ten calendar days after mailing of written notice by appellant department to respondent to commence work and was to be completed within forty-five days from the date of mailing of such notice; that the department failed to deliver or furnish to respondent certain of the necessary materials until May 24, 1937; that the contract provided that respondent was not to sell, assign, hypothecate or remove equipment or materials necessary for the completion of the contract without the consent of the department; that a notice of respondent's claim for damages here sought was filed with the chief engineer and general manager of the bureau of water works and supply of respondent department on June 1, 1937, and that thereafter and on June 5, 1937, respondent received a letter from said chief engineer and general manager, as follows: "Your 'Notice of Claim for Damage' dated May 28, 1937, and accompanied by 'Itemized Statement of Damage', was received by this Department on June 1, 1937. As we do not recognize that there is any basis for said claim or for the accompanying statement, we are compelled to reject the same, and each item thereof." The letter was signed by H. A. Van Norman, chief engineer and general manager. The damages claimed by respondent were alleged to have been caused by appellant department's delay in delivering and furnishing the said materials.

The record reveals that the contract in question contained the following clause:

"30. Claims for Damages:

"It is agreed that if the Contractor shall claim compensation for any alleged damage by reason of the acts or omissions of the Board or its agents he shall, within ten (10) days after the sustaining of such damage, make a written statement to the Chief Engineer and General Manager of the nature of the alleged damage. On or before the last day of the month succeeding that in which any such damage is claimed to have been sustained, the Contractor shall file with the Chief Engineer and General Manager an itemized statement of the details and amount of such damage, and upon request of the Chief Engineer and General Manager shall give him access to all books of account, receipts, vouchers, bills of lading and any other books or papers containing any evidence of the amount of such damages. Unless such statement shall be filed as thus required, his claim for compensation shall be forfeited and invalidated, and he shall not be entitled to payment on account of any such damage."

Appellants first contend that respondent's cause of action for damages must fail for the reason that respondent did not present his claim for alleged damages to the board of water and power commissioners, in accordance with sections 363 and 376 of the charter of the City of Los Angeles.

Section 363 of the charter reads as follows: "Every claim and demand against the city, except as provided in the preceding section, shall be first presented to and approved in writing by the board, officer or employee authorized by this charter to incur the expenditure or liability represented thereby. In all cases the date of such approval shall be given." Concededly, the claim of respondent does not come within the exception noted. Section 376, above referred to, provides that no suit shall be brought on any claim for money or damages against the City of Los Angeles, or any officer or board of the city, until a demand for the same has been presented, as provided, and rejected in whole or in part, and that all claims for damages against the city must be presented within six months after the occurrence from which the damages arose.

Respondent contends that the filing of his claim with the chief engineer, as above set forth, was a sufficient compliance with the charter provisions.

The point was raised at the trial when appellants objected to the introduction of any evidence in behalf of the plaintiff on the ground that the complaint failed to state a cause of action, in that it did not appear therefrom that a claim had been filed in accordance with section 376 of the charter, and that it further appeared from said complaint that a claim was not filed in accordance with said section. The objection was overruled. At the close of plaintiff's case defendants made a motion for a nonsuit, one of the grounds thereof being that plaintiff had failed to prove that a claim had been filed in accordance with said section of the charter. The motion was denied.

It was alleged in the complaint that the claim was served upon the Department of

Water and Power of the City of Los Angeles, and it appears from the above-mentioned stipulation and the evidence that said claim was in fact presented to H. A. Van Norman, who was at the time chief engineer and general manager of the bureau of water works and supply of the Department of Water and Power.

In determining whether such claim was filed with the Department of Water and Power or its board of water and power commissioners, let us first have recourse to the contract here under consideration, which commences with the following language: "This agreement, made and entered into this 25th day of February, 1937, by and between the Department of Water and Power of the City of Los Angeles, a municipal corporation, First Party, sometimes hereinafter called the Department, and S. M. Milovich, an individual, Second Party, sometimes hereinafter called the contractor." In this connection, it should be noted that in the foregoing preamble no reference whatever is made to the board of water and power commissioners as being one of the contracting parties, but the sole reference is to the "Department of Water and Power of the City of Los Angeles". Let us now turn to the phraseology embodied in the execution clause of the contract, where we find the following: "Department of Water and Power of the City of Los Angeles, by Board of Water and Power Commissioners of the City of Los Angeles, by John R. Haynes, President, and Jas. P. Vroman, Secretary. S. M. Milovich, by S. M. Milovich."

Thus we see that through the execution of the contract by the "Board" in the name of the "Department", the former recognized that the proper and legal name of the contracting party was the Department of Water and Power of the City of Los Angeles. That the terms "Board" and "Department" are synonymous for the purpose of filing a claim was recognized in Douglass v. City of Los Angeles, 5 Cal.2d 123, 134, 53 P.2d 353, 358, where in the following language the words "Board" and "Department" are used interchangeably:

"The *department* of water and power is conducted by the city in its proprietary capacity. This department has control of its own revenues and disbursements and in the ordinary course of its management would not be dependent on the city council for an appropriation to meet a demand for damages for the negligence of its officers or employees. The liability of the city for such negligence through the operations of such a department, was established long before the enactment of the statute of 1923. Davoust v. City of Alameda, 149 Cal. 69, 84 P. 760, 5 L.R.A., N.S., 536, 9 Ann.Cas. 847. And the necessity of presenting a claim to that *board* as a prerequisite to suit was properly declared in Continental Ins. Co. v. City of Los Angeles, 92 Cal.App. 585, 268 P. 920." (Italics added.)

As heretofore pointed out, the contract here in question provided that in the event any claim for damages be asserted, the contractor shall "within ten (10) days after the sustaining of such damage, make a written statement to the Chief Engineer and General Manager of the nature of the alleged damage", and "on or before the last day of the month succeeding that in which any such damage is claimed to have been sustained, the Contractor shall file with the Chief Engineer and General Manager an itemized statement of the details and amount of such damage". In that connection the court found:

"That it is true that on June 1, 1937, plaintiff filed with said defendant Department and the chief engineer and general manager thereof, a written, itemized statement of the details and amount of said damage and presented a claim and demand therefor in writing to said defendant Department and that a true and correct copy thereof is attached to the complaint herein and marked Plaintiff's Exhibit A and Plaintiff's Exhibit B.

"That it is true that on June 5, 1937, the defendant Department rejected said demand in whole and disallowed and refused to pay the same or any part thereof."

This finding was justified by evidence which included the terms of the contract hereinbefore narrated together with the admitted fact that a claim was filed with the chief engineer and general manager of the bureau of water works and supply of the Department of Water and Power, as well as the answer thereto, which is significant by reason of its contents. The reply letter reads as follows:

"H. A. Van Norman
Chief Engineer and
General Manager of
Water Works
207 S. Broadway
Los Angeles
Michigan 4211

"Department
"of
"Water and Power
"City of Los Angeles
"Bureau of Water Works
"and Supply
"June 4, 1937.

"RE: Claim for Damage
"PWA Docket No. Calif. 1929-80-R
"Sunland-Tujunga Water Supply Proj.

"Mr. S. M. Milovich
"208 Cochrum Building
"Montebello, California.
"Dear Sir:

"Your 'Notice of Claim for Damage' dated May 28, 1937 and accompanied by 'Itemized Statement of Damage,' was received *by this Department* on June 1, 1937. As *we* do not recognize that there is any basis for said claim or for the accompanying statement, we are compelled to reject the same, and each item thereof.

"Yours very truly,
"(Signed) H. A. Van Norman
"Chief Engineer and
General Manager."

By the foregoing writing the claimant was advised that his claim was rejected, not by the chief engineer and general manager, but by "we", which certainly meant by the "Department" of Water and Power, upon whose letterhead the notice of rejection was written. Viewed from any standpoint of fairness, equity and justice, the respondent herein complied substantially with the provisions of section 363 of the Los Angeles city charter. When we contemplate the terms of the contract which directed that the claim be transmitted by and through the chief engineer and general manager of the contracting "Department", coupled with compliance therewith by respondent, and the letter of rejection informing the claimant of adverse action upon his claim by such "Department", we are driven irresistibly to the inference and conclusion as declared in the findings of the trial court, that the board of water and power commissioners, who signed the contract for and in behalf of the Department of Water and Power, acted upon and rejected respondent's claim.

[3, 4] As pointed out in Sandstoe v. Atchison, T. & S. F. Ry. Co., 28 Cal.App. 2d 215, at page 223, 82 P.2d 216, at page 221, the purpose of filing a claim, as provided in the charter is to enable public officials to make proper investigation concerning the merits of the claim and if in their opinion settlement of such claim be proper, to proceed to such disposition without the expense of a lawsuit. In the same case we find the following expressive language: "In the absence of an intention to mislead, a substantial compliance with the charter requirement is sufficient. In Uttley v. City of Santa Ana, 136 Cal.App. 23, 28 P.2d 377, the court quoted with approval from Wagner v. City of Seattle, 84 Wash. 275, 146 P. 621, Ann.Cas.1916E, 720: 'When, therefore, there is no evident intention to mislead, but a bona fide attempt to comply with the law, the notice is sufficient in the absence of any evidence that it did in fact mislead'. * * * The court further stated: 'The general rule with respect to this sort of notice of claim is that a substantial compliance with the provisions of the statute is sufficient. 19 R.C.L. 1044.' * * *"

[5] By reason of the foregoing, we are thoroughly impressed that respondent herein did absolutely in effect present his claim to the proper board when he filed it with the administrative officer of such board designated in the contract and received notice of its rejection in the manner and form aforesaid. There was certainly no manifestation of any intention or desire to mislead, nor is there any evidence that appellants were in fact misled; and there was, therefore, a substantial compliance with the charter requirements.

As a further ground for reversal of the judgment herein, appellants urge that respondent failed to file the claim for damages provided for in paragraph 30 of the agreement until June 1, and is thereby precluded from recovering any damages accruing prior to a ten-day period immediately preceding June 1. The first intimation that appellants relied upon nonconformance by respondent with the said provisions of paragraph 30 in order to defeat the latter's cause of action came at the commencement of the trial, when objection was made to the introduction of any evidence pertaining to any damages occurring prior to May 20, on the ground that no claim as provided for in paragraph 30 of the agreement had been filed until June 1. Objection also was made to the introduction of the filed notice as constituting any evidence of a notice filed pertaining to items of damage which accrued prior to a ten-day period immediately preceding the filing of such claim. It is argued by appellants that since the evidence showed that a breach occurred April 1 when there was a failure by the department to deliver steel pipe, that thereafter and on each succeeding day, until May 24, successive breaches occurred, because delivery was not made by the department until the last-named date. Therefore, urge appellants, it was necessary for respondent to file a statement within ten days after each daily breach occurred and to file an itemized statement of the details and amount of such damages on or before the last day of the month succeeding that in which such damage is claimed to have been sustained. Paragraph 30 of the agreement provides that for noncompliance with the requirement to file a claim as aforesaid, such "claim for compensation shall be forfeited and invalidated, and he shall not be entitled to payment on account of any such damage".

[6-9] Appellants not having filed either a general or special demurrer, and not having set up as an affirmative defense the alleged failure of the respondent to comply with paragraph 30 of the agreement in connection with the filing of claims, we are compelled to construe respondent's pleading liberally and to indulge in every reasonable intendment in its favor. Gallagher v. California Pacific T. & T. Co., 13 Cal.App.2d 482, 484, 57 P.2d 195. Further, paragraph 30 of the agreement, providing as it does for a forfeiture of any damages for noncompliance, must be strictly construed against appellants, for whose benefit such clause was inserted in the contract. Civ.Code, § 1442; Taylor v. Hamilton, 194 Cal. 768, 230 P. 656; Skookum Oil Co. v. Thomas, 162 Cal. 539, 547, 123 P. 363. Neither law nor equity looks with favor upon forfeitures and neither will enforce them unless the right thereto is clear and certain. Unless no other interpretation is reasonably possible, a contract should not be construed so as to effect or provide for a forfeiture. Laffoon v. Collins, 212 Cal. 750, 300 P. 808; Hansen v. D'Artenay, 121 Cal.App. 746, 9 P.2d 889. Let us therefore examine the facts of this case in connection with the presentation of respondent's claim to ascertain therefrom whether thereunder a forfeiture was the unmistakable intention of the agreement. If we can reasonably interpret the agreement so as to avoid a forfeiture in view of respondent's conduct, it is our duty so to do. Quatman v. McCray, 128 Cal. 285, 60 P. 855.

[10, 11] Briefly, the pertinent language of section 30 of the contract provides that the contractor shall within ten days after sustaining damage make a written statement to the chief engineer and general manager of the nature of the alleged damage, and further, that on or before the last day of the month succeeding that in which any such damage is claimed to have been sustained, the contractor shall file with the chief engineer and general manager an itemized statement of the details and amount of such damages. Then follows this language: "Unless such statement shall be filed as thus required, his claim for compensation shall be forfeited and invalidated, and he shall not be entitled to payment on account of any such damage." The language decreeing a forfeiture is in the singular and does not say that unless both statements are filed a forfeiture will occur, but plainly limits the penalty to a failure to file the itemized statement on or before the last day of the month succeeding that in which any damage is claimed to have been sustained. The trial court found upon competent evidence that by reason of the failure of appellant department to deliver the steel pipe and the steel pipe bends, respondent was prevented from performing work upon that portion of the contract dealing therewith from April 1, 1937, to May 24, 1937, and it was further found that on June 1, 1937, respondent filed with the chief engineer and general manager a written itemized statement of the details and amount of said damage and presented a claim and demand therefor in writing to appellant department. In view of our holding that forfeiture and invalidation of the claim for damages is predicated upon paragraph 30 of the agreement only on the failure to file the itemized statement, we turn now to a determination of whether such itemized statement was filed on or before the last day of the month succeeding the month in which the damage is claimed to have been sustained. Needless to say, so far as the damages sustained during the month of May are concerned, it is clear that respondent complied with section 30, since he filed his itemized statement on June 1. With reference to the claim for damages sustained during the month of April, and in connection with which it was required that such itemized statement be filed on or before the last day of the succeeding month, viz., the month of May, if respondent was to avoid a forfeiture and invalidation of his claim for April damages, it is significant that the 30th day of May, 1937, was Decoration Day, a holiday within the meaning of our law. Civ.Code, § 7; Pol.Code, § 10. Further, the 30th day of May, 1937, fell upon a Sunday, and therefore the Monday following, or May 31, was a holiday. Civ.Code, § 7; Pol. Code, §§ 10 and 11. Since, under section 11 of the Civil Code, "whenever any act of a secular nature, other than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, it may be performed upon the next business day, with the same effect as if it had been performed upon the day appointed", it follows that the filing of the itemized statement here under consideration for damages accruing during the month of April, which was required to be filed upon May 31, 1937, could be filed upon the next business day, or June 1, with the same effect as if it had been filed May 31. Since the only condition by which respondent could have forfeited and invalidated his claim would be by his failure to file the itemized statement of the details of such damage on or before the last day of the month succeeding the occurrence of such damage, and since he did file such statement on June 1 and such filing was tantamount to a filing upon the last day of May, it follows that such filing was timely. As no forfeiture or invalidation of respondent's claim was worked by his failure to make a written statement of the nature of the alleged damage within ten days of such damage, the court was justified in concluding that respondent complied with the requirements of paragraph 30 of the agreement when he filed his itemized statement on June 1, 1937.

[12] We come now to a consideration of appellants' contention that extensions of time for completion of the contract is the sole remedy of respondent, and that by reason of the extensions of time granted by the department to the contractor within which to complete the contract, the latter is not entitled to recover damages for any delay in carrying out the contract when such delay was occasioned by the acts of negligence of the appellants. In this connection the trial court found "that it is not true that defendant department granted an extension of time to plaintiff to complete said contract, nor is it true that plaintiff accepted any such extension of time from defendants". We find ourselves in accord with appellants' contention that the foregoing finding is not supported by the evidence. The testimony not only conclusively shows that such extensions were granted, but that on June 28, 1937, respondent himself requested in writing a thirty-day extension. Respondent's claim that such extensions could only be granted and were granted by the Public Works Administration of the Federal Government is without merit. The fact that appellant department received from the Federal PWA certain portions of the cost of the project covered by the contract between the parties hereto in no way affects the relationship between respondent and appellant department. Whether appellant department received the approval of the federal agency in granting extensions was of no concern to respondent. He was entitled under the terms of his contract to the extensions from the department, and any detriment suffered by the latter in the way of refusal of the Federal PWA to furnish additional money if extensions were granted, could not affect respondent. His contract was with the appellant department, and as to him in his contractual relation with the other parties to the contract, the PWA was a total stranger.

Nevertheless, we are of the opinion that a reversal of the judgment is not required or warranted because of the failure of the evidence to support the challenged finding. This because whether extensions were requested or granted is not determinative of respondent's right to recover damages, if any were sustained by reason of appellant department's acts or neglect. If our view in this regard be sound, then a finding by the court that the extensions were requested and granted would not aid appellants. We are not impressed by the latter's argument that when delays occurred in said work through the acts and neglect of appellant department, respondent was restricted to the sole remedy of securing an extension of time within which to complete the project. Paragraph 8 of the contract here under consideration provides: "If the Second Party should neglect to prosecute the work properly or fail to perform any provisions of this contract, the First Party, after three days' written notice to the Second Party, may, without prejudice to any other remedy he may have, make good such deficiencies and may deduct the cost thereof from the payment then or thereafter due the Second Party." Thus we see that should the contractor "fail to perform any provisions of this contract", which, we take it, includes a failure to complete the work within the specified time, the department was authorized to take over the contract and deduct the cost of making "good such deficiencies" from the contract price. It seems to us that it was in connection with such prerogatives given to appellant department that paragraph 11 was inserted in the agreement, reading as follows:

> "The time during which said Second Party is delayed in said work by the acts or neglect of said First Party, or its employees or those under it by contract or otherwise, or by changes ordered in the work, or by strikes, lockouts, fire, unusual delay in transportation, unavoidable casualties or any causes beyond the Second Party's control, or by delay authorized by the First Party, or by any cause which the Chief Engineer and General Manager shall decide to justify the delay, then the time of completion shall be extended for such reasonable time as the Chief Engineer and General Manager may decide.
>
> "This article does not exclude the recovery of damages for delay by either party under other provisions in the contract documents."

It would outrage every semblance of justice, fairness and equity to assume that under the foregoing paragraph 11 respondent should be foreclosed from recovering damage sustained by him when through the failure of appellant department to furnish pipe from April 1 to May 24 respondent was compelled to keep his machinery on the ground in idleness. The court found upon competent and substantial evidence that during the last-named period respondent had his machinery on the ground; that such machinery was necessary to perform the contract; that appellant department knew at all times that such machinery was upon the ground and was necessary to be used in laying pipe which appellant department neglected to deliver. It was further found by the court that it was not practicable for respondent to remove any of this equipment from said project during the period from April 1 to May 24, because it was required of respondent contractor that he have such machinery ready and available on the ground in order to be prepared to commence the performance of that portion of his contract which was delayed by reason of appellant department's neglect to provide pipe in accordance with its agreement. To uphold appellants' contention in this regard would be to give to the language of the contract a construction at variance with equitable principles and to clothe the appellant department with an unconscionable advantage over the contractor, by permitting the former to make amends for its contractual derelictions, delays and neglect by simply extending the time within which the contract could be completed regardless of the financial loss accruing to the contractor. This we cannot do in the absence of a plain, unequivocal intention on the part of the contracting parties, as evidenced by the language of the contract, to restrict the remedy of the contractor to that of obtaining an extension of time. We have given careful consideration to the case of Hansen v. Covell, 218 Cal. 622, 24 P.2d 772, 89 A.L.R. 670, and other cases cited by appellants, but in none of these cases was the contractor required to maintain machinery and apparatus in idleness upon the ground awaiting performance of the agreement by the other party to the contract, such as was required by the department in the instant case.

[13] Finally, appellants urge that they were entitled to have the sum of $1,200 deducted from the damages, by reason of a benefit in that amount allegedly received by respondent because of appellant department's delay and neglect in the matter of delivery of pipe. In this connection appellants assert that under the contract all work was to be completed within 45 days, and that if the steel pipe had been delivered by appellant department on April 1 as provided in the agreement, the contractor would have had to lay the steel pipe and construct the infiltration gallery at the same time, whereas, due to appellant department's delay in furnishing the steel pipe, the contractor was able to complete the construction of

the infiltration gallery before he began the laying of the steel pipe about June 1. From the foregoing appellants reason that the evidence establishes the fact that if the two parts of the work were to be completed concurrently, the respondent would have to rent another crane, which would have cost $20 per day, or a total of $1,200 for a period of sixty days. Not having to rent such other crane because of appellant department's delay, it is claimed that the saving of the $1,200 rental should enure to the benefit of appellants. In this contention appellants cannot be sustained, for the reason that the record is barren of any evidence to show that $20 per day or any other sum would be the reasonable value of a crane which respondent would have had to rent if the gallery infiltration and pipe laying actually had been done contemporaneously. True, there is contained in the record a stipulation as to the reasonable rental value of a crane, but that was the crane used by the contractor, and no reference is made to any other crane which he might have been required, under different circumstances, to utilize. Neither does the record contain a basis upon which to compute, as appellants do, that such crane, if used, would be in service for sixty days. This contention should have been urged and established by proof in the trial court and not left to the caprice and vagaries of speculation in the briefs on appeal.

The action of the trial court in denying the motion for a new trial having been considered in a review of the appeal from the judgment, the attempted appeal from the order denying the motion for a new trial is dismissed.

We find no prejudicial error in the record, and accordingly, for the reasons herein stated, the judgment is affirmed.

I concur: YORK, P. J.

DORAN, Justice (dissenting).

I dissent.

In order to decide the question here presented, it is apparent from the provisions of section 363 of the city charter that it will first be necessary to determine who was authorized by the charter to incur the expenditure or liability represented by the claim. Further, if it should be determined that such authority lies only with the board of water and power commissioners itself, it then becomes necessary to decide whether a presentation of a claim to a subordinate of said board, such as the chief engineer of the bureau of water works and supply of the Department of Water and Power, is tantamount to presenting the claim to the board and a sufficient compliance with the charter.

The city charter of Los Angeles provides that the Department of Water and Power shall be under the control and management of a board of five commissioners known as the board of water and power commissioners. §§ 70, 71, Los Angeles city charter. The charter permits the said board in its discretion to divide the work of the department into two bureaus, a bureau of water works and supply and a bureau of power and light, and the chief engineer of the respective bureaus is general manager thereof. § 220[4], idem. Without considering the pertinent charter provisions in detail, it is clear that such a general manager is an administrative officer subordinate to the board and subject to its instructions and that his authority to expend funds extends only to such funds as have been appropriated by the board. §§ 80 [1], [3], 82, 83, idem.

Concededly, the board of water and power commissioners had made no appropriation to cover a claim such as that made by respondent, and it must be concluded therefore that the general manager of the bureau of water works and supply had no authority to incur the expenditure represented by said claim. In accordance with the provisions of the charter, such authority is vested solely in the board of water and power commissioners. Nor can it be said that the general manager of said bureau had authority to incur the liability under the claim here in question. The claim here is for damages arising out of an alleged breach of a contract. In the light of the provisions of the city charter, manifestly the general manager of a department is not given authority at will to disregard or breach a contract entered into by the department. Under the circumstances, to properly found respondent's cause of action his claim must first have been presented to said board, as the only body with authority under the charter to incur the expenditure or liability.

Compliance with the provisions of the city charter with respect to the filing of claims against the city has been held to be mandatory and to constitute a condition precedent to the commencement of any action for damages against the city. See

Continental Ins. Co. v. City of Los Angeles, 92 Cal.App. 585, 268 P. 920; Spencer v. City of Los Angeles, 180 Cal. 103, 179 P. 163; Crescent Wharf & Warehouse Co. v. City of Los Angeles, 207 Cal. 430, 278 P. 1028; Geimann v. Board of Police Commissioners, 158 Cal. 748, 112 P. 553; Beeson v. City of Los Angeles, 115 Cal.App. 122, 300 P. 993. However, substantial compliance with said provisions is deemed sufficient, in the absence of an intention to mislead. Sandstoe v. Atchison, T. & S. F. Ry. Co., 28 Cal.App.2d 215, 223, 82 P.2d 216; Uttley v. City of Santa Ana, 136 Cal.App. 23, 28 P.2d 377. In the instant case there was clearly no intention on the part of respondent to mislead.

There remains, therefore, the question as to whether a presentation of the claim to the chief engineer and general manager of the bureau of water works and supply may be held to be the equivalent of presentation of said claim to the board of water and power commissioners and a substantial compliance with the charter provisions.

It is not disputed that respondent's work under his contract was under the supervision of the bureau of water works and supply; and the chief engineer of said bureau was the chief executive in charge. Moreover, as seen above, the contract provided that any such claim must be filed with the "Chief Engineer and General Manager", and respondent's claim states that it is made pursuant to section 30, chapter IV of the contract, the pertinent wording of the claim being as follows: "Notice is hereby given, that the undersigned Contractor on the above named work or project, pursuant to Section 30, Chapter IV of the contract and specifications hereby makes claim for compensation for damages by reason of the acts or omissions of the Board of Water and Power Commissioners of the Department of Water and Power of the City of Los Angeles, and its agents, in failing to comply with the terms and conditions of said contract and specifications on the part of said Board and its agents to be performed." The section of the contract referred to has already been quoted in full in the majority opinion. The claim does not state that it is made pursuant to the charter provisions, although of course this would not be necessary if the claim were in fact properly presented.

It does not appear from the record that the claim was ever transmitted to or considered by the board of water and power commissioners. The reply to respondent's claim was made by the chief engineer of the bureau of water works and supply and there is no indication therein that any action was taken on the claim by the board or that it had ever been presented to the board for its consideration. The only reasonable inference to be drawn from the record is that the claim was considered and acted upon by said chief engineer and general manager as the chief administrative officer of that particular bureau of the Department of Water and Power.

The letter written by the chief engineer notifying respondent of the rejection of his claim, set forth in full in the opinion of the majority of the court, furnishes no foundation whatsoever for any inference that the claim was acted upon and rejected by the board of water and power commissioners. The use of the word "we" therein can only be taken as referring to the department of which the said chief engineer was an administrative head. The distinction between the Department of Water and Power and its governing board is hereinafter pointed out. To infer that the board had acted on and rejected the claim herein is to engage first in a presumption that the claim had been presented to the board by the chief engineer, as there is no evidence that the claim was so presented. Such an inference would therefore be based upon a presumption and not upon a fact legally proved or upon a deduction properly drawn from that fact. Moreover, a presumption that the claim was presented to the board is not warranted by the facts of this case. Whatever view is taken of the facts herein, there is no basis for a legal conclusion that the board of water and power commissioners received and acted upon respondent's claim.

It may also be inferred that in filing the claim it was respondent's intention to comply with the terms of the contract and that the charter provisions were not considered.

Respondent argues that there is no appreciable or controlling legal difference between the board of water and power commissioners and the Department of Water and Power so far as the requirements of sections 363 and 376 of the city charter are concerned, and asserts that the article of the charter dealing with the Department of Water and Power uses the term "board" and the term "department" interchangeably. In my judgment the argument lacks substance in view of the charter provisions above referred to, which clearly indicate that the "board" is the board of water and power commissioners, consisting of five persons, which forms the governing body of the Department of Water and Power, and which generally bears the same relation to the department as the board of directors bears to a private corporation. When the charter speaks of the "board" it must be taken to mean the governing body of the department as distinct from any subordinate officer or employee, and the term "board" as used in section 363 of the charter must be taken in the same sense.

The majority opinion herein states that the terms "board" and "department" have been recognized as synonymous in Douglass v. City of Los Angeles, 5 Cal.2d 123, 124, 53 P.2d 353, for the purpose of filing claims. In my judgment a careful reading of the case reveals no basis for such a conclusion. The opinion of the Supreme Court therein indicates throughout that the court understood the term "board" to refer to the governing body of a department. Moreover, the decision did not involve the question here presented. At page 129 of 5 Cal. 2d, at page 355 of 53 P.2d, the Supreme Court there stated: " * * * the discussion must necessarily exclude from consideration all claim for the expenditure of funds in the several departments of the city government over which the respective governing or administrative officers or boards have charge and control, with specific authority in the charter to order the expenditure thereof". Later in the said opinion, at pages 134 and 135 of 5 Cal. 2d, 53 P.2d 353, the Supreme Court cites two cases holding the filing of a claim with the board as the governing body a prerequisite to the commencement of a suit against the city. One of the cases so cited, Continental Insurance Co. v. Los Angeles, supra, is clearly in point in the instant case and should control the decision of this court. At page 592 of 92 Cal.App., at page 923 of 268 P., the court in the Continental case said: "So that it is apparent that the general plan or scheme and intention of the framers of the charter and of the legislature was first to provide for the presentation of a demand as a necessary prerequisite to the maintenance of a suit to the end that the city should always be given an opportunity to pay before being subjected to litigation, and second, as its business and administrative responsibility increased to create new boards and commissions with the object and to the end of relieving the council of many of its responsibilities and enabling it to function, more especially as a distinctive legislative body. After the adoption of the charter as new boards and commissions were created, and broad powers and duties and independent functions were given to them, so, consistently, was the charter amended from time to time to make its provisions harmonize with this main purpose, and in this connection to provide that before paying any demand it must first be presented to and approved by the board or commission authorized by the charter to incur the expenditure or liability represented. The entire plan and scheme of approving and auditing every demand disclosed by the provisions of the charter * * * makes it apparent that the prerequisite presentation of a demand in accordance with the provisions of the charter requires that that demand be first presented to the board or commission without whose approval the council may not order it paid. * * * The demand should first be presented to the board, so that if it approved the demand it could recommend the 'expenditure.' "

The last sentence of the above quotation clearly reveals the reason for the charter provisions here considered and the necessity therefor. Under the charter, the board alone has the authority to authorize the expenditure. Therefore, the only method of avoiding unnecessary suits is for the board to consider the claim and act upon it.

It is significant that the paragraph quoted in the majority opinion from the Douglass case, supra, is immediately followed (5 Cal. 2d at page 134, 53 P.2d at page 358) by this paragraph:

"Likewise the harbor department, established by charter amendment in 1911 (St. 1911, p. 2125, § 168 et seq.), may be classed as a department *under the management of an independent board* with power to fix the charges for its own revenue and having control of the disbursement thereof. In the ordinary course of the business of that department it is assumed that its own funds would be sufficient to satisfy any claims for damages arising in that department. In Huey v. City of Los Angeles, 137 Cal.App. 48, 29 P.2d 918, suit was brought against the city on account of the death of a boy who was killed on a drawbridge, the maintenance and operation of which was under the charge and control of the board of harbor commissioners. It was held that an action was not maintainable against the city in the absence of a showing that a claim had been filed with that *board.*" (Italics added.)

The apparent reason for the charter provisions requiring the filing or presentation of a claim before suit compels a conclusion that the claim in the instant case was not properly filed or presented. In the Douglass case, supra, it was said, at page 133 of 5 Cal.2d, at page 357, of 53 P.2d: "The theory of the law requiring the filing of a claim before suit contemplates that if the claim be just and proper the municipal officer or body with which the claim is filed shall have power to approve payment without suit and make such approved claim a valid claim against the city without the necessity of the claimant reducing the demand to judgment. If the board has no such authority the filing of a claim with it would be futile and would thus fail to bring notice of the claim to the municipal authority having power to order the claim paid, without suit."

It has already been pointed out that the chief engineer and general manager of the bureau of water works and supply had no authority to approve payment of the claim without suit, but from all that appears in the record, he was the only officer who passed upon it. Obviously, in such a situation the filing of the claim was futile, as far as compliance with the charter was concerned, in that it failed to bring notice of the claim to the municipal authority having power to order the claim paid, namely, the board of water and power commissioners.

Moreover, it should be pointed out that the charter requires something more than mere formal notice. The board, officer or employee with the authority to do so must *act* upon the claim and accept or reject it. Section 363, above referred to, requires every claim to be first presented *and approved in writing* by the board, etc., and section 376 provides that no suit shall be brought thereon until so presented *and rejected* in whole or in part. The charter thus provides for a *positive act* on the part of the proper authority before a suit may be commenced. Respondent's claim here lacked the requisite rejection by the proper authority.

It should also be pointed out that the pertinent provisions of the city charter make no distinction between claims founded in tort and those in contract The requirement of presentation and rejection apply clearly to both.

If it be assumed that the board of water and power commissioners in the instant case intended by the provisions of the contract above mentioned to delegate to the chief engineer of the bureau of water works and supply the duty of receiving and considering claims for damages under said contract, such an attempt on the part of the board would be in excess of the powers granted it by the charter, of no effect and void, since the charter clearly does not permit it, and the board is without power to waive the statutory provisions of the charter. Spencer v. City of Calipatria, 9 Cal.App.2d 267, 49 P.2d 320; Chapman v. City of Fullerton, 90 Cal.App. 463, 470, 265 P. 1035. There could of course be no objection to a provision in the contract which required some condition to be met in addition to those required by the charter, but the provisions of the charter cannot be dispensed with.

Nor can it be asserted that presentation of a claim to the general manager of said bureau is analogous to presentation of a claim to the city clerk, in cases which have held that such procedure constitutes presentation to the city council. See Lynch v. City of Los Angeles, 11 Cal.App.2d 633, 54 P.2d 488; Douglass v. City of Los Angeles, supra. The relation of the general manager to the board of commissioners is not the same as the relation of the city clerk to the council. The city clerk acts as secretary to the council. § 44 [3], L. A. city charter. The charter specifically provides for a secretary to a board of commissioners, a position wholly distinct and separate from that of a general manager (see §§ 75 and 80 [2] of said charter); and the duties of a general manager are in no way analogous to those of the city clerk.

Viewed as an attempt to comply with the charter provisions, the filing of the claim herein with the chief engineer of the bureau of water works and supply falls short of a substantial compliance as approved in the cases of Sandstoe v. Atchison, T. & S. F. Ry. Co., and Uttley v. City of Santa Ana, both supra. In the Sandstoe case the charter provision in question required that the claim be first filed with the city controller and after rejection by that official, then with the legislative body of the city. The plaintiff there filed her claim with both simultaneously, which was held to be a substantial compliance since the city was given a full opportunity to investigate the merits of the claim and was not misled or prejudiced by plaintiff in filing her claim as she did. In the Uttley case the sole question was whether the name and address of the claimant's attorney endorsed upon the claim was a substantial compliance with a charter provision requiring the name and address of the claimant to appear on the claim. In both these cases the body in authority had actually received the claim. In the instant case it appears that the proper authority never received the claim at all, and that the person who did receive the claim was not in such a position that the proper authority might be deemed to have received and acted upon it.

To sum up, then, the situation here presented is one wherein a contract with the Department of Water and Power required a different method of presenting a claim than that provided by the city charter, and a claim was presented to the general manager of that department pursuant to the provisions of said contract, and it appears that no attempt was made to comply with the provisions of the charter as to presentation of the claim and that said claim was never presented to, or acted upon by the board of water and power commissioners, which was the board with authority under the charter to incur the expenditure or liability represented by said claim, but the claim was considered and acted upon instead by the general manager of the department. In such a case, and under such circumstances, there has not been a substantial compliance with sections 363 and 376 of the city charter, above referred to, and the claim therefore was not properly presented to and rejected by the proper authority before the commencement of suit. Respondent has consequently failed to satisfy the condition prerequisite to his cause of action herein; and this court should avoid setting aside the procedure outlined in the charter by judicial construction. See the opinion of Mr. Justice Thompson in the Douglass case, supra, 5 Cal.2d at page 140, 53 P.2d 353.

As already pointed out, the board of water and power commissioners cannot alter by contract the procedure prescribed by the charter. Nor is it the province of the courts to alter such procedure, however harsh the effect may be in a particular case. A purported attempt to comply with the charter, if legally insufficient, acquires no added sufficiency by reason of the good faith related to the notice. Good faith has never been regarded by the law as a substitute for an indispensable legal requirement. It is argued in the prevailing opinion that: "Viewed from any standpoint of fairness, equity and justice, the respondent herein complied substantially with the provisions of section 363 of the Los Angeles city charter." It is my opinion that there are no equities involved in the issues here presented. The question is clearly one of interpretation and construction. Manifestly, it is not unjust for the people to establish reasonable and lawful requirements in a city charter, and when, as here, an individual in dealing with the city fails to comply with such requirements the consequences cannot be regarded either as unfair or unjust. If the respondent is the unfortunate victim of his own mistake it is not the function of the court to accommodate the charter by construction to respondent's error. If expediency is to govern in each case when such disputes arise, there can be no standard upon which claimants generally can rely. Such elasticity of the law only creates uncertainty, and what may be obliging to a litigant in one case may be disastrous to a litigant in another.

It is not necessary to consider what would have been the effect had it appeared that the general manager transmitted respondent's claim to the board. As is seen above, the record fails to show that this was done.

It follows from the foregoing that appellants' motion for nonsuit should have been granted and that the court erred in denying the same, and the finding of the trial court that respondent's claim was filed with the Department of Water and Power and "the chief engineer and general manager thereof", and that said department rejected the same, does not support the judgment in favor of respondent, in that it fails to show a proper presentation and rejection of respondent's claim, the prerequisite to his cause of action.

The judgment should therefore be reversed.

In re ALLEN'S ESTATE.

ALLEN v. ALLEN et al.

Civ. 2909.

District Court of Appeal, Fourth District, California.
Jan. 7, 1941.

Hearing Denied March 7, 1941.

1. Executors and administrators 🔑93(1)

The unauthorized operation of a business by an administrator of an estate is not binding on the estate and imposes a liability on the administrator for any debts thus incurred.

2. Executors and administrators 🔑93(1)

The statutory amendment empowering court to authorize an administrator to continue the operation of a decedent's business, though it enlarged the powers of the representative of an estate, did not have the effect of creating a lien on the assets of the estate to enforce the payment of obligations incurred on that account as preferred claims. Probate Code, § 572.

3. Executors and administrators 🔑261

"Expenses of administration", within meaning of statute giving preference thereto, refer primarily to the costs and expenses of the probate proceedings themselves, when the costs and expenses have arisen because of the necessity of probating the estate. Probate Code, § 950.

See Words and Phrases, Permanent Edition, for all other definitions of "Expenses of Administration".

4. Executors and administrators 🔑261

Certain obligations are imposed by law on an administrator, because of which he has been allowed to claim a preference for money he has necessarily expended in preserving the property of the estate, including taxes, assessments, insurance, repairs, cost of necessary assistance, and many other things, but such a preference, as "expenses of administration" within meaning of statute giving preference thereto, has not been allowed to outsiders who furnished such things without being under an obligation to do so. Probate Code, § 950.

5. Executors and administrators 🔑93(1), 261

Claims for goods sold on credit to a decedent's business which was being continued by decedent's administratrix under order of court were not "expenses of administration", either under statute authorizing the making of an order authorizing an administrator to continue the business of a decedent, or under statute giving the order in which debts, expenses, and charges against an estate are to be paid. Probate Code, §§ 572, 950.

6. Executors and administrators 🔑93(1), 261

Though the effect of the statute authorizing the making of an order to permit a decedent's personal representative to continue his business is to make claims arising under such circumstances a charge against the estate, rather than one against the administrator, no lien or preference is created thereby. Probate Code, § 572.

7. Executors and administrators 🔑93(1)

The purpose of the statute permitting a continuance of the business of a decedent's estate on order of court is largely to add to the assets of the estate, directly or indirectly, through such operation. Probate Code, § 572.

8. Executors and administrators 🔑261

The cost of an improvement to an estate cannot be allowed as "expenses of administration" within meaning of statute giving a preference thereto. Probate Code, § 950.

9. Executors and administrators 🔑93(1), 261

The purpose of legislature in adopting statute empowering a court to authorize an administrator to continue operation of a decedent's business was to permit business of a decedent to be continued under direction of the court, for such benefits as might accrue to all concerned, thereby relieving administrator of personal liability therefor, but it was not the intention to give to those advancing credit on the business a preference over other creditors who may have contributed to assets in hands of administrator. Probate Code, § 572.

10. Executors and administrators 🔑510(11)

Where trial court held on conflicting evidence in proceeding for approval of accounts of administratrix that estate was not insolvent at all times, the finding could not be disturbed on appeal.

11. Executors and administrators 🔑197

Though creditors of decedent's estate had right to seek a modification or change of order dealing with a family allowance as soon as they discovered that estate was insolvent, any such modification or change could not operate retroactively. Probate Code, § 680.

12. Executors and administrators ⚿111(6), 496(2)

The allowance of ordinary fees to administratrix and her attorneys, based on inventory valuation of estate was improper, where the main assets of the estate were sold for less than half of their appraised value.

13. Executors and administrators ⚿111(6), 496(2)

Where certain profits were made by administratrix in operating business of decedent, and those profits became a part of the estate, they should be taken into consideration in fixing ordinary fees of administratrix and her attorneys.

14. Executors and administrators ⚿497

That operation of decedent's business by administratrix turned out to be unsuccessful and that estate finally became insolvent were not determinative in passing on question whether administratrix was entitled to extraordinary fees.

15. Executors and administrators ⚿497

Extraordinary fees for a decedent's personal representative should be based on the amount of extra work required.

16. Executors and administrators ⚿497

The allowance of $500 to attorneys of administratrix for extraordinary fees, was too low, where administratrix continued decedent's business for almost three years.

◆

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Proceeding in the matter of the estate of Frederick Jay Allen. Helen B. Allen, administratrix of the estate of Frederick Jay Allen, filed her accounts, and Harvey D. Allen and others filed objections. From a decree approving certain accounts, approving and directing the payment of certain amounts as family allowance to surviving widow, fixing and allowing compensation for administratrix and her attorneys, both ordinary and extraordinary, and classifying and directing payment of claims against the estate, the objectors appeal.

Decree reversed in part and affirmed in part.

Atherton & Atherton, of San Diego, for appellant Allen.

A. T. Procopio, of San Diego, for appellant Knudsen Creamery Co.

Adam Thompson and Renwick Thompson, both of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a decree approving certain accounts of the administratrix of this estate, approving and directing the payment of certain amounts as family allowance to the surviving widow, fixing and allowing compensation for the administratrix and her attorneys, both ordinary and extraordinary, and classifying and directing the payment of claims against the estate.

Frederick Jay Allen, who died on September 16, 1936, had, for some twenty years, owned and operated a distributing business for dairy products. The principal assets of the estate consisted of real estate, buildings and equipment used in this business, including five retail routes.

His widow was appointed special administratrix immediately upon his death and general letters of administration were thereafter issued to her. On December 23, 1936, an order was entered authorizing and directing her to continue the business, which she did until it was sold in September, 1939. In the operation of the business the administratrix purchased dairy products and sold them at both retail and wholesale. The business was run at a profit until August, 1938, after which, due to a "milk war", it was operated at a loss until it was sold. Altogether, in these operations the administratrix accounted for receipts in excess of $335,000. The two appellants here furnished dairy products to the administratrix during these operations, being paid in part from time to time but leaving unpaid balances.

On June 11, 1937, the appellant Harvey D. Allen filed a petition asking to have the assets of the estate sold, and a family allowance reduced from $200 to $100 a month. This petition was never presented to the court for the reason that the said appellant entered into a written agreement with the administratrix, pursuant to which she gave him her personal notes for $10,500, part of which was secured by a mortgage, and paid off a note for $5,000 owed by the deceased upon which Harvey D. Allen was jointly liable.

In March, 1939, the administratrix filed her second annual report to which objections were filed by appellant Harvey D. Allen with a petition asking that the administratrix be compelled to sell and dispose of the assets. Early in May, the court continued these matters and directed that the operation of the business be continued for a further 90-day period. On August 15, 1939, the court entered an order directing the administratrix to sell the assets of the estate and thereafter the same were advertised and sold at public auction to the appellant Harvey D. Allen for a price much less than that for which they had previously been appraised. Thereafter, the administratrix filed a third and final account, to which objections were filed, and in due course the order was made from which this appeal was taken. The sale of the assets of the estate, after paying a mortgage lien, left an amount which is entirely inadequate to cover the debts and claims against the estate.

Appellants' main contention is that their claims for dairy products furnished during the operation of the business by the administratrix are obligations necessarily incurred in the care and preservation of the assets of the estate, that, as such, they are expenses of administration and preferred claims, and that the court erred in holding to the contrary.

[1, 2] The unauthorized operation of a business by an administrator of an estate was not considered binding on the estate and imposed a liability upon the administrator for any debts thus incurred. In re Rose, 80 Cal. 166, 22 P. 86; In re Estate of De Rome, 175 Cal. 399, 165 P. 919. By an amendment adopted in 1929, St. 1929, p. 157, now found in section 572 of the Probate Code, the court was empowered to authorize an administrator to continue the operation of a decedent's business. As pointed out in In re Estate of Smith, 16 Cal.App.2d 239, 60 P.2d 574, 575, this amendment, while it enlarged the powers of the representative of an estate, "did not have the effect of creating a lien upon the assets of the estate to enforce the payment of obligations incurred on that account as preferred claims". In that case, the decedent died shortly after the above-mentioned amendment became effective. The court authorized the executors to continue the operation of the decedent's farming business. A bank having loaned money for that purpose contended that the money thus borrowed and used by the executors was used for the purpose of preserving the property of the estate and should be classified as "expenses of administration", with the result that it was a preferred claim as to the executors, and that the bank was entitled to subrogation to such rights and the benefit of that lien. It was held that this contention was without merit; that while the rule is that administrators who advance their own money for the necessary purpose of preserving the property of the estate are entitled to a preference in the repayment thereof, the executors had not used their own money in carrying out the farming enterprise; that the money thus loaned had been loaned to the estate and not to its representatives; that the debt there in question should be classed "as an ordinary debt or obligation of the estate, and not as current expenses of administration exactly the same as though the loan had been made to the decedent for the same purpose before her death"; and that the executors were entitled to no preference with respect to said claim to which the bank could be subrogated. The court then pointed out the danger of injustice to heirs and other creditors in permitting such a preference and stated that such a rule of law should not be declared "in the absence of clear statutory provisions to that effect".

The principles and reasoning of that case are applicable here and we can see no difference in principle between loaning money to be used in the continued operation of a business and furnishing goods on credit for the same purpose. Regardless of any other consideration, the administratrix here had not used her own money or credit in carrying on this business, at least in so far as appellants' claims are concerned, and the credits under which appellants' claim were given to the estate and not to the administratrix.

[3, 4] "Expenses of administration", within the meaning of the statutes giving preference thereto, now section 950 of the Probate Code, have always been understood as referring primarily to the costs and expenses of the probate proceedings themselves, and which have arisen because of the necessity of probating the estate. Certain obligations are imposed by law upon the administrator, because of

which he has been allowed to claim a preference for money he has necessarily expended in preserving the property of the estate, including taxes, assessments, insurance, repairs, cost of necessary assistance, and many other such things. Ludwig v. Superior Court, 217 Cal. 499, 19 P.2d 984; Estate of Smith, supra. Such a preference, as an expense of administration, has not been allowed to outsiders who furnished such things without being under an obligation so to do. Matter of Hincheon's Estate, 159 Cal. 755, 116 P. 47, 36 L.R.A.,N.S., 303. In that case, even a devisee of an uncompleted house was held not to have a preferred claim for expenses she incurred in protecting the house from possible injury, although such an expense would have been given a preference if it had been incurred by the executors. In Quigley v. Nash, 1 Cal.2d 502, 36 P.2d 112, 114, a widow applied for letters of administration a week after her husband's death, having in the meantime taken charge of his business. Later, at her request, another was appointed the administrator of the estate. The court held she was entitled to a preference with respect to two items "insignificant in amount" which were incurred in the conduct of the business of the decedent after his death, it having been found that these expenditures were necessary "for the preservation of the property" of the estate. Under such circumstances the court held that these claims were such as would have been entitled to preference if made by an administrator and that they should be allowed as preferred charges against the estate. We find nothing in that case which conflicts with the views above expressed and the Supreme Court later denied a hearing in Re Estate of Smith, supra.

[5, 6] We think that such claims as these, for goods sold on credit to a business being continued under order of court, are not properly to be classed as expenses of administration either under section 572 of the Probate Code, authorizing the making of such an order, or under section 950 giving the order in which debts, expenses and charges against an estate are to be paid. Section 572 does not specifically provide for such a preference and should not be so construed. In re Estate of Smith, supra. While the effect of that section is to make claims arising under such circumstances a charge against the estate rather than one against the administrator, no lien or preference is created thereby. In 1931, two years after that provision was first adopted, the various provisions of the Code of Civil Procedure in connection with the payment of charges against an estate were placed altogether in section 950 of the Probate Code, which begins "The debts of the decedent, the expenses of administration and the charges against the estate must be paid in the following order". Then follow nine items, the first of which is "Expenses of administration" and the last "All other demands against the estate". The first clause of the section contains a new element: "charges against the estate", which is distinguished from debts of the decedent and expenses of administration. It is not unreasonable to believe that one reason for thus distinguishing between charges against the estate and expenses of administration was the very fact that the law had recently been changed to permit an order of court authorizing the continuance of a decedent's business and to care for claims which would naturally arise from such operation, which are quite different from those theretofore recognized as expenses of administration and which logically and reasonably should not be considered as such expenses, for which the administrator had always been entitled to a preference.

[7, 8] The purpose of the statute permitting a continuance of the business upon order of court would seem to be largely to add to the assets of the estate, directly or indirectly, through such operation. In practical effect it is no more than an attempt to improve the property, as distinguished from preserving it, within the meaning of the decisions holding that the administrator is entitled to a preference with respect to money expended for the preservation of the estate. The cost of an improvement to an estate has never been allowed as an expense of administration. Matter of Hincheon's Estate, supra.

[9] Persons selling goods to a business thus being conducted by an estate are naturally in about the same position as those selling goods to the owner before he died. They rely upon the success of the business and the assets of the owner or his estate, and no real reason exists for giving a preference to those selling goods after his death over those who sold before that event. There is a difference between expenses incurred during administration and expenses of administration, within the meaning of section 950 of the Probate Code. While debts contracted in continuing such a business are proper

charges against an estate, we think the statutes should not be so extended by judicial interpretation as to constitute them expenses of administration and that they should, under the provisions of section 950 of the Probate Code, be considered and treated as other demands against the estate. We think the purpose of the legislature, in adopting the provisions here in question, was to permit the business of a decedent to be continued upon the order of and under the direction of the court for such benefits as might accrue to all concerned, thereby relieving the administrator of the personal liability theretofore existing in such a case, but that it was not the intention to give to those advancing credit to the business thus continued a preference over other creditors who in many cases, if not in most, may have contributed just as much or more to the assets in the hands of the administrator.

[10, 11] The appellants further contend that this estate was insolvent at all times, that the payment of a family allowance was therefore limited to one year, § 680, Prob.Code, and that the court erred in approving and ordering payments of the family allowance up to the date of the decree appealed from. The order for a family allowance was entered on December 2, 1936, more than two months before an inventory and appraisement was filed. It is argued that this estate was at all times insolvent. The trial court held to the contrary upon conflicting evidence and this finding cannot be disturbed. Moreover, the original order for a family allowance had become final and remained in force until it was directly attacked or steps taken to set it aside. While at the hearing upon the final account the appellants objected to certain payments upon the family allowance upon the ground of the insolvency of the estate, which then appeared, they had not theretofore moved to set aside the order. They had the right to seek a modification or change of the order as soon as they discovered the estate was insolvent, but any such modification or change could not operate retroactively. In re Estate of Bell, 131 Cal. 1, 63 P. 81, 668; In re Estate of Houston, 205 Cal. 276, 270 P. 939, 60 A.L.R. 730; In re Estate of Monge, 25 Cal.App.2d 235, 77 P.2d 290.

Finally, it is charged that the court erred in fixing the fees of the administratrix and of her attorneys, both ordinary and extraordinary. The court fixed the ordinary fees at the statutory rate based upon the first inventory filed in February, 1937. On September 11, 1939, another inventory was filed with a still higher appraisement of the property, but in that same month the main assets were sold at a sale forced by the appellants for less than half of their appraised value. The statutory fees allowed to the administratrix was $924.60, and the same amount to her attorneys. The court also allowed the administratrix $1,800 as extraordinary fees, and her attorneys $500 on that account.

[12, 13] The allowance of the ordinary fees based upon the inventory valuation under these circumstances was improper. In re Estate of Fernandez, 119 Cal. 579, 51 P. 851; In re Estate of Aldersley, 174 Cal. 366, 163 P. 206; In re Estate of O'Connor, 200 Cal. 646, 254 P. 269. However, it would appear that certain profits were made in operating the business during the first two years, which became a part of the estate and which should be taken into consideration in fixing the ordinary fees.

[14-16] The appellants further contend, in this connection, that no extraordinary fees should have been allowed because the operation of this business turned out to be unsuccessful and the estate finally became insolvent. These facts are not determinative and extraordinary fees should be based upon the amount of extra work required, one element, as provided in the statute, being the continued operation of the business. In view of the situation as disclosed by the record now before us, it would appear that any error in fixing the extraordinary fees, as far as the attorneys are concerned, was in fixing them too low. The entire matter of these fees, ordinary and extraordinary, should be returned to the trial court to be redetermined in accordance with the law and the facts.

That part of the decree appealed from which fixes the fees of the administratrix and her attorney, ordinary and extraordinary, is reversed. The remainder of the decree is affirmed. Each party to pay his own cost on appeal.

We concur: MARKS, J.; GRIFFIN, J.

42 Cal.App.2d 389

AXIS PETROLEUM CO. et al. v. TAYLOR et al.

Civ. 11547.

District Court of Appeal, First District, Division 2, California.

Jan. 10, 1941.

1. Mines and minerals 🔑78(2)

Lessors were not entitled to terminate oil lease on ground of breach of covenant imposing duty on lessees to keep oil well on production except for unavoidable causes, beyond lessees' control, where, though for a short period, well was not on production when perforated pipe became filled with mud because of acts of third persons, lessees at once proceeded with due diligence to avoid the obstructions and in about 90 days had the well again on production.

2. Mines and minerals 🔑77

Lessors were not entitled to terminate oil lease on ground that lessees had not furnished lessors with monthly statements of production, where statements in due form were made by purchaser of oil and delivered to lessors' bankers for the information of the lessors.

3. Appeal and error 🔑840(1)

Whether oil company had paid to lessees moneys for gasoline that it should have paid to another oil company was a question not involved on appeal, where the other gas company did not appeal.

4. Mines and minerals 🔑79(3)

Where producers agreed to furnish "wet gas" for manufacture and extraction of gasoline therefrom and manufacturer agreed to pay a percentage of the "proceeds" of manufactured gasoline to producers, with provision that the "proceeds" would be estimated at 2½ and 3 cents per gallon under the retail price of certain brand of gasoline in certain city, and lease contained no covenant on the part of assignees of sublease to process gas, such assignee properly charged lessors their portion of the cost of processing.

> When gas comes from an oil well, it is called "wet gas". After it has been "processed", that is, dehydrated, the products of the processing are "dry gas" and gasoline.
>
> See Words and Phrases, Permanent Edition, for all other definitions of "Dry Gas", "Proceeds", "Processed", and "Wet Gas".

5. Mines and minerals 🔑77

Act of lessees under oil lease in allowing third person, who operated another well on an adjoining lease, to locate on lessees' lease a boiler to operate third person's well, though it be considered a breach of the lease, was not a material breach, so as to entitle lessors to predicate a forfeiture.

6. Mines and minerals 🔑79(6)

The fact that lessors under oil lease were not, on many occasions, paid royalties on date provided by lease, would not entitle lessors to predicate a forfeiture, where lessors were ultimately paid the royalties and accepted them.

7. Evidence 🔑69

In action involving oil lease, wherein lessors contended that one of the lessees did not keep correct books and accounts, the presumption was that such lessee did keep correct books and accounts in absence of direct evidence that such lessee did not do so.

8. Mines and minerals 🔑77

That one of oil lessees did not notify lessors of that lessee's action to quiet title against corporation, though lease provided that lessees should promptly notify lessors of any jurisdictional proceedings brought to attention of the lessees purporting to affect the lessees' possession under the lease, would not warrant a forfeiture of the lease, where the action to quiet title in no manner affected the possession of the lessee who brought the action.

9. Appeal and error 🔑1010(1)

Where there was evidence to support each of trial court's findings, no one of them could be disturbed on appeal.

10. Tenancy in common 🔑49

Where three of four tenants in common neither joined with nor authorized fourth tenant in common to issue a declaration of forfeiture of oil lease, a notice by the fourth tenant in common declaring a forfeiture was not sufficient at common law, and that rule has not been changed by statute.

11. Tenancy in common 🔑49

The act of two tenants in common, in joining third tenant in common in framing her answer and cross-complaint seeking declaration of forfeiture of oil lease, was a "ratification" by those two tenants in common of a declaration of forfeiture of the lease by the one tenant in common, but was not a "ratification" by fourth tenant in common, which neither authorized declaration of forfeiture nor joined in the framing of the answer and cross-complaint.

See Words and Phrases, Permanent Edition, for all other definitions of "Ratification".

12. Mines and minerals ⚷77

Where lessors under oil lease made no showing that they had been damaged by any act of the lessees in deepening well in accordance with deepening agreement providing that lessors should pay one-fourth of the cost, lessors were not entitled to enforce a forfeiture of the lease. Civ.Code, §§ 1688–1691.

13. Mines and minerals ⚷77

Where agreement to deepen oil well was an independent agreement not going to the root of the oil lease, lessors' remedy for alleged fraud of lessees in deepening the well was an action for damages, and they could not obtain a forfeiture of the lease.

14. Mines and minerals ⚷79(6)

Where lessors under oil lease collected royalties, they thereby "waived" lessees' defaults, if any, in failure to pay royalties on time.

See Words and Phrases, Permanent Edition, for all other definitions of "Waived".

15. Payment ⚷5

Lessors under oil lease could not obtain forfeiture of lease on ground that lessees did not pay royalties, where oil company bought all oil produced and by consent of all parties paid royalties to lessors' bankers, who in turn paid the royalties to the lessors, though oil company was allegedly not the agent of the lessees, since whether oil company in paying royalties acted as lessees' agent, servant, or trustee, was immaterial.

16. Evidence ⚷96(2)

Defendants who filed a cross-complaint had the burden of proving their affirmative allegations of new matter.

17. Mines and minerals ⚷73

In action involving oil lease, wherein defendants in their cross-complaint contended that they had been overcharged by the plaintiffs for costs incurred under oil well deepening agreement, defendants' evidence was insufficient to sustain their burden of proving the overcharge.

18. Pleading ⚷377

Where contract was pleaded by plaintiffs and was not denied by defendants, there was no need of plaintiffs' introducing it in evidence.

* * *

Appeal from Superior, Los Angeles Court; Charles D. Ballard, Judge.

Suit by the Axis Petroleum Company and others against Isabelle H. Taylor and others, and John C. Ort, Jr., and others, for a decree quieting title, except as to a lease and for declaratory relief, wherein John C. Ort, Jr., and others, filed a cross-complaint for a decree quieting their title, for possession, for cancellation of lease, and for other relief. From a judgment in favor of the plaintiffs, the defendants appeal.

Judgment affirmed.

William M. Taylor, of Long Beach (Solomon Rosenbaum, of Los Angeles, of counsel), for appellants.

John M. Hall, of Los Angeles, for respondents.

STURTEVANT, Justice.

In the plaintiffs' complaint they asked to have a decree entered quieting their title, except as to a lease hereinafter called the head lease, to lot 4 in block H of Signal Hill Tract in the city of Signal Hill in Los Angeles county. They also asked for declaratory relief. The defendants answered and filed a cross-complaint. The latter pleading was answered. The defendants asked for an unlimited decree quieting their title, that they be given possession, that the head lease be ordered cancelled, and for other relief. The trial court made findings in favor of the plaintiffs and the defendants have appealed from the judgment.

(1) July 22, 1921, defendant Isabelle H. Taylor, made an oil lease to John C. Ort, Jr. This will be herein referred to as the head lease.

(2) July 23, 1921, John C. Ort, Jr., made an oil lease to Big Jumbo Oil Company.

(3) October 23, 1922, defendant Isabelle H. Taylor, deeded to defendants Arthur W. Hjorth and Anna O. Hjorth, an undivided one-half interest in the land.

(4) January 29, 1925, Big Jumbo Oil Company made an oil sublease to L. T. McCutcheon and Harold A. Gilman, as trustees for Wigle & McBride, Inc.

(5) April 29, 1925, L. T. McCutcheon and Harold A. Gilman, as trustees for Wigle & McBride, Inc., assigned to plaintiffs, Walter Hughes and R. H. Bess, a one-half interest in the sublease of January 29, 1925.

(6) November 1, 1928, L. T. McCutcheon and Harold A. Gilman, as trustees for Wigle & McBride, Inc., assigned to plaintiff Axis Petroleum Company, a one-half interest in the sublease of January 29, 1925.

(7) April 12, 1929, plaintiffs Walter Hughes, R. H. Bess and Axis Petroleum Company; defendants Isabelle H. Taylor, Arthur W. Hjorth and Anna O. Hjorth; and Big Jumbo Oil Company, entered into a written agreement. This is referred to by defendants and will be herein referred to as the deepening agreement.

(8) Thereafter and about July, 1929, defendants Taylor and Hjorth, executed a writing appointing Western Trust and Savings Bank (Long Beach) their "distributing agent for such money as actually comes into its hands from rentals, gas and oil". This will be herein referred to as the distribution order. Each instrument, (1)-(8) inclusive, was introduced in evidence or was either expressly admitted by the pleadings or by failure to deny. Code Civ.Proc., secs. 447 and 448.

It was the theory of the plaintiffs that they had in all respects done and performed every covenant contained in the head lease. On the other hand it was the claim of the defendant lessors that the plaintiffs had breached material covenants, that for that reason the defendants had duly terminated the lease, and the plaintiffs should be ordered to surrender possession to the defendants. We have read the pleading and the findings and the bill of exceptions. We find no merit in any of the attacks. The record does not present a case of conflicts in the evidence. There was not a substantial conflict in it. No question of real merit was involved. The action was tried throughout on its merits with meticulous care.

[1] The termination of the lease, the defendants contend, arose by operation of two notices which were served on the plaintiffs. The first notice dated July 21, 1933, asserted that the plaintiffs had defaulted in two different respects. It recited that the plaintiffs had failed to keep the well on production. The covenant contained in the lease imposed the duty on the lessee to keep the well on production except for "* * * unavoidable causes beyond the control of the lessee * * *". The evidence showed without conflict that on July 21, 1933, and for a short period thereafter, the well was not on production. But it also showed, without conflict, that the perforated pipe used by the plaintiffs was by the operation of a well (located about 100 feet distant and operated by third persons) filled with mud. The evidence also showed that the plaintiffs at once proceeded with due diligence to avoid the obstructions caused by the acts of such third parties and that in about ninety days had the well again on production. There is no evidence that they did not act promptly and with all due speed.

[2] The said notice specified as another default that the plaintiffs had not furnished the lessor with monthly statements of the production. It is perfectly clear that the lease imposed such an obligation on the plaintiffs. However the proof was all to the effect that such statements were furnished. It may be argued that such statements were not delivered to each of the defendants personally but there was no conflict in the evidence and the proof was clear that the Hancock Company, the purchaser of the oil, made out statements in due form and that the latter company delivered to the Western Trust and Savings Bank, the defendants' bankers, for the information of the defendants, the statements provided for in the lease.

The second notice, mentioned above, was given January 9, 1934. It specified no additional defaults but was solely based on the first notice and alleged a termination of the lease.

We have treated above the two defaults specified in the formal notice. However at the trial the defendants contended there were other defaults or breaches.

[3] The defendants make the point that the plaintiffs were not entitled to gas produced from the well. The point requires us to state some additional facts. August 15, 1933, Isabelle H. Taylor and Big Jumbo Oil Company, the parties of the first part, entered into an agreement with R. E. Bering, the party of the second part, by the terms

of which the parties of the first part "* * * hereby lease and agree to furnish and deliver to said party of the second part for the purpose of manufacturing and extracting gasoline therefrom, all of the gas produced by them from the above described property, for and during the entire period of time they shall produce gas therefrom * * *". By mesne assignments said instrument became the property of Signal Oil Company. Bering agreed to pay 30 per cent of the *proceeds* of manufactured gasoline to Big Jumbo Oil Company and 6 per cent to Isabelle H. Taylor. Bering also agreed that the *proceeds* would be estimated at *2½ and 3 cents* per gallon, respectively, under the retail price of Red Crown gasoline in Los Angeles for gasoline that tested 70 degrees Baume or over and for that which tested less than 70 degrees. The Signal Oil Company has paid Mrs. Taylor for her portion of all gas it received. That fact is evidenced by a contract dated February 11, 1936. Whether the Signal Oil Company has paid to the plaintiffs moneys it should have paid the Big Jumbo Company is a question not involved in this appeal because the latter company has not appealed.

[4] When gas comes from an oil well it is called "wet gas". After it has been processed, that is dehydrated, the products of the processing are dry gas and gasoline. Those products are marketable. The plaintiffs delivered to the Signal Oil Company, all wet gas, the latter processed it and accounted to the plaintiffs therefor. The latter charged to the defendants their part of the cost of processing and paid them their part of the proceeds of the sales. At this time they object to the costs of processing. They contend that no part of such costs should have been charged to them. But the lease contained no covenant on the part of the lessee to process gas. The trial court held that within a reasonable construction of the lease the charge was not improper. We think there was no error in the ruling.

[5] Adjacent to lot 4, block H, the plaintiffs own another lot which is leased to Callahan who operates another well. The plaintiffs allowed him to locate on lot 4 a boiler to operate his well. The defendants contend said act was a use of lot 4 by the defendants not authorized by the lease. If said act be considered a breach of the lease it was not a material breach and the trial court so held. The incident was never mentioned until the action was on trial.

All wet gas was piped to the Signal Oil and Gas Company. By the latter it was dehydrated. Some dry gas was piped back to the premises of the defendants and by the latter it was used as fuel to operate its boilers. All gas was measured by passing through meters. It was all accounted for.

The defendants contend the gas was used to operate wells on other properties. Some dry gas was transmitted by pipes through meters and used to operate the so-called Woods well. Later an equal amount was in the same manner returned. In other words it was, in effect, a loan which was duly repaid.

The plaintiffs contend that in June, July, August, and September, 1936, the plaintiffs were overcharged for gas used on lot 4. But the evidence showed although such was the fact the error was soon discovered and later no charge was made for gas that was used until the error had been adjusted and the account balanced.

[6] The head lease provided that the royalties should be paid on or before the 15th day of each calendar month. The defendants introduced evidence to the effect that they were not, on many occasions, paid on time. But there was evidence they were paid and accepted. The plaintiffs may not predicate a forfeiture on such facts. 15 Cal.Jur. 786; Boone v. Templeman, 158 Cal. 290, 296, 110 P. 947, 139 Am.St.Rep. 126.

[7] The defendants assert the plaintiffs in violation of the terms of the head lease refused to permit them to examine the books of the Axis Company. There was no evidence supporting that assertion. In this same connection they say the Axis Company did not keep correct books and accounts. There was no direct evidence to that effect. The presumption is that it did.

[8] In 1930 an action to quiet title was brought by Axis Petroleum Company against Wigle & McBride, Inc. It in no manner affected the possession of the Axis Company. The head lease provided the lessee should promptly notify the lessor of "any jurisdiction proceedings brought to the attention of the lessee purporting to affect or affecting his possession hereunder". The Axis Company was granted a decree May 12, 1930. Manifestly such facts will not warrant any court in declaring a forfeiture.

[9] The trial court made findings against the defendants on each of the fore-

going attacks. There was evidence to support each of those findings and no one of them may now be disturbed.

[10, 11] Furthermore if there were any breaches the plaintiffs contend the defendants never legally gave notice thereof and took the proper steps to terminate the lease. The purported notice of default was signed by Mrs. Taylor only. She was a tenant in common with the Hjorths and Jumbo Oil Company. The latter neither joined with her nor authorized her to issue a declaration of forefeiture. A notice by her declaring a forfeiture was not sufficient at common law. In Howard v. Manning, 79 Okl. 165, 192 P. 358, 361, 12 A.L.R. 819, the supreme court of Oklahoma made a thorough examination of the law back to and including "Coke upon Littleton". On page 363 of 192 P. that court said: "The alleged forfeiture for breach of covenant, not having been declared by declaration of forfeiture joined in by all the tenants in common, and the alleged forfeiture not being self-executing, the lease, in so far as this record shows, was a subsisting and valid lease for the entire year of 1917." See, also, McCormick v. Marcy, 165 Cal. 386, 392, 393, 132 P. 449. Our statutes have not changed said rules. True it is that in the case before us the Hjorths joined Mrs. Taylor in framing her answer and cross-complaint. That act may be said to be a ratification by them. Gill v. Bennett, Tex.Civ.App., 59 S.W.2d 473, 475. But it was in no manner a ratification by the Jumbo Oil Company. It follows that the notice of forfeiture was not effective.

[12-15] On April 12, 1929, all of the interested parties executed another contract which they call the deepening agreement. Therein they agreed that the lessees should sink the well to a depth of 5,300 feet. The expense was not to exceed $20,000. The lessees were to keep accounts of the actual costs. Of those costs the lessors were to pay one-fourth. Their portion of the cost was to be deducted from their royalties and, to that end, one-fifth of their royalties was to be withheld. The work was done by the Rotary Oil Company. It sent invoices to the plaintiffs. The latter, in turn, made a compilation of the account and sent a copy to Isabelle H. Taylor. The deepening was completed and on June 7, 1929 the well was again put in full operation. On November 20, 1936 the defendants served a notice of rescission of the deepening agreement. They now claim a finding in their favor should have been made on that issue. In their notice of rescission they stated it was based on the "deceit, fraud, and misrepresentation * * *" of the plaintiffs. In the entire record there is no evidence of any "deceit, fraud, and misrepresentation * * *" and the court so found. There was no attempt to make a tender. There was no attempt to excuse the delay in rescinding. They did not comply with the provisions of sections 1688–1691 of the Civil Code. There was no showing the defendants had been damaged by any act of the plaintiffs and therefore they were not entitled to rescind. Bancroft v. Woodward, 183 Cal. 99, 106, 190 P. 445. The defendants reply that action was based on alleged fraud. A complete answer is that the notice given by these defendants purported to rest on fraud. For that reason alone we think the distinction which the defendants attempted is insufficient. However there is another rule which we deem pertinent to the facts contained in this record. It will be noted that the deepening agreement was an independent agreement not going to the root of the head lease, the contract which the defendants now seek to forfeit. Under such circumstances the party's remedy is an action for damages. Walker v. Harbor Business Blocks Co., 181 Cal. 773, 780, 186 P. 356; III Elliot on Contracts, sec. 2046. Down to a date as late as December, 1936 the defendants collected their royalties. The defendants therefore waived plaintiffs' defaults, if any. Kern Sunset Oil Co. v. Good Roads Oil Co., 214 Cal. 435, 445, 6 P. 2d 71, 80 A.L.R. 453. Addressing themselves to this point counsel for defendants assert the defendants received payments from the Hancock Oil Company but not from the plaintiffs—because the plaintiffs had no agents. It is sufficient to state that the Hancock Oil Company bought all of the oil, and, by consent of all parties, paid defendants' royalties to their bankers who in turn paid the same to the defendants. Whether the Hancock Company acted as plaintiffs' agent, servant, or as a trustee, is not material.

[16, 17] The defendants contended they were overcharged for the costs incurred under the deepening agreement. The issue was tried with much care and a finding was made that the correct amount of said charges was $15,588.04 instead of $16,562.92, the amount shown on the statement sent Mrs. Taylor. But defendants

claim said amount was still excessive in the sum of $4,003.61. That claim is based solely on the fact that certain charges were entered for April, May, and June, 1929, and that the work was actually done between May 1 and June 7, 1929. They claim no charge should have been allowed for any date except the period last stated. But they introduced no evidence as to the specific factors of the charges made for both earlier and later dates. Non constat charges were made for labor performed and materials furnished to get ready to do the work. And, perhaps some later charges were made of invoices for labor and materials furnished during the performance of the work, but not billed until a later date. They did not call any officer or employee of the Rotary Oil Company, the company that had done the work, but, as stated above, they relied solely on the wording of the statement sent to Mrs. Taylor. Said statement of the costs was rendered to Mrs. Taylor October 10, 1933. She acknowleged receipt thereof October 19, 1933. Defendants' contention that they did not see it until September 22, 1936 is incorrect. The plaintiffs believed the statement correct and paid Rotary Oil Company their part of costs as shown by the statement. In September, 1936 defendants' attorney, in plaintiffs' office, objected to thirteen items. Mr. Izenour, treasurer for the plaintiffs, said he would examine into those items. On September 30, 1936 plaintiffs' attorney advised Mr. Taylor, defendants' attorney, that three of the items amounting to $781 would be stricken out and that was done. When, on April 22, 1937, the defendants filed their answer and cross-complaint they sought to surcharge the account. In their answer to the cross-complaint the plaintiffs denied any errors were contained in the account. On the trial the burden was on the defendants to prove their affirmative allegations of new matter. Vanderslice v. Matthews, 79 Cal. 273, 278, 21 P. 748. They failed to meet that burden.

All taxes for mineral rights and well taxes for the years 1934, 1935, and 1936, were with the full knowledge of the defendants paid by the plaintiffs. The trial court allowed $242.35 as a credit to the plaintiffs, that is, one-sixth of amount of the taxes so paid. Claiming the head lease was terminated January 9, 1934, the defendants assert the plaintiffs had no right to be reimbursed for said sum. But as we have shown above the head lease has not been terminated. Hence the assertion of the defendants falls.

[18] Prior to February 11, 1936, the parties discovered the confusion that had been created by the Bering contract, but that confusion was soon adjusted by a contract made on February 11, 1936 which was signed by Mrs. Taylor and Signal Oil Company. The defendants say that contract was not admitted in evidence. But it was pleaded by the plaintiffs and was not denied by defendants and therefore there was no need of introducing it in evidence. Knight v. Whitmore, 125 Cal. 198, 200, 57 P. 891.

The trial court in making findings set forth the alleged breaches. It also made a finding that the plaintiffs have faithfully performed their contract. The defendants point to those findings and assert they are contradictory. The assertion is without any foundation because, as we have shown above, the alleged breaches were not, in legal effect, breaches and the court so found.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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42 Cal.App.2d 308

FORMAN v. GOLDBERG et al.

Civ. 6379.

District Court of Appeal, Third District, California.

Jan. 6, 1941.

1. Trusts 🔑44(2), 110

In daughter's suit to declare a voluntary trust in property, conflicting evidence *held* to support judgment for daughter based on finding that property was transferred to father in trust for the benefit of daughter with agreement that property was to be restored on request and that such transfer was procured by means of fraud practiced by father.

2. Trusts 🔑110

Where a close bond of friendship existed between father and daughter, whose husband was about to die of cancer, and daughter, unaccustomed to business, transferred all her property to father, who was in real estate business, to be invested for daughter's benefit and restored on request, and after handling property for six years without an accounting father refused on demand to restore property except for a small sum, there was a "confidential relationship" between father and daughter and evidence established that transfer of property was procured by fraud.

See Words and Phrases, Permanent Edition, for all other definitions of "Confidential Relationship".

3. Deeds 🔑196(2)

The mere relationship of father and daughter is insufficient to raise a presumption that transfer of property by daughter to father was procured through father's fraud.

4. Trusts 🔑110

In daughter's suit to declare a voluntary trust in property transferred to father, where existence of confidential relationship between father and daughter was established and property was shown to have been transferred to father for daughter's benefit and by father invested and handled to his profit for six years without an accounting, burden shifted to father to show that transaction was fair and free from undue influence or fraud.

5. Trusts 🔑44(2)

In daughter's suit to declare a voluntary trust in property transferred to father, where transfer was made upon father's promise to restore property on request, the statutory requirements as to the intention of the parties to create a voluntary trust in the property, the purpose, and the acceptance of the trust were adequately fulfilled. Civ.Code, §§ 2221, 2222.

6. Trusts 🔑110

Where a transfer of property has been obtained through fraud, the transfer will be set aside at the instance of transferor, and the transferee may be deemed to hold title as "constructive trustee" for the transferor, and, where property has been sold by the transferee, transferor may recover the proceeds of sale or sue for the reasonable value of property so converted. Civ.Code, §§ 2223, 2224.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Trustee".

7. Trusts 🔑95

Where transfer of property by daughter to father for daughter's benefit was made upon father's promise to restore property upon demand, which promise father never intended to perform, the transfer created a "constructive trust", entitling daughter to recover the property or its value. Civ.Code, § 1572.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Trust".

8. Trusts 🔑109

In daughter's suit to declare a voluntary trust in property transferred to father for daughter's benefit, where it was alleged and proved that transfer was procured by father's false promise to invest property for benefit of daughter and restore property on demand, evidence of a parol agreement creating a constructive trust was admissible as part of the proof of fraud. Civ.Code, § 1572.

9. Limitation of actions 🔑103(2)
Trusts 🔑95

A constructive trust, which was created by daughter's transfer of property to father upon father's false promise to invest it for daughter's benefit and restore property on demand, was continuous in its nature so that daughter's action to declare a voluntary trust in property, commenced shortly after father's repudiation of trust by refusal to restore property, was not barred by limitation or "laches", notwithstanding that transfer had been made several years previously.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

10. Trial 🔑22

Where no request was made for appointment of interpreter for examination of defendants as witnesses, and defendants were examined at great length and responsiveness and intelligibility of their answers indicated their comprehension of questions asked, court did not err in failing to appoint an interpreter.

11. Evidence 🔑182

In daughter's suit to declare a voluntary trust in property transferred to father for daughter's benefit, photostatic copies of statements of daughter's bank accounts, offered to show daughter's ownership of money represented by trust deeds involved in the suit, in absence of preliminary proof of the genuineness of the bank statements from which the photostatic copies were made, were incompetent and should have been excluded.

12. Appeal and error ⚷1050(4)

In daughter's suit to declare a voluntary trust in property transferred to father for daughter's benefit, where daughter testified without objection as to ownership of money represented by trust deeds involved in suit and as to material items in statements of bank accounts, the admission of photostatic copies of the statements without proof of genuineness of the originals from which copies were made, and over objection that copies were not the "best evidence", was not reversible error.

See Words and Phrases, Permanent Edition, for all other definitions of "Best Evidence".

13. New trial ⚷104(1)

Newly discovered evidence, which is merely cumulative, affords no ground for a new trial unless the evidence is of such probative force that it would require the rendering of a different judgment.

14. New trial ⚷150(4)

Affidavits on motion for a new trial on the ground of newly discovered evidence are fatally defective unless facts are therein alleged showing due diligence to obtain the evidence for trial.

15. New trial ⚷104(1), 150(4)

Where affidavits in support of motion for new trial on ground of newly discovered evidence were defective in that new evidence sought to be elicited was merely cumulative as to material issues and no facts showing due diligence to procure evidence for trial were alleged, trial court did not abuse its discretion in denying a new trial.

16. New trial ⚷95

Where testimony of defendants at trial indicated that they understood and intelligently answered all questions propounded, trial court did not abuse its discretion in overruling defendants' motion for new trial on ground that their attorney was unable fairly to present their defense because of defendants' inability to understand or speak English, where same attorney had conducted trial throughout and defendants' knowledge or lack of knowledge of English must have been apparent from the beginning.

◆

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Suit by Dora Forman against Max Goldberg and others to declare a voluntary trust in property allegedly belonging to plaintiff. From a judgment for plaintiff, defendants appeal.

Affirmed.

Peter T. Rice and Sydney M. Williams, both of Los Angeles, for appellants.

Henry S. Cohen, of Los Angeles, for respondent.

THOMPSON, Justice.

The plaintiff brought this suit against her parents to declare a voluntary trust in property belonging to her. It was alleged and found that the defendant, Max Goldberg, obtained possession of the property by means of fraud; that he holds it in trust for his daughter and that he refused to account for or deliver the property to her. Judgment was rendered in favor of the plaintiff for the recovery of the property or the value thereof. From that judgment the defendants have appealed.

The defendants are husband and wife. The plaintiff is their daughter. She was married and has two children. Her husband died as the result of a cancer in April, 1930. After his death, she lived with her parents who reside in Los Angeles. A relationship of confidence and trust existed between the plaintiff and her parents. The plaintiff owned two trust deeds which were executed in her name. One of them secured a loan for $4,000 and the other was for the sum of $2,000. She also owned an automobile, a house and lot in Los Angeles, which was sold for $3,700, and an additional sum of money which is involved in this suit. She maintained a separate savings account in a New York bank, and she rented a safe deposit box in a Los Angeles bank jointly with her father, in which she kept her bank books, her trust deeds and other valuable documents and jewelry. Her father was engaged in the real estate business.

The plaintiff's husband was a painter and paperhanger. About a month before the husband's death, Max Goldberg persuaded his daughter to assign to him her two deeds of trust with the agreement that he would hold in trust and invest her property for her benefit and return it to her upon demand. The deeds were assigned March 21, 1930. At the same time their Willys Knight automobile was transferred to Mr. Goldberg pursuant to the same agreement. After the death of her husband, the plaintiff's house and lot at Number 315 North St. Louis street, Los Angeles, was sold by Mr. Goldberg at her request for $3,700, and the proceeds were also retained by him under the same agreement. The plaintiff received from the Painter's Union, to which her husband belonged, as life insurance on account of his death, the sum of $1,149.79, which, together with the further sum of $700 in cash, she entrusted to her father under the same agreement.

With respect to the creation of the voluntary trust in said property belonging to the plaintiff, she testified that her father said to her, just prior to the assignment of the trust deeds: "Dora, you are going to be left alone with two kids and you have got here this money and property, why don't you transfer it to me? I will take care of it; I am in the real estate business; I can handle it for you. * * * You know I will never take your money away; you can trust me; we will have to live together; and, furthermore, you don't know much about business transactions, and I will handle it; and any profit, you and your children will profit. * * * Let's go to the bank and we will take care of the transaction."

The plaintiff agreed to transfer to her father and to entrust him with her property under that agreement. It appears that a written document acknowledging the trust was executed by the defendant, Max Goldberg. The plaintiff testified in that regard:

"Q. Now, had your father * * * executed a written paper of some sort? A. Yes, he had.

"Q. Now when did he execute *this paper,* before you signed the mortgage, or after? A. After.

"Q. How long after? A. About two months; * * * He says: 'I am going to protect you and the children *with this bare paper* in case anything happens to me, it would be yours and nobody will be able to get it.'"

This document was placed in plaintiff's joint safe deposit box in the bank with other papers of value. Subsequently, Mr. Goldberg procured from the plaintiff her key to the box, and secured a separate safe deposit box, to which he transferred the documents, and to which the plaintiff did not have access. None of the money or property was ever returned to the plaintiff except the sum of $300. On Labor Day, 1936, the plaintiff demanded of her father the return of her money and property, which he refused.

This suit was commenced to establish in the defendants a voluntary trust of the money and property for the benefit of the plaintiff, which property, it was alleged, was procured by the defendant, Max Goldberg, by means of fraud and misrepresentation. No demurrer to the complaint was filed. The defendants denied the material allegations of the complaint and affirmatively alleged that the two trust deeds and the money secured thereby originally belonged to them, and that the instruments were merely executed in the name of the plaintiff as an accommodation to them during the time they were absent on a journey to Europe.

Findings were adopted favorable to the plaintiff on all material issues. The court determined that all of the money and property in question belongs to the plaintiff and that it was delivered to the defendant, Max Goldberg, as a voluntary trust for the benefit of the plaintiff, with an agreement to restore it to her upon request; that upon demand the defendants refused to restore the property, with the exception of the sum of $300, which was paid to her, and that the possession and control of the money and property were procured by means of fraud exercised by Max Goldberg. Judgment was rendered in favor of the plaintiff for the aggregate sum of the proceeds of the two trust deeds amounting to $6,000, and for the proceeds of the sale of the Los Angeles house and lot in the amount of $3,700, and for the life insurance benefits amounting to $1,149.79, together with $700 in addition thereto, less said sum of $300, which was subsequently paid to plaintiff. The court also directed the return of the Willys Knight automobile. Interest on said sums was also allowed plaintiff from the respective dates of the receipt thereof at the rate of 7 per cent per annum. From that judgment the defendants have appealed.

The appellants contend that the findings and judgment are not supported by the evidence; that this suit is barred by the statute of limitations; that the court erred in receiving testimony of the plaintiff's ownership of the money and property, and in failing to appoint an interpreter to translate the questions and answers of the defendants at the trial, who, it is asserted, possessed an inadequate knowledge of the English language.

It is also asserted the court erred in refusing to grant a new trial, for the reason that the affidavits, which were filed by the defendants on that motion, on the ground of newly-discovered evidence, were unanswered by the plaintiff.

[1-4] The findings and judgment are adequately supported by the evidence, in spite of a serious conflict of testimony. Under the circumstances of this case there is satisfactory evidence that a confidential relationship existed between the plaintiff and her father and that he procured by fraud the transfer of all her money and property to him in trust for her benefit. A close bond of friendship and confidence existed between them. Her husband was about to die as a result of a malignant cancer; she had two young children who were dependent upon her care; there was no monetary consideration for the property; she was unaccustomed to business, as her father significantly suggested to her; her father was engaged in the real estate business; after the death of Mr. Forman the plaintiff and her children were taken into the household of her parents; Max Goldberg transferred her bank books and valuable documents from a safe deposit bank box, in which she held joint tenancy, to one of his own to which she did not have access; for a period of six years he handled all her money and property without accounting to her for any portion of it and he refused to restore any of the property to her, except the sum of $300, claiming that it belonged to him. Under such circumstances the court is warranted in holding that a confidential relationship between the father and the daughter was established. Cooney v. Glynn, 157 Cal. 583, 108 P. 506; Lauricella v. Lauricella, 161 Cal. 61, 118 P. 430; Campbell v. Genshlea, 180 Cal. 213, 180 P. 336; Mead v. Mead, 41 Cal.App. 280, 182 P. 761; 20 Calif.Jur. 443, sec. 41; 13 Cal.Law Rev. 174. It is true that the mere relationship of father and daughter is insufficient evidence upon which to raise the presumption of a fraudulent transfer. Best v. Paul, 101 Cal.App. 497, 281 P. 1089. But, under the affirmative evidence adduced of fraud and unjust profit secured by the defendants in the present case, the burden shifts to them to show that the transaction was fair and free from undue influence or fraud. Campbell v. Genshlea, supra, 180 Cal. at page 224, 180 P. 336; Johnson v. Clark, 7 Cal.2d 529, 61 P.2d 767.

[5] The requirements of sections 2221 and 2222 of the Civil Code, to show the intention of the parties to create a voluntary trust in the property transferred, the subject-matter of the transaction, the purpose, and the acceptance of the trust, were adequately fulfilled by the evidence which was adduced in this case.

Section 2224 of the Civil Code provides that: "One who gains a thing by fraud, accident, mistake, *undue influence, the violation of a trust, or other wrongful act,* is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

Section 2223 of the same code provides that: "One who *wrongfully detains a thing* is an involuntary trustee thereof, for the benefit of the owner."

[6] Where a transfer of property has been obtained through fraud, actual or constructive, it will be set aside at the instance of the grantor, and the grantee may be deemed to hold title as constructive trustee for the grantor. If the property has been sold by the grantee, the grantor may recover the proceeds of the sale, or the grantor may sue for the reasonable value of property so converted. Johnson v. Clark, supra. The same principle applies to a trust in personal property.

[7, 8] The evidence in this case amply supports the findings of the court that the plaintiff's money and property were procured by the defendant Max Goldberg by means of false and fraudulent representations, and that his agreement to hold them and invest the proceeds for the benefit of the plaintiff, to be restored to her upon demand, was made with the intention not to perform that promise, and that the transaction therefore created a constructive trust entitling her to recover the property or the value thereof. Brison v. Brison, 75 Cal. 525, 17 P. 689, 7 Am.St.Rep. 189; Lauricella v. Lauricella, 161 Cal. 61, 118 P. 430; Sec. 1572, Civil Code; 65 C.J. 254, sec. 37; Witkin's Summary of Calif. Law, 5th ed. 750. Evidence of a parol

agreement creating a constructive trust is competent under the pleadings and circumstances of this case. Brison v. Brison, supra, 75 Cal. at page 533, 17 P. 689, 7 Am.St.Rep. 189.

[9] Neither the statute of limitations nor laches barred the maintenance of this action. Cooney v. Glynn, supra, 157 Cal. at page 589, 108 P. 506. The constructive trust was continuous in its nature. The fraudulent intention of Max Goldberg to retain the property as his own was not discovered by the plaintiff until he repudiated the trust shortly before the commencement of this action.

[10] The court did not err in failing to appoint an interpreter for the examination of the defendants as witnesses at the trial. No request for the appointment of an interpreter was made. Both defendants were examined at great length. They appear to have thoroughly understood all questions propounded to them and their answers were invariably responsive and intelligible. We are pointed to no evidence indicating that either of them failed to comprehend the full import of all questions propounded to them. There is no merit in the claim that the court erred in failing to appoint an interpreter for the testimony of the defendants.

Two photostatic copies of statements of the bank accounts of plaintiff were received in evidence over the objection of the defendants. Before the copies were offered in evidence, the plaintiff was very fully examined without objection, by reference to these statements with respect to the bank accounts and various items included therein.

[11, 12] Finally, when they were offered in evidence, the defendants objected to them on the ground that they were not the best evidence. The objection was overruled, and they were received in evidence. The statements were referred to in the oral examination and offered in evidence to show that plaintiff was the owner of the money which was represented by the two trust deeds which are involved in this suit. In the absence of preliminary proof of the genuineness of the bank statements, from which the photostatic copies were made, they were incompetent and should have been excluded from the evidence. But the ruling was harmless. The evidence supplied by the copies was merely cumulative. The plaintiff had previously testified fully, without objection, regarding the ownership of the money and the material items of the bank account. The ruling admitting the copies in evidence was not reversible error.

[13-16] The trial court did not abuse its discretion in denying defendants' motion for a new trial, which was based on alleged newly-discovered evidence and the failure of the defendants' attorney to thoroughly understand his clients on account of their inability to speak the English language. The affidavits in support of the motion for new trial are inadequate in many respects. Upon the chief issue regarding the ownership of the property in question much of the evidence sought to be elicited is merely cumulative. The defendants positively swore at the trial that they owned the money and property. Newly-discovered evidence, which is merely cumulative, affords no ground for a new trial unless it is of such probative force that it would require the rendering of a different judgment. Sawyer v. Nelson, 115 Cal.App. 490, 495, 1 P.2d 1068; 1 Hayne on New Trial and Appeal, p. 417, sec. 90; 20 Calif.Jur. 94, sec. 62. The affidavits which were filed in this case fail to allege facts showing that the additional evidence could not have been obtained at the trial by the exercise of due diligence. Affidavits on motion for a new trial on the ground of newly-discovered evidence are fatally defective when they fail to allege facts constituting due diligence. 20 Calif.Jur. 184, sec. 120. The affidavits of Jacob and Ida Weinstock to the effect that they conveyed to Max Goldberg, November 11, 1926, a house and lot at number "225 North St. Louis Street" in Los Angeles, apparently have no bearing on the title to the Los Angeles house and lot claimed by the plaintiff. The court definitely found that the house and lot in Los Angeles belonging to plaintiff was "located at 315 North St. Louis Street". The affidavit of the defendants' attorney that he was unable to fairly present their defense to this suit, because of their inability to understand or speak the English language is without merit. That affiant conducted the trial in behalf of his clients throughout the case, and must have been fully informed of their knowledge or lack of knowledge of the English language from the beginning of his employment. Moreover, the testimony of the defendants at the trial indicates that they clearly un-

derstood and intelligently answered all questions propounded to them.

We conclude that the court did not err in denying the motion for new trial.

The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

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42 Cal.App.2d 144

BAUMAN v. CITY AND COUNTY OF SAN FRANCISCO.

Civ. 11166.

District Court of Appeal, First District, Division 1, California.

Dec. 30, 1940.

1. Municipal corporations 🔑851

The liability of city under the Public Liability Act for injuries sustained by child on a public playground must be predicated on a showing that playground was dangerous or defective. Gen.Laws 1937, Act 5619, § 2.

2. Municipal corporations 🔑857

In action against city under the Public Liability Act for injuries sustained by child on a public playground, plaintiff must establish that there was in fact a dangerous or defective condition, that injuries of child resulted from that condition, that board, officer or person having authority to remedy the condition had notice or knowledge thereof, and that after acquiring such notice or knowledge, the board, officer or person failed, within a reasonable time thereafter, to remedy the condition, or failed, within reasonable time, to take such action as might be reasonably necessary to protect the public. Gen.Laws 1937, Act 5619, § 2.

3. Municipal corporations 🔑851

The "dangerous or defective condition" of a playground for which a city may become liable under the Public Liability Act is not fixed by hard and fast rule, but each case must depend upon its own state of facts. Gen.Laws 1937, Act 5619, § 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Dangerous or Defective Condition".

4. Municipal corporations 🔑857

Generally, whether a given set of facts or circumstances creates a "dangerous or defective condition" of a playground for which a city may become liable under the Public Liability Act is for the jury. Gen. Laws 1937, Act 5619, § 2.

5. Municipal corporations 🔑857

In action against city for injuries sustained by five year old girl when struck by baseball while playing in public playground, evidence that playing of hard baseball was permitted in dangerous proximity to sandbox used by small children, that no barrier was maintained for protection of such children, and that small children were not kept away from sandbox while hard baseball was being played nearby, warranted finding that playground was in a "dangerous or defective condition" within the Public Liability Act. Gen.Laws 1937, Act 5619, § 2.

6. Municipal corporations 🔑847

A "dangerous or defective condition" can be created by the use or general plan of operation of government operated property, as well as by structural defect. Gen. Laws 1937, Act 5619, § 2.

7. Municipal corporations 🔑857

The very fact that five year old girl was injured while playing in sandbox in public playground operated by city, and while using the playground in the usual and ordinary way, was evidence that a "dangerous and defective condition" within the Public Liability Act existed. Gen.Laws 1937, Act 5619, § 2.

8. Negligence 🔑62(1, 3)

An intervening negligent act of a third person may break the chain of causation, but where there are two separate acts of negligence, whether the second act breaks the chain of causation, or whether it simply becomes a concurring act with the first, is a question of proximate cause.

9. Negligence 🔑136(25)

The question of proximate cause is primarily for the jury.

10. Negligence 🔑61(2)

The negligence of one who is sued for injury need not be the sole cause of the injury, and if it is one of the proximate causes, the mere fact that such negligence concurs with that of an independent actor does not break the chain of causation.

11. Municipal corporations 🔑854

A city may be liable under the Public Liability Act for injury resulting from dangerous or defective condition created by the city if the negligence of the city is a proximate cause of the injury, though the negligence of a third person concurs with that of the city. Gen.Laws 1937, Act 5619, § 2.

12. Municipal corporations 🔑857

In action against city for injuries sustained by five year old girl who, while playing in sandbox in public playground, was struck by baseball, evidence sustained implied finding that dangerous or defective condition of playground was a proximate cause of the injury so as to preclude avoidance of liability under the Public Liability Act, notwithstanding concurring negligence of WPA instructor who furnished his own baseballs and bats, and who upon request allegedly refused to move field of play to another portion of the grounds. Gen.Laws 1937, Act 5619, § 2.

13. Municipal corporations 🔑753(1)

Director charged with supervision of public playground maintained by city had power and duty to control boys playing on playground so as to avoid injury to small children. Gen.Laws 1937, Act 5619, § 2.

14. Municipal corporations 🔑851

Notice to mere employee of dangerous or defective condition of playground operated by city would not charge city with notice as basis for imposing liability against city under Public Liability Act. Gen.Laws 1937, Act 5619, § 2.

15. Municipal corporations 🔑857

In action against city for injuries sustained by five year old girl who, while playing in sandbox in public playground, was struck by baseball, evidence that playground had been furnished with hard baseball equipment, that hard baseball had been played on portion of ground for many years, that on one prior occasion a woman had been hit by a hard baseball, and that on another occasion a baby buggy had been hit, sustained implied finding that those having authority to remedy the dangerous or defective condition had notice thereof. Gen.Laws 1937, Act 5619, § 2.

16. Municipal corporations 🔑747(2)

The superintendent and assistant superintendent of recreation commission and directors in direct supervision of public playgrounds were not mere "employees" of city, but were persons having authority to remedy dangerous and defective condition of the playground within Public Liability Act. Gen.Laws 1937, Act 5619, § 2.

17. Municipal corporations 🔑847

Constructive notice of a dangerous or defective condition as basis for imposing liability under the Public Liability Act is sufficient, and such constructive notice may be shown by long-continued existence of dangerous or defective condition. Gen. Laws 1937, Act 5619, § 2.

18. Municipal corporations 🔑857

In action against city for injuries sustained by five year old girl who, while playing in sandbox in playground, was struck by baseball, whether dangerous and defective condition of playground had existed for sufficient time to give constructive notice to those having authority to remedy such condition was for the jury. Gen.Laws 1937, Act 5619, § 2.

19. Municipal corporations 🔑857

In action against city for injuries sustained by five year old girl who. while playing in sandbox in public playground, was struck by baseball, evidence that for several years after superintendent and assistant superintendent of recreation commission had acquired knowledge that hard baseball was being played on grounds, no steps, except verbal orders which they knew were being violated, were taken to protect small children, warranted finding that those having authority to remedy dangerous or defective condition of playground had failed for an unreasonable length of time to remedy the situation. Gen.Laws 1937, Act 5619, § 2.

20. Municipal corporations 🔑857

In action against city for injuries sustained by five year old girl who, while playing in sandbox in public playground, was struck by baseball, evidence that after the accident the recreation commission prohibited playing of baseball with hard ball equipment at the playground was properly rejected. Gen.Laws 1937, Act 5619, § 2.

21. Municipal corporations 🔑851

Cause of action against city under the Public Liability Act for injuries sustained by child on public playground was predicated on negligence. Gen.Laws 1937, Act 5619, § 2.

22. Municipal corporations 🔑745½

A city is not generally liable for the general negligence of its employees while they are acting in a governmental capacity, but the city is liable if that negligence comes within the Public Liability Act. Gen.Laws 1937, Act 5619, § 2.

23. Trial 🔑296(3)

In action against city for injuries sustained by child on public playground, where jury was fully, completely, and correctly instructed on elements necessary to prove a cause of action under the Public Liability Act, giving of instructions defining negligence and ordinary and reasonable care was not prejudicial. Gen.Laws 1937, Act 5619, § 2.

24. Trial 🔑295(1)

Where charge when read as a whole was full, fair, and complete although some of the instructions were not as clear as might be desired, and although several offered instructions might well have been given, giving of instructions which were allegedly contradictory and improper was not prejudicial.

25. New trial 🔑75(1)

Inadequacy of damages may constitute a ground for granting a new trial under statute specifying as a possible ground the insufficiency of the evidence to justify the verdict. Code Civ.Proc. § 657.

26. Appeal and error 🔑901, 933(1)

On appeal from order granting motion for new trial, presumption is in favor of the order, and burden is on appellant to affirmatively show that the order is erroneous. Code Civ.Proc. §§ 657, 659.

27. New trial 🔑6

The granting or denying of motion for new trial is largely in discretion of trial judge. Code Civ.Proc. §§ 657, 659.

28. Appeal and error 🔑979(2)

The granting of new trial for insufficiency of the evidence will not be disturbed unless there is a gross, manifest, and unmistakable abuse of discretion. Code Civ. Proc. §§ 657, 659.

29. New trial 🔑9, 75(4)

Evidence that child suffered a badly fractured skull, that after injury child was unable to talk and had paresis of the right side, that portions of skull were so shattered that they could not be replaced, that at time of trial child still suffered from headaches, that her co-ordination had been affected and that she perspired a great deal, warranted granting of new trial on issue of damages only, for inadequacy of $1,500 verdict. Code Civ.Proc. § 657.

30. New trial 🔑9

In action against city for injuries sustained by five year old girl who, while playing on public playground, was struck by baseball, issue of liability was clearly severable from issue as to amount of damage, so as to warrant granting new trial on issue of damages alone. Code Civ.Proc. § 657.

31. Damages 🔑43

Generally, where an injured child is living with and is being supported by its parents, they are primarily responsible for the child's care and maintenance, and cause of action to recover such expenses rests with them rather than with the child, but under some circumstances the child may recover such items of expense.

32. Damages 🔑46

The parents of a minor are normally responsible for the medical and hospital care furnished the minor, and cause of action to recover such items normally rests with the parents, but the child is also liable for the reasonable value of such expenses, as regards question of child's right to recover them.

33. Damages 🔑43

Where action for injuries to minor is brought by parents as guardians ad litem and bills for medical and hospital care have not been paid, but are pleaded, the right of the parents to recover such expenses is "waived," and the minor may properly recover them, at least where contributory negligence of the parents is not asserted as a defense.

See Words and Phrases, Permanent Edition, for all other definitions of "Waived".

34. Damages 🔑46

In action by child through her parents as her guardians ad litem to recover for injuries, where hospital and doctor bills were made out to minor, and hospital bill had been paid, although the doctor bills were unpaid at time of trial, and plaintiff pleaded such items as special damages, child was entitled to recover the unpaid doctor bills.

35. Damages 🔑185(1)

A recovery for future consequences of injury may not be had unless the evidence shows with reasonable certainty that such consequences will follow.

36. Damages ⚿166(2)

Physician's testimony regarding future consequences of injury was not inadmissible because standing alone the testimony would not support an award of damages for future consequences and because physician refused to state that possible epileptic seizures were reasonably certain to occur, since the ultimate fact to be determined by jury was whether it was reasonably certain that the consequences would result, and any evidence reasonably tending in an appreciable degree to prove that fact was admissible.

◆

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Action by Eleanor Bauman, through her parents as her guardian ad litem, against the City and County of San Francisco, for injuries sustained on public playground. From a judgment for plaintiff, and from an order granting plaintiff's motion for new trial on issue of damages alone, defendant appeals.

Affirmed.

John J. O'Toole, City Atty., and Henry Heidelberg and Edmond P. Bergerot, Deputy City Attys., all of San Francisco, for appellant.

Moser, Duncan, Seaman, Jackson & Gardiser, of San Francisco, J. G. Moser, of Hollywood, and A. Don Duncan, of San Francisco, for respondent.

PETERS, Presiding Justice.

Defendant, City and County of San Francisco, appeals from a judgment in favor of plaintiff, and from an order granting plaintiff's motion for a new trial upon the issue of damages alone. The cause has been submitted upon the appellant's opening brief, together with some supplemental authorities, and upon respondent's brief. Appellant has not filed a reply brief, so that many contentions made by respondent in her brief remain unanswered.

The action is one for personal injuries brought by Eleanor Bauman through her parents as her guardians ad litem. Eleanor was five years old at the time she was injured. Liability is sought to be imposed upon the defendant city and county under the terms of section 2 of the Public Liability Act (Deering's General Laws, 1937, vol. 2, Act 5619), which reads as follows: "Counties, municipalities and school districts shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways, buildings, grounds, works and property in all cases where the governing or managing board of such county, municipality, school district, or other board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such street, highway, building, grounds, works or property and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition."

The facts surrounding the accident are not materially in dispute. The accident occurred on May 10, 1938. On that date appellant owned and was operating a public playground called the Visitacion Valley Playground. This playground was one of the smaller playgrounds operated by appellant, being two hundred and eleven feet from east to west, and three hundred and sixty-eight feet from north to south. In the northeast corner of the playground was a small frame building used as an office by the two directors in charge, to store playground equipment, and for the playing of inside games. Running along the northerly end of the playground was a section constructed and intended for the use of small children. It contained a sand box, which had a low wooden railing around it two inches high, slides, teeter-totters, and swings. The balance of the playground was in lawn. There was no wire netting or other protection of any kind between the sand box and other equipment, and the balance of the playground.

On May 10, 1938, at about three o'clock in the afternoon, Mrs. Bauman took Eleanor and her younger sister to the playground. She left the two children playing in the sand box. Some time later, some boys began to play baseball with a hard ball in close proximity to the sand box. During the game, shortly after four o'clock, one of the fourteen-year-old boys hit a line drive outside the foul line. The ball hit Eleanor in the head, fracturing her skull.

The playground in question was under the control of the recreation commission, an appointive nonsalaried board. The active salaried head of the department is the superintendent, who, at the time of the accident, was Josephine Randall. She had a large staff of assistants to whom various administrative matters were delegated. Raymond Kimball was assistant superintendent, whose duty it was to check the activities of the various playgrounds. To do this properly he personally visited each of the playgrounds about once a month. In addition, the commission, through its superintendent and assistant superintendent, supervised the playgrounds including the one here involved, through directors employed by the commission and placed in charge of individual playgrounds. On May 10, 1938, the Visitacion Valley Playground was under the joint supervision of directors Rita McLaughlin and Garland Hoffman.

This playground had been constructed in 1933. Shortly thereafter, hard ball equipment had been furnished by the recreation commission for use at that field. However, the evidence of the appellant shows that oral instructions had been delivered by the supervising officers to various directors in charge of this playground that only small boys should play baseball on this field; that baseball should be restricted to bunting, running and infield play only; that all baseball play should be confined to the south end of the field to prevent a batted or thrown ball from reaching the small children's section; that no competitive hard baseball games should be played on this field. Mr. Hoffman, one of the directors in charge of the field on May 10, 1938, had been working at that field only about a week before the accident. He testified he had received no specific instructions about the Visitacion Valley Playground, concerning the playing of baseball thereon. It was stipulated that had the superintendent of the recreation commission, Josephine Randall, been called as a witness (she being ill at the time of trial) she would have testified that she had notice or knowledge that upon various occasions the above rules had been violated. The assistant superintendent, Raymond Kimball, admitted that prior to the accident he saw the boys using a hard baseball at the playground, and saw baseball bats in the hands of the boys. There is ample evidence in the record to show that, almost from the opening of the playground in 1933 until the time of the accident, hard ball was played at the playground; that the directors in charge knew of this fact and took no steps to prevent it; that hard ball was played at the north end of the playground, and that the directors in charge knew this fact; that Mr. Hoffman and Miss McLaughlin had been standing around while they played hard baseball at the north end of the field; that hard ball had been played at the north end of the field to such an extent that where home plate was customarily located there was a bare patch in the lawn; that the boys chose up sides and played competitive baseball with a hard ball nearly every night after practice; that no one, including the directors, had ever prevented them from playing with a hard ball at the north end of the playground; that on at least three prior occasions hard balls had been hit into the small children's section; that on one occasion the ball had narrowly missed a small child; that on another occasion an adult witness had been hit on the leg by a hard ball while sitting with her baby in the children's section. This last witnesses testified she told the director then in charge of the accident and on other occasions complained to the director about hard ball being played in close proximity to the children's section; but that the director did not stop the boys from playing hard ball near the swings and sand box but allowed them to continue to play there. Another adult witness testified that she visited the playground with her small child frequently between 1936 and 1938; that she observed the boys playing hard baseball every day near the swings and sand box; that on many occasions the ball was hit in her direction, and that on one occasion the baby buggy was hit by a hard ball; that she made complaints to those in charge, but, while the directors told the boys to be a little more careful or to move down the playground a little way, that the boys never stopped playing and that the directors never stopped the boys from playing baseball at the north end. Miss McLaughlin, one of the directors in charge of the playground on May 10, 1938, testified that while normally hard ball was limited to the south end of the field, that when that end of the field was wet the youngsters played hard ball at the north end.

The evidence also shows that on May 10, 1938, a class in the fundamentals of baseball was being held on the playground by one "Spike" Hennessy, a WPA worker, who had been sent by the recreation department to teach the youngsters the fundamentals of baseball. The class had been advertised in advance, and on that day about forty boys received instruction, although but seventeen or eighteen, just about enough to make up two teams, were playing at the time of the accident. Mr. Hennessy had brought his own equipment—bats, balls and gloves—but the bases were playground equipment secured from the supervisor's house. At the time of the accident Miss McLaughlin was inside the supervisor's house in charge of indoor games. Mr. Hoffman testified that he was on the playground. It should be here added that at least two of the boys then playing testified that they first saw Mr. Hoffman coming from the supervisor's house after the accident. This would seem to cast some doubt on the testimony of Hoffman. He testified that he observed the playing with the hard ball in close proximity to the small children's section; that he discussed the matter with "Spike" Hennessy, and that Hennessy told him he could not take his boys down to the lower end of the field because it was wet. Hoffman did not order Hennessy or the boys to desist, or to change their location, but, realizing the danger, started to patrol the small children's section, and ordered the children playing there to go into the supervisor's house to play. He testified that he walked up and down in front of the section at least five times, but at no time did he observe Eleanor playing in the sand box. According to this testimony, he did keep some other small children off the swings, but did not see Eleanor in the sand box.

The appellant urges that the accident occurred either through the negligent act of a WPA worker or of one of appellant's employees; that in either event it is not liable under the Public Liability Act; that the playground was not inherently dangerous or defective; that it had no notice of any inherently dangerous or defective condition, or, if it did, that such condition was not the proximate cause of the injury.

[1, 2] There can be no doubt that, under the terms of the Public Liability Act, the liability of the appellant if any, must be predicated upon a showing that the playground was dangerous or defective. The elements that must be established by the plaintiff in such an action are well-settled. They are:

(1) That there was in fact a dangerous or defective condition; (2) that the injuries to the plaintiff resulted from that condition; (3) that the board, officer, or person having authority to remedy the condition had notice or knowledge thereof; (4) that, after acquiring such notice or knowledge, such board, officer or person failed, within a reasonable time thereafter, to remedy the condition, or failed, within a reasonable time, to take such action as might be reasonably necessary to protect the public against the dangerous or defective condition. Arellano v. City of Burbank, 13 Cal.2d 248, 89 P.2d 113; Bosqui v. City of San Bernardino, 2 Cal.2d 747, 43 P.2d 547; Nicholson v. City of Los Angeles, 5 Cal.2d 361, 54 P.2d 725; 9 Cal. Jur., 10 Year Supp., p. 627, sec. 180.

[3, 4] The first and basic element is that the playground was in fact dangerous or defective. It has frequently been stated that no hard and fast rule can be laid down as to what constitutes a dangerous or defective condition, but that each case must depend upon its own state of facts. Sandstoe v. Atchison, T. & S. F. Ry. Co., 28 Cal.App.2d 215, 82 P.2d 216; Rafferty v. City of Marysville, 207 Cal. 657, 280 P. 118; Hook v. City of Sacramento, 118 Cal.App. 547, 5 P.2d 643; Arellano v. City of Burbank, supra; George v. City of Los Angeles, 11 Cal.2d 303, 79 P.2d 723. It is also well-settled that as a general rule it is a question of fact for the jury to determine whether a given set of facts or circumstances creates a dangerous or defective condition. Sandstoe v. Atchison, T. & S. F. Ry. Co., supra; Norton v. City of Pomona, 5 Cal.2d 54, 53 P.2d 952; Barrett v. Southern Pac. Co., 207 Cal. 154, 277 P. 481; Gerberich v. Southern Calif. Edison Co., 5 Cal.2d 46, 53 P.2d 948.

[5-7] Applying these rules to the facts of the instant case, it is clear that this court cannot hold as a matter of law that the implied finding that the playground was dangerous or defective does not find substantial support in the record. The jury was justified in finding that the playground was dangerous and defective for any of the following reasons: That the playground was rendered dangerous or defective by the negligence of appellant in permitting the playing of hard baseball in dangerous proximity to the sand box; that under the circumstances here existing it was the duty of appellant, if hard baseball was to be permitted to be played in the north end of the field, to erect some barrier for the

protection of those playing in the small children's section; or the appellant negligently failed to properly supervise the playground by either failing to prevent the boys from playing hard baseball in dangerous proximity to the small children's section or in negligently failing to keep the small children away from the sand box while hard baseball was being played nearby. There can be no doubt that a dangerous or defective condition can be created by the use or general plan of operation of government operated property, as well as by a structural defect. Huff v. Compton City Grammar School Dist., 92 Cal.App. 44, 267 P. 918. The very fact that plaintiff was injured while playing in the sand box, and while using the playground in the usual and ordinary way, is some evidence that a dangerous and defective condition existed. Hook v. City of Sacramento, 118 Cal.App. 547, 5 P.2d 643; Adams v. Southern Pacific Co., 4 Cal.2d 731, 53 P.2d 121. Under such circumstances it seems clear that the implied finding of the jury that the playground was in a dangerous or defective condition within the meaning of the Public Liability Act finds ample support in the record.

[8-12] Appellant argues, however, that admitting the existence of a dangerous or defective condition, such condition was not the proximate cause of the accident. This argument is predicated upon the contention that the evidence shows that the accident happened through the negligence of "Spike" Hennessy, a WPA worker, who was using hard ball equipment in a prohibited fashion and in a prohibited part of the playground. This contention is largely based on the testimony of director Hoffman, called as a witness by the plaintiff, that he requested Hennessy to move to the south end of the field, but that Hennessy demurred on the ground that the field was wet and the testimony that Hennessy furnished his own baseballs and bats. Appellant cites many cases to the effect that an intervening negligent act of a third person may break the chain of causation. That is undoubtedly the law. However, when there are two separate acts of negligence, the question as to whether the second act breaks the chain of causation, or whether it simply becomes a concurring act with the first, is simply a question of proximate cause. The cases are legion that the question of proximate cause is primarily one of fact for the jury. The negligence of the defendant need not be the sole cause of the injury—as long as it is one of the proximate causes, the mere fact that such negligence concurs with that of an independent actor does not break the chain of causation. Newman v. Steuernagel, 132 Cal.App. 417, 22 P.2d 780; Hartford v. Pacific Motor T. Co., 16 Cal.App.2d 378, 60 P.2d 476; Gerberich v. Southern Calif. Edison Co., 5 Cal.2d 46, 53 P.2d 948. That this doctrine applies where the negligent act of a third person concurs with a dangerous or defective condition created by a city in causing an injury, so as to impose liability on the city under the Public Liability Act, was expressly held in Bosqui v. City of San Bernardino, 2 Cal.2d 747, 43 P.2d 547. In that case the Supreme Court stated at page 764 of 2 Cal.2d at page 554 of 43 P.2d: "The defendant city suggests that the Public Liability Act does not apply where the defective condition of the street or highway concurs with some other efficient cause or act of a third person to cause the injury. It is urged that a strict construction of the statute leads to this conclusion. The question is apparently new in this state. A few decisions from other jurisdictions support this view. See Grenier v. Town of Glastonbury, 118 Conn. 477, 173 A. 160. Other courts hold the city liable in such a case. See Beebe v. Scotts Bluff County, 92 Neb. 501, 138 N.W. 737; David, Municipal Liability in Tort in California 7 So.Cal.L.Rev. 372, 440. In our opinion, where the thing exists which is denounced by the statute, namely, the neglect to remedy a dangerous or defective condition after knowledge thereof, and it proximately causes the injury, the city is liable under the clear meaning of the law despite the existence of another and concurring cause."

When these rules are applied to the facts here involved there can be little doubt that the implied finding of the jury that the negligence of the city was one of the proximate causes of the injury is amply sustained.

[13] The testimony of some of the boys who were engaged in the game contradicts that of Hoffman in regard to whether he asked Hennessy to move. They testified they did not see Hoffman

on the field or around the small children's section until after the accident, and then observed him coming from the supervisor's house. Moreover, the evidence of Kimball and Hoffman and others is to the effect that Hoffman and Miss McLaughlin were then in charge of all activities on the playground. It is a fair inference from the evidence that these directors had the right to control the activities of Hennessy while he was on the playground. At any rate, there is no doubt that it was within the power and it was the duty of Hoffman to control the boys playing on the playground. Hoffman did not order the boys to go to the south end of the field nor did he order the boys to stop playing at the north end of the field. The evidence is overwhelming that playing with a hard ball at the north end of the field was a common practice, well-known to the directors in charge.

[14, 15] There can be little doubt but that the implied finding of the jury that the third element necessary to fasten liability on the appellant—that the board, officer, or person having authority to remedy the dangerous or defective condition had knowledge or notice thereof—finds ample support in the record. It is settled that notice to a mere employee is not sufficient. Watson v. City of Alameda, 219 Cal. 331, 26 P.2d 286; Sinclair v. City of Pasadena, 21 Cal.App.2d 720, 70 P.2d 241. But that is not the status of Hoffman and Miss McLaughlin. They were not mere employees of the recreation commission. The evidence shows that the city operates about ninety playgrounds under the control of a nonsalaried board known as the recreation commission; that the active head of the commission is the superintendent; that she properly delegated many matters of administration to others; that the superintendent and assistant superintendent supervised the playground here in question through directors employed by the commission and placed in charge of that playground. Although evidence was introduced that the superintendent had orally promulgated rules forbidding hard baseball games at this playground (except bunting, base running, etc.) it was stipulated that had Miss Randall, the superintendent, been called as a witness she would testify that she had notice that the rules had been violated. Moreover, Hoffman was given no instructions at all concerning the playing of hard baseball at this playground. It was admitted that the recreation commission had sent hard baseball equipment to that field as early as 1935. The assistant superintendent testified that the director in charge is "in complete charge of this ground from the time that it is opened until it closes and everything that goes on in that ground". There is considerable evidence that hard baseball had been played at the north end of the field for many years, and that the directors in charge knew it, and made no effort to prevent it. As already pointed out, on one prior occasion a woman had been hit with a hard baseball while sitting in the children's section, and, on another, a baby buggy had been hit. On both occasions the mothers had complained to the directors. Kimball, the assistant superintendent, testified that he had observed the boys playing hard baseball at the field. Miss McLaughlin testified that she had observed the boys playing hard baseball at the north end of the field on several occasions.

[16-18] Under these circumstances it cannot be doubted that a "person having authority to remedy such" dangerous and defective condition, as required by the Public Liability Act, supra, had actual notice. The superintendent and assistant superintendent of the commission, and the directors were not mere employees. Huff v. Compton City Grammar School Dist., 92 Cal.App. 44, 267 P. 918; Hook v. City of Sacramento, 118 Cal.App. 547, 5 P.2d 643; Wise v. City of Los Angeles, 9 Cal.App.2d 364, 49 P.2d 1122, 50 P.2d 1079. Even were this not so, it is well-settled that constructive notice is sufficient under this act, and that constructive notice can be shown by the long-continued existence of the dangerous or defective condition. Edwards v. City of San Diego, 126 Cal.App. 1, 2, 14 P.2d 119; Bridge v. Board of Education, 2 Cal.App.2d 398, 38 P.2d 199. It is a question of fact for the jury to determine whether the condition complained of has existed for sufficient time to give the public agency constructive notice. Edwards v. City of San Diego, supra; Wise v. City of Los Angeles, supra; Cressey v. City of Los Angeles, 10 Cal.App.2d 745, 53 P.2d 172; Hook v. City of Sacramento, supra.

[19, 20] The other element of respondent's cause of action—that those in charge of the playground having authority to remedy the dangerous or defective condition and having notice thereof failed for an unreasonable length of time to remedy

the situation or to take such action as was reasonably necessary to protect the respondent against such condition—is amply shown by the evidence. For several years after the superintendent and assistant superintendent and the directors had knowledge as to how the field was being operated, no steps, except verbal orders which they knew were being violated, were taken to protect the small children. Appellant complains of the refusal of the court to admit in evidence testimony to the effect that after the accident the commission prohibited the playing of baseball with hard ball equipment at the playground. Evidence of precautions taken after the accident is not admissible. Meyer v. San Francisco, 9 Cal.App.2d 361, 49 P.2d 893. Certainly, evidence that precautions were taken after the accident in no way shows that the appellant was not negligent in not taking precautions before the accident, after it had knowledge of the dangerous or defective condition. The proffered testimony in fact demonstrates to a certainty the obvious precaution that should have been taken before the accident after the appellant had notice of the defective condition.

[21-23] Appellant complains of several of the instructions given and several offered by it that were refused. Particular complaint is made of several instructions dealing with the subject of the liability of the municipality for negligence. There can be no doubt that the cause of action created by the Public Liability Act is one predicated upon negligence. While it is true that the municipality is not generally liable for the general negligence of its employees while acting in a governmental capacity, when that negligence comes within the provisions of the Public Liability Act the city is liable. George v. City of Los Angeles, 11 Cal.2d 303, 79 P.2d 723; Whiteford v. Yuba City Union H. S. Dist., 117 Cal.App. 462, 4 P.2d 266; Sandstoe v. Atchison, T. & S. F. Ry. Co., 28 Cal.App.2d 215, 82 P.2d 216. While an unqualified instruction that the city is liable for the general negligence of its employees would clearly be error, that is not the situation here presented. In the instant case the jury was fully, completely and correctly instructed on the elements necessary to prove a cause of action under the Public Liability Act, supra. Under such circumstances no prejudice resulted from two instructions, one defining negligence and the other defining ordinary and reasonable care. In Arellano v. City of Burbank, 13 Cal.2d 248, 89 P.2d 113, and Huff v. Compton City Grammar School Dist., 92 Cal.App. 44, 267 P. 918, similar instructions were given and it was held not to constitute reversible error.

[24] Other instructions are complained of as being contradictory and others as improper. We have read the entire charge. Although some of the instructions are not as clear as might be desired, while several others offered by appellant might well have been given, the charge, when read as a whole, was full, fair and complete. We find no prejudicial error in the instructions.

The only other contention of appellant is that the trial court abused its discretion in granting respondent's motion for a new trial, and in limiting the same to the question of damages alone. The respondent's motion, among other things, specified, as one of the grounds for the motion, "Inadequate damages, appearing to have been given under the influence of passion or prejudice; cutting down the recovery to which plaintiff was entitled under the facts" and, as another ground, "Insufficiency of the evidence to justify such an inadequate verdict, and that such inadequate verdict is against law." The order of the trial court reads, in part, as follows: "* * ordered that the motion for a new trial be granted upon the grounds of insufficiency of evidence to justify verdict—damages insufficient. New trial limited to damages alone."

Appellant contends that the specifications contained in the notice of motion are not sufficient under the rule of Benjamin v. Stewart, 61 Cal. 605. That case was decided in 1882. Since that date, sections 657 and 659 of the Code of Civil Procedure have been amended several times. The strict requirements formerly existing have been deleted.

[25] While it is true that section 657 of the Code of Civil Procedure does not expressly specify inadequacy of damages as a ground for a new trial, it is now too well-settled for controversy that inadequacy of damages may constitute a ground for granting a new trial under subdivision 6 of that section specifying, "Insufficiency of the evidence to justify the verdict." The cases are collected in 20 California Jurisprudence, page 104, section 67.

[26-28] On the merits of the motion the appellant urges that the evidence supports

the $1,500 verdict; that every presumption must be indulged in favor of the jury verdict, and against the motion. That is not the law. The presumption on an appeal from an order granting a motion for a new trial is in favor of the order, and the burden is upon the appellant to affirmatively show that the order is erroneous. The granting or denying the motion rests largely in the discretion of the trial judge. Particularly, when the motion is granted on insufficiency of the evidence, the ruling will not be disturbed unless there is a gross, manifest and unmistakable abuse of discretion. These rules are well-settled. 2 Cal.Jur., p. 887, sec. 522; Ogando v. Carquinez G. School Dist., 24 Cal.App.2d 567, 75 P.2d 641; Laverne v. Dold, 17 Cal.App.2d 180, 61 P.2d 497; Carter v. J. W. Silver Trucking Co., 4 Cal.2d 198, 47 P.2d 733.

[29] With these elementary rules in mind there can be no doubt that the evidence introduced by respondent supports the trial court's conclusion that the verdict of $1,500 was inadequate. The testimony shows that the child suffered a badly fractured skull. The attending physician testified that after the injury the child was unable to talk and had a paresis of the right side. X-rays showed multiple comminuted depressed fractures of the left frontal parietal region. The child was operated on by a specialist. He testified that he tried to place the fractured pieces of the skull back in their proper position, but that portions of the skull were so shattered they could not be replaced; that the child has two holes in her head covered only by scalp; that these holes will never be closed with bone. Although the child made a good recovery, there is substantial evidence that at the time of trial she still suffered from headaches, that her co-ordination had been affected, and that she perspires a great deal. Enough has been stated to demonstrate that the evidence supports the action of the trial court.

[30] Appellant also urges that it was error for the trial court to limit the retrial to the issue of damages alone. In its brief it is argued that the question of damages is "so interwoven with the question of liability that the issues should not be segregated". The issue of liability is clearly severable from the issue as to the amount of damage. The two issues are in no way connected. Since 1929, section 657 of the Code of Civil Procedure has expressly authorized the trial court in a proper case to grant a new trial on the issue of damages alone. The power was properly exercised in the present case.

The trial court instructed the jury that they were not to award any amount for damages for doctor bills or hospital bills incurred as a result of the injury. If this instruction was error, it may be that it was one of the reasons that moved the court to grant a new trial on the issue of damages. In view of the retrial on this issue the propriety of this instruction should be determined.

During the course of the trial there was offered in evidence doctors' bills totaling $850, and the hospital bill in the sum of $161.67. All bills were made out to the minor. The hospital bill had been paid by the parents, but the doctors' bills were unpaid at the time of trial. The plaintiff had pleaded these items as special damage. The trial court excluded this evidence and gave the above instruction on the ground that these expenses were chargeable to, and payable by, the parents, and could not be recovered by the minor. Both parents were appointed guardians ad litem.

[31] The rule has been frequently stated that where the injured child is living with, and is being supported by, the parents, they are primarily responsible for the child's care and maintenance, and for that reason the cause of action to recover such expenses rests with them and not with the injured minor. McManus v. Arnold Taxi Corp., 82 Cal.App. 215, 255 P. 755; Durkee v. Central P. R. R. Co., 56 Cal. 388, 38 Am.Rep. 59; Sullivan v. Thompson, 30 Cal.App.2d 675, 87 P.2d 62. There is an exhaustive annotation on the subject in 37 A.L.R. 11. But this rule is not without its exceptions. In one case it has been held that, although the parent may recover such items, so may the child, for the reason that the child's estate would be liable for the reasonable value of such services, they being necessities. The rule was applied although the father had, in fact, paid the expenses. Aubel v. Sosso, 72 Cal.App. 57, 236 P. 319. All of the California cases recognize that under some circumstances the child may recover these items of expense. Thus, in the McManus case, supra, the court stated (page 224 of 82 Cal.App., page 759 of 255 P.): "But, as respondent contends, there are certain exceptions to the foregoing rule under which it has been held that the child may recover

said expenses, among them being where the child has paid, or is legally bound to pay, the same (Sutherland on Damages, § 1250, note 70); or is under guardianship, thereby making his estate legally liable therefor (1 Sedgwick on Damages, § 226f; Stotler v. Chicago & A. Ry. Co., 200 Mo. 107, 98 S.W. 509), and in some jurisdictions it has been held that, if the parent appears as guardian ad litem in an action brought by the child, and includes therein as elements of damages loss of wages and the payment of medical expenses, reimbursement for which under the general rule would accrue to him, he is deemed to have waived the right to recover the same in favor of the child; such waiver operating in the nature of an emancipation, and conferring upon the child the right to recover said wages and expenses." In that case, however, the child was not permitted to recover because, under the facts, contributory negligence of the father had been pleaded.

In Galwey v. Pacific Auto Stages, Inc., 96 Cal.App. 169, at page 178, 273 P. 866, at page 870, it was held:

"Appellant also objects to an instruction, in substance, that, if the jury found for the plaintiff in damages, then he was also entitled to recover such reasonable expense as he had necessarily incurred for hospital and physicians' services, not exceeding the amount alleged in the complaint. It is claimed that the mother of plaintiff was liable for his necessities, including medical attention; that the expense incurred was chargeable to her and could not be recovered in this action.

"It is clear that the mother, who appears to have been the only surviving parent of the plaintiff, was not able to pay the expenses, and that she made no promise to do so. The services were necessary in order to save the life of the plaintiff, and for which, to the extent of their reasonable value, he would be liable (Civ.Code, § 36). Under the circumstances shown they were recoverable in the present action. Aubel v. Sosso, 72 Cal.App. 57, 236 P. 319; McManus v. Arnold Taxi Corp., 82 Cal.App. 215, 255 P. 755."

In Finnerty v. Cummings, 132 Cal.App. 48, at page 50, 22 P.2d 37, at page 38, the exceptions are stated as follows: "Ordinarily, that is where the usual relationship of parent and child exists in which the parent exercises his right to the child's services and performs his duty to support it, the right to recover for loss of the child's earnings and for medical expenses incurred in treating its injuries belongs to the parent. Karr v. Parks, supra [44 Cal. 46]; Sykes v. Lawlor, 49 Cal. 236; Durkee v. Central Pac. R. Co., 56 Cal. 388, 38 Am. Rep. 59; McManus v. Arnold Taxi Corp., 82 Cal.App. 215, 255 P. 755. Where the parent has emancipated the child (Galwey v. Pacific Auto Stages, Inc., 96 Cal.App. 169, 273 P. 866), or, as guardian in the child's action, by pleading or testimony, waived his right or estopped himself from subsequently asserting it, the child is permitted to recover these items. McManus v. Arnold Taxi Corp., supra."

[32-34] From these cases the following rules can be ascertained. The parents of a minor are normally responsible for medical and hospital care furnished the minor, and the cause of action to recover these items normally rests with the parents. But the child is also liable for the reasonable value of these expenses. Moreover, where the parents bring the action as guardians ad litem, and the bills have not been paid, and these expenses are pleaded, this constitutes a waiver of the parents' rights, and at least where contributory negligence of the parents is not asserted as a defense, the child may properly recover these items. In such case the parents would be estopped from recovering these expenses on their own behalf. Applying these rules to the facts here involved it is our opinion that on the retrial the plaintiff should be permitted to recover the unpaid doctors' bills.

One other point should be passed upon. During the direct examination of Dr. Edmond J. Morrissey, the physician who operated upon respondent, he was asked to give his prognosis of the case. He stated that, "The prognosis in this case is good, providing the particular patient does not develop epileptic seizures." When asked if such result was "probable", the trial judge ruled that the doctor could not answer unless he would state that epileptic seizures were "reasonably certain" to occur. The doctor stated that he could not state whether or not this patient was "reasonably certain" to have such seizures; that, "I would not say it was reasonably certain; I would say that it might occur and I would not be surprised if it occurred, but certainly I would not state it was reasonably certain." Thereupon all the doctor's testimony as to future damage was stricken from the record.

[35, 36] The law does not require a doctor to state that future results are "reasonably certain" to occur before his testimony is admissible. Before the jury may allow a recovery for future consequences the evidence must show with reasonable certainty that such consequences will follow, and the jury should be so instructed. The testimony referred to above would not, standing alone, support an award for damages for future consequences. But that does not mean that such evidence was not admissible. The ultimate fact to be determined by the jury is whether it is reasonably certain that future evil consequences will flow from the injury. Any evidence reasonably tending in an appreciable degree to prove that fact is admissible. Its sufficiency to prove that fact is largely for the jury.

The proper limits of such testimony were discussed at length by Judge Shaw in Cordiner v. Los Angeles Traction Co., 5 Cal. App. 400, 91 P. 436. There the doctors did not testify that the evil consequences were "reasonably certain" to occur. After referring at length to the testimony, the court stated (page 403 of 5 Cal.App., page 437 of 91 P.):

"To justify a recovery for future consequences, the evidence must show with reasonable certainty that such consequences will follow. The fact that in the minds of the jurors the disability indicated may follow, or is likely to or will probably follow as a result of the injury, will not warrant a verdict for damages. This, however, does not mean that the testimony of a witness should be excluded unless he is reasonably certain that the indicated results will follow, nor that isolated portions of his testimony should, standing alone, or considered with other evidence, extend to the degree of strength required to establish reasonable certainty as to future resulting consequences. It is the province of the jury to weigh and determine its value as proof. The evidence here tended, in an appreciable degree, to prove the ultimate fact—that is, the reasonable certainty that future evil consequences would result from the injury—and was properly admitted for the consideration of the jury; it being its function, upon a consideration of the evidence as a whole, to determine its sufficiency as proof of the ultimate fact. Its competency should not be confounded with its sufficiency; nor should the technical definition of words constitute a controlling factor in determining the question of admissibility. But, as stated in Ballard v. Kansas City, 110 Mo.App. 391, 86 S.W. 479: 'The main object is not to draw fine distinctions based upon accurate definitions of words, but to ascertain the real idea expressed'. See, also, Block v. [Milwaukee] St. Ry. Co., 89 Wis. 371, 61 N.W. 1101, 27 L.R.A. 365, 46 Am.St.Rep. 849. It is often impossible to show by positive proof whether or not an impairment of health or faculties will follow as a result of injury. Hence, of necessity, in determining the question, courts and juries must rely upon the testimony of properly qualified physicians for such testimony as will in the minds of the jury establish the fact in issue to a reasonable certainty. Such evidence must be clearly distinguished from conjecture, or that which merely establishes a possibility of future trouble. As a rule, the physician whose opinion is most reliable is loath to give an opinion as to what consequences will or will not follow, as a result of an injury in a certain case, but at the same time willing, as here, to state the result of his own professional experience and observations in treating cases where like injuries have occurred, and as a result of that experience say that we might or might not expect like results to follow in this case. Testimony of duly qualified experts which shows that in a majority of cases, where the injury consists of a fracture at the base of the brain, such injury results in future epilepsy, paralysis, or mental deterioration, tends to prove the reasonable certainty that such consequences will follow in any given case of like injury.

"In this view considered, the evidence, while it may not have been by the jury considered sufficient proof, nevertheless tended to establish to a reasonable certainty that, notwithstanding the apparent recovery of the plaintiff, she would in the future suffer from the effects of the injury."

Practically the same rule was applied in Riggs v. Gasser Motors, 22 Cal.App.2d 636, 72 P.2d 172. In that case, at page 640, of 22 Cal.App.2d, at page 175 of 72 P.2d, the court stated: "On the question of damages and what the jury might consider, the court read to the jury section 3283 of the Civil Code, as follows: 'Damages may be awarded, in a judicial proceeding, for detriment, resulting from the commencement thereof, or certain to result in the future.' Appellants rely upon the fact that no witness testified absolutely that future results were certain to occur, but only gave their opinions as to what might and might not occur. We take it that it is the province of the jury to determine from testimony whether the injuries are such that future detriment is certain to occur, or rather, may be shown by the testimony to be so reasonably certain to occur as to be considered by the jury in determining the damages to be awarded. The fact that a witness may testify that in his opinion a future detriment is certain to occur does not make it certain that such detriment will occur any more than a modified opinion or statement that future detriments do occur under like conditions may reasonably be apprehended to occur."

On the retrial the admissibility of evidence on this issue should be governed by these rules.

For the foregoing reasons the judgment and order appealed from should be, and each is, affirmed.

We concur: KNIGHT, J.; WARD, J.

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42 Cal.App.2d Supp. 823

FISHER v. PICKWICK HOTEL, Inc.

No. 101524.

Appellate Department, Superior Court, San Diego County, California.

Dec. 11, 1940.

Rehearing denied Jan. 10, 1941.

1. Trover and conversion 🔑4

A "conversion" is any act of "dominion" which is defined as perfect or complete property or ownership in a thing, complete ownership, absolute property and ownership or right to property, wrongfully exerted over another's personalty in denial of or inconsistent with his rights therein, from which injury to the owner results.

See Words and Phrases, Permanent Edition, for all other definitions of "Conversion" and "Dominion".

2. Automobiles 🔑372

Where storage garage attendant handed claim check to driver of automobile and observed that driver handed check to owner of automobile and claim check provided that automobile would be released only on return of the claim check, release of automobile to driver without presentation of claim check or owner's consent was a "conversion", and owner was entitled to recover for damage to automobile when it was wrecked and value of articles of personalty removed therefrom.

3. Trover and conversion 🔑3

The basis of an action for "conversion" is not the knowledge or intent of defendant but rests upon the unwarranted interference by defendant with the dominion over property of the plaintiff from which injury results and good faith, care, ignorance and want of wrongful motives is no defense.

Appeal from Municipal Court of San Diego; Eugene Daney, Judge.

Action for conversion of an automobile by Harvey D. Fisher against the Pickwick Hotel, Inc., also known as the Pickwick Hotel Company, known also as the Pickwick Hotel Corporation, and the Pickwick Company, and others. From a judgment of the municipal court of the city of San Diego for the defendants, plaintiff appeals.

Reversed and remanded, with directions.

Liggett & Liggett, of San Diego, for appellant.

Monroe & McInnis, of San Diego, for appellee.

PER CURIAM.

Appellant, Harvey D. Fisher, on September 27, 1939, owned a 1939 model de luxe Dodge sedan, admitted to have been of the reasonable value of $1,050, in which were various items of personal property of the admitted value of $46.45. In the early morning of the day referred to, this automobile was driven into the garage of respondent Pickwick Hotel Company, which is under the same management as its hotel and occupies part of the same structure, by one Keith Case, who was in the driver's usual position. Appellant also sat in the front seat at Case's right. One English was in the back seat asleep. Case was not an employee of appellant but apparently his guest. One Scott Christian, respondent's attendant, received the car and gave to Case, the driver, a claim check reading as follows:

"Claim check 77876. All charges C. O. D. We are not responsible for loss or damage by fire or other causes beyond our control to vehicles or contents left with us. No cars delivered without this check."

Case passed the claim check over to appellant in the presence of the attendant Christian and in doing so was noticed by him. Nothing appears to have been said by anyone in connection with the parking of the car, except that appellant told the attendant to send English up to his room when he woke up. Appellant and Case then entered the hotel where appellant registered under a fictitious name as a guest. Case did not register. The desk clerk, an employee but not an officer of the respondent corporation, on learning that appellant had no baggage, asked for the room charge in advance, to which appellant responded by saying that his car was in the garage and that that should be sufficient security. On the clerk's insistence, however, he paid his room charge by giving his check, thereby disclosing his true name. He then went with Case to his room. Shortly afterwards Case came down to the garage, without appellant's knowledge, and demanded the car, and on being asked for the claim check told the attendant that his "partner" had mislaid it, whereupon the attendant let him take the car. He drove it away with English still occupying the back seat, and it was subsequently found in a wrecked condition. The salvage from the car amounted to $185. The personal property was not recovered. It was stipulated that appellant's loss was that claimed by him, which is $911.45 net. The foregoing facts are undisputed.

The case was tried by the Court without a jury and resulted in findings in which it is inter alia determined, "that the defendant" (respondent) "and its agents and employees had neither notice nor knowledge that the said Keith Case was not the owner of said automobile or entitled to the use and possession thereof".

It was also found that when Case demanded the car the attendant recognized him as the same person who had driven it in.

The Trial Court concluded, as a matter of law, that the claim check was a mere means of identification of the person who delivered the automobile to respondent's garage for storage and that, in redelivering the car to him, respondent and its employee complied with the terms of the bailment contract. With this conclusion we are unable to agree. It appears, as we have noted, without dispute, that the attendant observed Case when he handed the claim check to appellant. That certainly put him on notice that appellant was at least one of the real parties in interest with whom in behalf of respondent he was contracting. The writing expresses the terms of the contract insofar as that here concerns us. One of these was that the car should be released only on return of the claim check. It is clear that the car was parked in respondent's garage as a measure of protection. The terms on which such protection were to be afforded were, as we have just seen, embodied in the claim check. Appellant was entitled to rely on the statement therein contained that the car would not be released without the presentation of the check. The check was not returned, nor was the party into whose hands it was, in the presence of attendant, delivered, consulted before the car was allowed to go out. The contract was thus clearly breached.

[1] While the conduct of respondent's attendant thus amounted to a breach of the contract it went beyond that, and was in effect a conversion. In Gruber v. Pacific States Savings & Loan Co., 13 Cal.2d 144, 148, 88 P.2d 137, 139, it is said: "It is settled that conversion is any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein."

The general rule is further, quoting Hull v. Laugharn, 3 Cal.App.2d 310, 315, 39 P.2d 478, 480, thus laid down: "Conversion consists in the unwarranted interference by defendant with the dominion over the property of plaintiff, from which injury to the latter results. * * * Dominion is defined in law lexicons as 'perfect or complete property or ownership in a thing' (Bouvier's Law Dict. [Rawle's Third Revision]); 'complete ownership; absolute property' (Anderson's Dict. of Law); and 'ownership or right to property' (Black's Law Dict.)."

[2] In Poggi v. Scott, 167 Cal. 372, 375, 139 P. 815, 816, 51 L.R.A.,N.S., 925, it was said: "The foundation for the action of conversion rests neither in the knowledge

nor the intent of the defendant. It rests upon the unwarranted interference by defendant with the dominion over the property of the plaintiff from which injury to the latter results. Therefore neither good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are of the gist of the action. 'The plaintiff's right of redress no longer depends upon his showing, in any way, that the defendant did the act in question from wrongful motives, or, generally speaking, even intentionally; and hence the want of such motives, or of intention, is no defense. Nor, indeed, is negligence any necessary part of the case. Here, then, is a class of cases in which the tort consists in the breach of what may be called an absolute duty; the act itself (in some cases it must have caused damage) is unlawful and redressible as a tort.'"

[3] The foregoing discussion makes it clear that the Trial Court's finding above quoted, to the effect that defendant, its agents and employees had neither notice nor knowledge that Case did not own the automobile, is not sustained by the evidence. Nor can the conclusions of law above referred to be maintained. The judgment is reversed and the Municipal Court directed to enter judgment for the plaintiff upon the undisputed facts for $911.45 and costs.

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